



BEE REAL ESTATE SAVVY



Las Vegas AGENT FORMULA

The Internet Formula For Las Vegas Agent Success

Nevada R.E. Law The Attorney General is on line one

**3 Hours CE/Law
CE.6821000-RE**



Nevada R.E. Law

The Attorney General is on line one... A Three Hour *Law* Course

**If you were arrested, and charged with a real estate crime –
would a jury of your peers send you up the river?**

This course is designed to take the licensee through 3 ‘real world’ cases and determine the evidence and how that evidence would be weighed. As a result of the training, participants will be able to:

- 1) Participants will review their “Duties” to *clients* and to *ALL parties*
- 2) Demonstrate, in lay terms, the meaning of ‘material fact’ and ‘reasonable’ skill and care required on the part of a licensee.
- 3) Participants will examine where Law/NRS, Administrative Code/NAC and Ethics intersect.
- 4) Differentiate between, rumors, gossip, opinion, puffing and fact.
- 5) Identify the *proper* course of action under NRS 645.252 & 254 & 257 in regards to CLIENT and LICENSEE misrepresentations
- 6) Participants will, through the use of 3 ‘case studies’ determine positions of: Prosecution, Defense, and, *Trier of Fact* (Judge or Pro Standards).
- 7) Legal concepts such as ‘weight of the evidence’, ‘implied agency’(2 case citations), and ‘precedent’ will be explored and discussed.

**"Everyone is entitled to his own opinion,
but not his own facts."**

Sen. Daniel Patrick Moynihan of New York



Student Outline

Ground Rules: - We will be using actual cases – but no actual names. Please be advised that, while it is true that some proceedings can be discussed – it is equally true that some cannot. In consideration of all the parties we shall *assign names* for each case – please use those names during your discussion of the case.

The Rule of Three?

Law – Agency! & Court Cases

Division/Commission

Case Studies – Does ETHICS rise to the level of Legal?

Pop Quiz – With a partner – LIST the “Duties Owed” to a client.

Pop Quiz # 2 – With your partner – list the “Duties Owed” to ALL PARTIES (and, just exactly WHO is a party?)

The INTERSECT

The licensee must be aware that, in any action – whether it be an Administrative Complaint at the Real Estate Division, a Hearing before the Real Estate Commission, a Court case or a Professional Standards Hearing – in all of these instances – the “Trier of Fact” will likely be aware of;

Statutes or Administrative Codes that could or would apply
Prior Court decisions (precedents/case law) or actions by the body
Code of Ethics (specifically of the National Assn. of REALTORS®)
Local Custom – which would have a bearing on “reasonable care”



Statutes or Codes that apply:

NAC 645.605 Considerations in determining certain misconduct by licensee. ([NRS 645.050](#), [645.190](#), [645.633](#)) In determining whether a licensee has been guilty of gross negligence or incompetence under paragraph (h) of subsection 1 of [NRS 645.633](#) or conduct which constitutes deceitful, fraudulent or dishonest dealing under paragraph (i) of that subsection, the Commission will consider, among other things, whether the licensee:

1. Has done his utmost to protect the public against fraud, misrepresentation or **unethical practices** related to real estate or time shares.

So, legally, by the Code – you **MUST** be Ethical AND you must *do something* when you witness an unethical act!

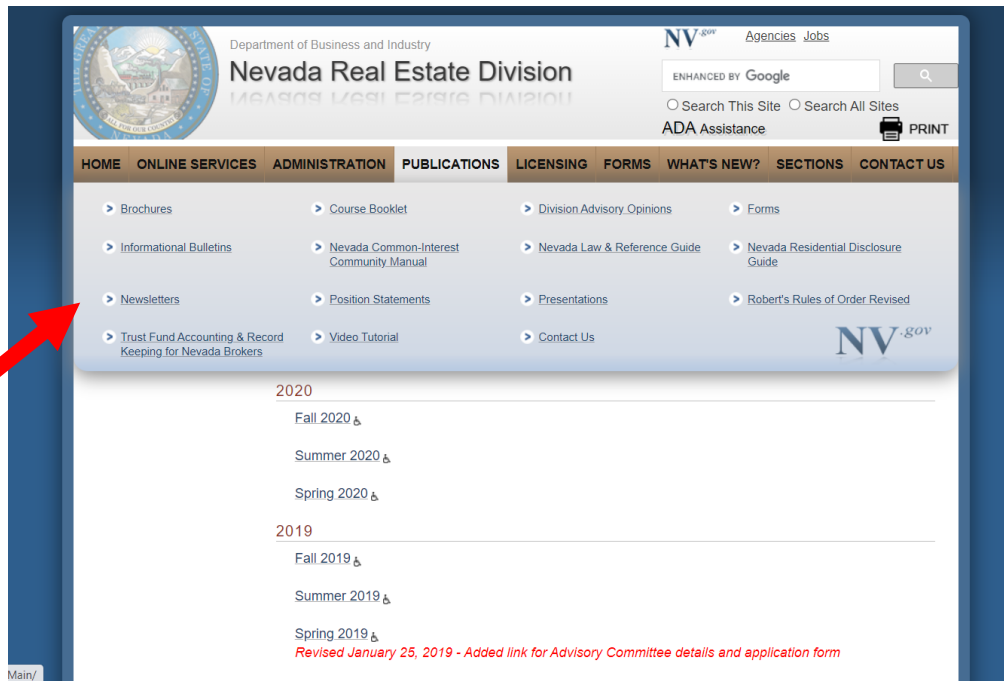
Prior (Supreme) Court decisions – Precedents

Court Cases

Case summaries reprinted with permission from *The Letter of the Law*®, a publication of the NATIONAL ASSOCIATION OF REALTORS® www.REALTOR.org

Menzel v. Morse (See pg. 17)

In *Menzel v. Morse*, 362 N.W.2d 465 (Iowa 1985), the **Supreme Court of Iowa** addressed the issues of negligence and breach of fiduciary duty. The court found that the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® was the standard for determining a broker's negligence. Further, the court held that **conduct** between the parties can constitute an **implied agency** relationship with attendant fiduciary duties.



A sampling of prior decisions by the Nevada Real Estate Commission and R.E. Division actions and disciplines from the “Open House” publication;

In the RED publication, going back to 2020 in summary, the following findings were published:

2020 totaled 51 cases – 2 were rehearings

One individual was fined \$100,000 for operating without a license

15 licenses (and permits) were revoked

Biggest fines were \$420,000 & \$120,000



DISCIPLINARY ACTIONS / STIPULATIONS

ACTIONS/DECISIONS

Real Estate Commission actions are not published in this newsletter until the 30-day period allowed for filing for Judicial Review has passed. A Respondent's license is automatically suspended for failure to comply with a Commission Order, and the Division may institute debt collection proceedings to recover fines and costs.

ALLEGATIONS/STIPULATIONS

Stipulations occur when both the Respondent and Division have agreed to settlement conditions. A stipulation may or may not be an admission of guilt. Stipulations are presented to the Commission for final approval.

| NAME | EFFECTIVE DATE | ALLEGATIONS / VIOLATIONS | DISCIPLINE / SETTLEMENT |
|--|----------------|--|--|
| Diep, Nga 2018-1280 B.1001692 (Active) PM.163925 (Expired) PM.167405 (Expired) | June 2021 | Violated NRS 645.230(1)(b) 38 times by knowingly engaging the business of, acting in the capacity of, advertising or assuming to act as a property manager within the State of Nevada without first obtaining the appropriate permit to engage in property management from the Real Estate Division. | \$14,466.51 fine \$1,887.83 in Division costs and fees 3 hours Agency 3 hours Broker Management |

2021

27 cases – in the final newsletter – 7 of the 9 cases were P.M.

5 Revocations 1 Suspension Permit lost

\$217,000, \$40,000 fine + another case - \$40,000 *restitution* & two

\$30,000 fines – LOTS of CE + Hearing costs went way up!

Question, how much does it cost a member of the public to file a complaint at the Real Estate Division?



Basic Definitions under the Law:

Agency

Merriam-Webster's Dictionary of Law - Cite This Source - Share This

Main Entry: **agen·cy**

Function: *noun*

Inflected Form: *plural -cies*

1 : the person or thing through which power is exerted or an end is achieved *agency*—W. Railroad LaFave and A. W. Scott, Junior>

2 a : a consensual fiduciary relationship in which one party acts on behalf of and under the control of another in dealing with third parties; *also* : the power of one in such a relationship to act on behalf of another

NOTE: A principal is bound by and liable for acts of his or her agent that are within the scope of the agency.

Fiduciary

Merriam-Webster's Dictionary of Law - Cite This Source - Share This

Main Entry: **fi·du·cia·ry**

Pronunciation: f&-'dü-sh&-rE, -'dyü-, -shE-"er-E

Function: *noun*

Inflected Form: *plural -ries*

: one often in a position of authority who obligates himself or herself to act on behalf of another (as in managing money or property) and assumes a duty to act in good faith and with care, candor, and loyalty in fulfilling the obligation : one (as an agent) having a fiduciary duty to another—see also *fiduciary duty* at [DUTY](#), [FIDUCIARY RELATIONSHIP](#)—compare [PRINCIPAL](#)

Contract

1 : a ***voluntary agreement*** between two or more ***competent*** parties that creates in each party a duty (*or other ***consideration****) to do or not do something (*a ***legal thing****) and a right to performance of the other's duty or a remedy for the breach of the other's duty; *also* : a document embodying such an agreement

Parties

a signatory to a legal instrument.

Material Facts – can the *client* CAUSE something to be material?

If a buyer has 3 kids in dog suits and that buyer finds out *after* the purchase that there is a 2 pet limit – does the *agent* have any liability?



Stigmas – “Psychological Impacts” involving a non-physical or emotional defect e.g. a murder or suicide (How accurate is the Sex Offender Registry?)

Fraud vs. Misrepresentation

Two kinds of Fraud? _____ & _____

‘Reasonable’ skill and care

***Reasonable would be;* _____ background,
_____ circumstances – So reasonable is subjective
NOT absolute!**

Preponderance of evidence (vs. Clear, Strong and Convincing)

Advocate

Confidential - _____ the Client thinks is Confidential?!

Precedence and ‘Published Opinions’

***Scary thought:* _____ that can afford the
_____ can sue you.**



Minimum NRS Standards

There are at least **THREE** levels of ‘care’ under NRS –

Level one – Duties of a licensee acting *as an agent*

Level two – Duties of a licensee representing a client

Level three – Duties for *Exclusive Representation*

Per NRS 645 & NAC 645 in regards to “Listing Contracts” and “Exclusive Representation” agreements.

All licensees should be familiar with NRS 645.254 in regards to Brokerage Agreements – AND that there are additional duties when that Agreement is to be exclusive. The basics for any agreement are:

- 1) Mutual (Voluntary) _____ - a Meeting of the Minds
- 2) Legal purpose
- 3) _____ parties
- 4) Consideration – Can be performance – or an agreement NOT to perform
- 5) A right to Performance or _____ for breach

“Beer is proof that God loves us and wants us to be happy.”

Benjamin Franklin

NRS 645.254 Additional duties of licensee entering into brokerage agreement to represent client in real estate transaction. A licensee who has entered into a brokerage agreement to represent a client in a real estate transaction:

1. Shall exercise reasonable skill and care to carry out the terms of the brokerage agreement and to carry out his duties pursuant to the terms of the brokerage agreement;
2. Shall not disclose confidential information relating to a client for 1 year after the revocation or termination of the brokerage agreement, unless he is required to do so pursuant to an order of a court of competent jurisdiction or he is given written permission to do so by the client;
3. Shall seek a sale, purchase, option, rental or lease of real property at the price and terms stated in the brokerage agreement or at a price acceptable to the client;
4. Shall present all offers made to or by the client as soon as is practicable, unless the client chooses to waive the duty of the licensee to present all offers and signs a waiver of the duty on a form prescribed by the Division;
5. Shall disclose to the client material facts of which the licensee has knowledge concerning the transaction;
6. Shall advise the client to obtain advice from an expert relating to matters which are beyond the expertise of the licensee; and
7. Shall account for all money and property he receives in which the client may have an interest as soon as is practicable.

(Added to NRS by 1995, 2073; A [2007, 1788](#))



Answer the following questions:

In order for a licensee to enter into an **EXCLUSIVE** (whether for Buyer or Seller) Agency agreement per NRS 645.320 (pg. 16) – the agreement must:

- 1) Be _____
- 2) Have no provision for _____
- 3) Be signed by all parties or _____

- 4) Have a definite and specified _____.

Note: The Nevada Real Estate Division published a position statement dated 2/4/2009 regarding Broker Price Opinions. Licensees must use care to operate under current rules.

“Learn from the mistakes of others. You can’t live long enough to make them all yourself.”

Eleanor Roosevelt

Case #1 –

The Agent – Sarah Lister has been arrested and charged with ‘Fraud’.

The facts of the case are as follows:

Betty Boop called Sarah for a ‘Brokers Opinion’ as to the market value of her townhome. She told Sarah she wasn’t interested in selling the place but she was contemplating marriage to E. Fudd and she was going to have a pre-nup drafted. Sarah (having been married and divorced more than once) surmised that this might be an opportunity to sell the new (possibly soon to be) happily married couple a larger home.



Sarah pulled data from both MLS and the Assessors data base to determine what comparable townhomes had sold for the past 12 months. Sarah also checked nearby new homes and townhomes for competitive properties.

When Sarah arrived at Ms. Boop’s home, it appeared that there had been a recent burglary and that Hurricane Ike had come closer to Nevada than the news had reported. The main concern Sarah had was the severe discoloration on the ceiling in both the living room and second bedroom.

Betty decided to list the townhome with Sarah and promised to get the ceiling fixed. Sarah asked about the cause of the leak and Betty explained that several of the units had leaks around the flashing of the a.c. units and that the builder, after being threatened by a committee of homeowners with a construction defects lawsuit had repaired all the units.

Buyer, Foghorn Leghorn stopped by Sarah’s open house the first weekend of the listing (without an agent) and made an offer.

He did ask Sarah about the ‘bleach’ smell and she said the owner was just a ‘neat freak’.

When Mr. Leghorn’s new neighbors came over with the ‘Welcome Wagon’ and he heard about the roof leak he reviewed the S.R.P.D. and found no mention of the repair, nor any mention of a “Claim”.

When he called Sarah, she responded that it was the SELLERS representation of the property condition and the seller had determined that since there was ‘no problem’ that she did not need to disclose. In fact the seller was adamant that if she had to disclose *all the past problems* she would have had to talk about why she had a new water heater – and the buyer should be happy they got new items.

Based on the narrative, what potential problems can you see with this case? (Make your notes below.)

Notes and Findings:



**From case #1 – what is the difference between
“Misrepresentation” and “Fraud”?**

**“Values are like fingerprints.
Nobody’s are the same, but you leave ‘em all over
everything you do.”**

Elvis Presley

The basis for Case #1 – was a case that went to a NEVADA Supreme Court Decision (July 26, 2007 Nelson v. Heer) that was decided in favor of the Seller (Nelson). The decision was based on the SRPD version *at the time* where the question was:

“ARE you AWARE of any problems that would affect the value or use in an adverse manner?”

The question now reads, “Are there or *have there been* any problems...”

What is the LATEST Version of the S.R.P.D.?

**NRS 645.257 Action to recover damages suffered as result of licensee's failure to perform certain duties; standard of care.**

1. A person who has suffered damages as the proximate result of a licensee's failure to perform any duties required by [NRS 645.252](#), [645.253](#) or [645.254](#) or the regulations adopted to carry out those sections may bring an action against the licensee for the recovery of his actual damages.

2. In such an action, any knowledge of the client of the licensee of material facts, data or information relating to the real property which is the subject of the real estate transaction may not be imputed to the licensee.

2. In an action brought by a person against a licensee pursuant to subsection 1, the standard of care owed by a licensee is the degree of care that a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge required to be obtained by a real estate licensee pursuant to [NRS 645.343](#) and [645.345](#).

A positive attitude may not solve all your problems, but it will annoy enough people to make it worth the effort.

Herm Albright

Case #2-

Don Juan, a licensee with Hookum and Snookum realty decided to sell his townhome. He knows that if he lists it himself, the companies E&O coverage will not apply so he lists it with an agent in his office, Consuela Smith.

Consuela does a good job making sure the paperwork is in order and completed by Mr. Juan.

The townhome sells. The buyer – Mr. Deeds (who had representation) finds out there was a construction defect case against the builder. He files against Mr. Juan for misrepresentation of the condition of the property and against Ms. Smith for failure to use 'reasonable skill and care'.



The facts turn out to be these:

Mr. Juan lived in phase 1. Mr. Juan did order the ‘resale package’ from the management company and provided it to Mr. Deeds. The builder hired ABC management company for phase 1 but couldn’t get along with them, so, when it came time to hire a management company for phase 2 – he hired LMN company.

By the time phase 3 was complete he didn’t like LMN anymore so he hired RST company. Phase 4 was given to XYZ to manage. While Mr. Juan was aware there was more than one management company, he was NOT aware that phase 2 was in litigation. He stated under oath that he had gotten no notice because it was *only* phase 2 that got letters – phase 1, 3 & 4 were not involved.

Participants will switch ‘roles’ for the case and the hearing.

Five horizontal lines for writing notes.

"Those are my principles, and if you don't like them... well, I have others."
Groucho Marx

NRS 645.259 Liability of licensee for misrepresentation made by client; failure of seller to make required disclosures is public record. A licensee may not be held liable for:

1. A misrepresentation made by his client unless the licensee:
 - (a) Knew his client made the misrepresentation; and
 - (b) Failed to inform the person to whom the client made the misrepresentation that the statement was false.
2. Except as otherwise provided in this subsection, the failure of the seller to make the disclosures required by [NRS 113.130](#) and [113.135](#) if the information that would have been disclosed pursuant to [NRS 113.130](#) and [113.135](#) is a public record which is readily available to the client. Notwithstanding the provisions of this subsection, a licensee is not relieved of the duties imposed by paragraph (a) of subsection 1 of [NRS 645.252](#).

**Review of N.R.S. 40.770 (see pg. 16)**

There is **NO** duty to disclose the fact that a property is or has been:

- Site of homicide, suicide or death unless death is result of condition of property.
- Site of felony crime.
- Occupied by person exposed or suffering from HIV or AIDS.
- A sex offender resides or expected to reside in community.

Soooo, **HOW** DO I deal with Stigmas (gossip and rumors)?

Step 1 – Determine whether fact or fiction.

What is the *source* of the information?

Step 2 – Check state laws. See appendix as to NRS 40.770

Step 3 – Determine *materiality*.

Remember material is subjective! If your *client* thinks something is material you need to either **TREAT IT** as if it is – or tell your clients that the particular issue under consideration is **BEYOND YOUR SCOPE!** If they *think* (perception bears equal gravity with fact) you are watching for a particular issue – and you don't make it **CLEAR** to them that you are not – you may be held liable!

Step 4 – Discuss disclosure with client.

****This is a “Check with your Broker” area! Just because someone will GIVE you a listing – doesn't mean you should TAKE the listing!**



Case #3 –

First National Bank and Grill decides to sell a parcel of undeveloped property they had been ‘land banking’ as it doesn’t seem that right now is a good time to open another branch. They put a sign up on the property ‘For Sale’ by Owner FNB&G.

Tom Cat a commercial broker calls to inquire as to the price and availability of the property. He is directed to Thurston Howell III, the V.P. of the Trust department. Mr. Howell advises Mr. Cat the property is \$6,000,000.00 Mr. Cat tells Mr. Howell that he may have a buyer and that he’d like to represent the bank. Mr. Howell says that while they will be happy to look at the offer, they feel they are qualified to represent themselves.

Two days later, Mr. Cat calls Mr. Howell again and says he definitely does have a buyer – and if they bank will give him the listing – he can come in with a full price offer. Mr. Howell reiterates that it would be fine if Mr. Cat brings a buyer but that the bank was selling it ‘By Owner’.

Two days later, Mr. Cat calls again. He explains to Mr. Howell that he will actually be going in as a partner on the deal so he has a lot of influence on the potential buyers and sale and asks Mr. Howell once more to consider hiring him. Mr. Howell explains that he doesn’t even *like* Mr. Cat and that if he wants to bring an offer – it had better be full price.

Mr. Cat does produce an offer – and he is, in fact, a minority partner in the transaction. The sale closes and Mr. Cat sues for a 10% (yes, \$600,000.00) commission.

Should the court award a commission? Why, or why not?



Standard of Practice 16-11

On unlisted property, REALTORS® acting as buyer/tenant representatives or brokers shall disclose that relationship to the seller/landlord at first contact for that buyer/tenant and shall provide written confirmation of such disclosure to the seller/landlord not later than execution of any purchase or lease agreement. (Amended 1/04)

REALTORS® shall make any request for anticipated compensation from the seller/ landlord at first contact. (Amended 1/98)

**Review court cases on “Implied Agency” –
Mississippi Supreme Court decision in Smith v. Sullivan (attached)**

Court of Appeals of Iowa decision in Bauman v. Nutter (attached)

“If I knew I was going to live this long, I would have taken better care of myself.”
Eubie Blake



Closing thoughts and ideas on resources:

THOUGHT #1 – Talk to your Broker FIRST!

If you are considering whether you need to call the Legal Hotline or get your own attorney – your Broker needs to be apprised of the entire sequence of events AND be in on the call. (You NEED a Witness!)

Whether a licensee is a REALTOR® or not, in *Menzel v. Morse*, the Supreme Court of Iowa (1985), held that the applicable standard for real estate brokers was the NAR Code of Ethics.

The court added that it was immaterial as to whether the broker is a NAR member if the Code is applicable in the state.

The NAR Code of Ethics and Arbitration Manual, updated annually, includes a “Professional Standards Training Guide”. There is a very complete section on Case Interpretations that can provide a basis for further training in this area.

2007 NAR Legal Scan – 655 cases 112 statutes and regulations. Available on REALTOR.org at NO CHARGE to NAR members.

“The jury has a right to judge both the law as well as the facts in controversy.”

John Jay, 1st Chief Justice of the Supreme Court

Appendix: Statutes and R.E.D. Position Letters

**“Learning is not compulsory –
neither is survival.”**

W. Edwards Deming –

NRS 645.251 Licensee not required to comply with certain principles of common law. A licensee is not required to comply with any principles of common law that may otherwise apply to any of the duties of the licensee as set forth in [NRS 645.252](#), [645.253](#) and [645.254](#) and the regulations adopted to carry out those sections.

(Added to NRS by 1995, 2072)



NRS 645.320 Requirements for exclusive agency representation. Every brokerage agreement which includes a provision for an exclusive agency representation must:

1. Be in writing.
2. Have set forth in its terms a definite, specified and complete termination.
3. Contain no provision which requires the client who signs the brokerage agreement to notify the real estate broker of his intention to cancel the exclusive features of the brokerage agreement after the termination of the brokerage agreement.
4. Be signed by both the client or his authorized representative and the broker or his authorized representative in order to be enforceable.

[28.5:150:1947; added 1955, 18]—(NRS A 1995, 2075; [2003, 932](#))

NRS 40 – Stigmas

NRS 40.770 Limitation on liability of seller, seller's agent and buyer's agent for failure to disclose certain facts concerning property. [Effective July 1, 2008.]

1. Except as otherwise provided in subsection 6, in any sale, lease or rental of real property, the fact that the property is or has been:

(a) The site of a homicide, suicide or death by any other cause, except a death that results from a condition of the property;

(b) The site of any crime punishable as a felony other than a crime that involves the manufacturing of any material, compound, mixture or preparation which contains any quantity of methamphetamine; or

(c) Occupied by a person exposed to the human immunodeficiency virus or suffering from acquired immune deficiency syndrome or any other disease that is not known to be transmitted through occupancy of the property, is not material to the transaction.

2. In any sale, lease or rental of real property, the fact that a sex offender, as defined in [NRS 179D.095](#), resides or is expected to reside in the community is not material to the transaction, and the seller, lessor or landlord or any agent of the seller, lessor or landlord does not have a duty to disclose such a fact to a buyer, lessee or tenant or any agent of a buyer, lessee or tenant.

3. In any sale, lease or rental of real property, the fact that a facility for transitional living for released offenders that is licensed pursuant to [chapter 449](#) of NRS is located near the property being sold, leased or rented is not material to the transaction.

4. A seller, lessor or landlord or any agent of the seller, lessor or landlord is not liable to the buyer, lessee or tenant in any action at law or in equity because of the failure to disclose any fact described in subsection 1, 2 or 3 that is not material to the transaction or of which the seller, lessor or landlord or agent of the seller, lessor or landlord had no actual knowledge.

5. Except as otherwise provided in an agreement between a buyer, lessee or tenant and his agent, an agent of the buyer, lessee or tenant is not liable to the buyer, lessee or tenant in any action at law or in equity because of the failure to disclose any fact described in subsection 1, 2 or 3 that is not material to the transaction or of which the agent of the buyer, lessee or tenant had no actual knowledge.

6. For purposes of this section, the fact that the property is or has been the site of a crime that involves the manufacturing of any material, compound, mixture or preparation which contains any quantity of methamphetamine is not material to the transaction if:

(a) All materials and substances involving methamphetamine have been removed from or remediated on the property by an entity certified or licensed to do so; or

(b) The property has been deemed safe for habitation by a governmental entity.

7. As used in this section, "facility for transitional living for released offenders" has the meaning ascribed to it in [NRS 449.0055](#).

(Added to NRS by 1989, 629; A 1995, 845; 1997, 1674; [2003, 1338](#); [2005, 2353](#); [2007, 2772](#), effective July 1, 2008)



Court Cases

Menzel v. Morse

In *Menzel v. Morse*, 362 N.W.2d 465 (Iowa 1985), the Supreme Court of Iowa addressed the issues of negligence and breach of fiduciary duty.

The court found that the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® was the standard for determining a broker's negligence.

Further, the court held that conduct between the parties can constitute an implied agency relationship with attendant fiduciary duties.

Facts: The Menzels (buyers) were relocating to Fort Dodge, and were sought out by Morse, a sales agent for Jones, a broker who belonged to the local MLS. Morse testified he hoped to make the Menzels his customers. The Menzels testified Morse said he wished to be their broker and find them a house. Morse never told them they were not his clients, nor did he tell them he was an agent for any seller. Morse showed them an MLS-listed house that was under construction, and the Menzels made a full-price offer which was rejected. Later, in the absence of the Menzels, Morse drafted a new offer and signed it "By agent Morse" for the Menzels. The sellers signed the contract which stated that all necessary work was to be completed by the closing date.

On the closing date, the Menzels were given only fifteen minutes to inspect the house. The Menzels, who had no experience with construction or new homes, found so many obvious defects they refused to close. The Menzels testified that Morse told them that if they failed to close they would lose their down payment and would be sued for breach of contract. Morse also advised them they did not need an attorney. Mr. Menzel testified that he felt he had no choice but to go through with the closing. When the closing took place, \$1,500 was placed in escrow to cure the defects. Upon moving into the home, the Menzels found serious defects. They sued the contractor, who then claimed bankruptcy. They sued Morse and Jones for negligence and breach of fiduciary duty. The trial court found for the defendants and the Menzels appealed.

Holdings/Analysis: The Supreme Court of Iowa first addressed the negligence issue. The court stated that the general rule requires a plaintiff to produce evidence to show the standards of conduct and practices that establish the requisite skill and knowledge of members in good standing in the defendant's trade or profession. The court found that the applicable standard for real estate brokers was the NAR Code of Ethics (Code). The court added that it was immaterial as to whether the broker is a NAR member if it is definitely established that the Code has been adopted and is applicable to those in the real estate profession in the state. The court noted the defendants' admissions that the Code was the accepted standard in Iowa. The court then remanded the negligence issue.

Turning to the fiduciary duty issue, the Supreme Court of Iowa found that an agency relationship between the parties was a requirement for such a claim. The court stated that an agency relationship may be by express agreement between the parties, or by implication from the words and conduct of the parties. The court found overwhelming evidence that Morse was an agent for the Menzels, beginning with his seeking them out and soliciting them as customers. Further, the court found no substantial evidence that he represented the sellers. The court stated that, on remand, Morse's activities must be viewed in light of the agency relationship between him and the Menzels.



Smith v. Sullivan

Smith v. Sullivan—Implied agency and undisclosed dual agency

In *Smith v. Sullivan*, 419 So. 2d 184 (Miss. 1982), the Supreme Court of Mississippi addressed the issues of implied agency and undisclosed dual agency. The court found that an expired agency contract may be extended by a broker's actions and the principal's acquiescence, and that where implied agency exists, the agent owes all requisite fiduciary duties.

Facts: The Sullivans (sellers) owned 220 acres of undeveloped land, most of which was held as security for a loan on which they were delinquent. To avoid an impending foreclosure, the Sullivans wished to sell some of the land, yet retain the mineral rights. In March 1978, the Sullivans executed a listing agreement with Smith, a broker, who was given a three-month exclusive right to sell 112 1/2 acres of the land.

On the expiration date of the listing agreement, Smith had not found a purchaser. In August 1978, Smith produced Brown, a prospective purchaser. When the Sullivans inquired about Brown's financial background, Smith responded that Brown was a man with real estate development experience. In fact, Brown was a female acquaintance of Smith enlisted to purchase the Sullivans' property with a loan cosigned by Smith. This arrangement would enable Smith's petroleum company to develop any oil deposits. Under these false pretenses, the Sullivans authorized Smith to negotiate with Brown, who offered to purchase 120 acres of land, plus all mineral rights for \$54,000.

Foreclosure was impending, and Smith persuaded the Sullivans to agree to those terms. Subsequently, Brown was granted a two-month option to purchase. Prior to Brown's exercise of the option, the Sullivans were approached by a third party interested in leasing the mineral rights for the entire 220 acres. The proposal would have netted the Sullivans an extra \$5,200.

The Sullivans wished to speak with Brown regarding the offer, but Smith refused to arrange a meeting or to provide Brown's phone number. When the Sullivans eventually learned Brown's true identity, they refused to honor the option contract. Brown then sued the Sullivans for specific performance. Smith also sued the Sullivans for the sales commission. The Sullivans filed a complaint against Smith with the state real estate commission, which revoked Smith's real estate license.

The revocation was affirmed by the Circuit Court of Hinds County and Smith appealed to the Supreme Court of Mississippi.

Holdings/Analysis: The Supreme Court of Mississippi found that a broker holds a fiduciary relationship with his principal, including all the attendant duties. The court also found that if the agency is conferred for a certain period of time, it expires upon the completion of that period. The court added that under Mississippi law, a contract which has expired may be extended by a broker's actions and the principal's acquiescence. The court observed that Smith viewed himself as the Sullivans' agent after the expiration of the listing since he charged them a commission and filed suit on those grounds. Additionally, conversations between Smith and the Sullivans indicated that an implied or oral contract still existed. Therefore, the court held that Smith was the broker/agent for the Sullivans throughout the time period and owed them the duties attendant with fiduciary status.



The Supreme Court of Mississippi also held that an agent must not put himself in a position antagonistic to the principal's interest by fraud or by representing others with interests adverse to his principal's interests. The court affirmed the revocation of Smith's license on the basis that he acted as an undisclosed dual agent and that he had dealt unfairly with the Sullivans.

Bauman v. Nutter

Bauman v. Nutter—Implied agency and specific performance

In *Bauman v. Nutter*, 328 N.W.2d 354 (Iowa Ct. App. 1982), the Court of Appeals of Iowa addressed the issues of implied agency and specific performance. The court held that an agent-principal relationship may be implied from the parties' words or conduct and the circumstances of a particular case, and that specific performance will be denied to the principal where the agent induces the seller to sign a contract with mistaken terms.

Facts: Nutter (seller) listed 151 acres of property with Davitt Realty at a firm price of \$750 per acre. The agreement authorized placement on a multiple listing service. Bauman (buyer) first learned of the property from Stanley, a broker who did not work for Davitt, and who was not a member of the listing service. Prior to this referral, Bauman asked Stanley to "keep his eye out and keep him in mind if he found anything suitable." Also, Bauman had previously acquired another piece of property through Stanley and had been satisfied with Stanley's work. After Stanley informed Bauman about the property, Bauman signed an offer. Stanley took Bauman's offer to Davitt Realty, which informed him of the firm \$750 per acre price. Against Davitt Realty's advice, Stanley presented the offer to Nutter. Rather than indicate a price of \$750/acre in the offer, Stanley wrote the terms with a net price of \$75,500 (which was less than \$500/acre). Nutter, who mistakenly believed Stanley was affiliated with Davitt Realty, accepted the offer with those terms. After realizing the mistake, Nutter sought to avoid the contract. Bauman sued Nutter for specific performance. Nutter then sued Stanley for breach of fiduciary relationship, false representation, and negligence. Stanley sued Nutter for the sales commission. The trial court held for Bauman and Stanley. Nutter appealed.

Holding/Analysis: The Court of Appeals of Iowa first addressed the specific performance claim.

The court found that specific performance may be avoided when there is a mistake on the part of the defendants, though such mistake is not such to warrant the invalidating of the contract. The general rule regarding a mistake is that a person who signs a written contract without reading it is bound thereby, and is precluded by his own negligence from claiming that he did not know its contents. However, if a person is induced to sign a contract without reading it through some trick or artifice or false representation on the part of another, he is not estopped to deny the validity of the document. The court found that Nutter thought that Stanley worked for Davitt and trusted that the offer included a price of \$750/acre. The court held that Stanley, who failed to inform Nutter of the change in the price, procured his signature by "trick or artifice," and that because there was a mistake as to the contract, specific performance should be denied.



The Court of Appeals of Iowa also addressed whether Stanley's actions were attributable to Bauman, the buyer. The court found that if an agency relationship existed between Stanley and Bauman, that specific performance would not be allowed for Bauman, as he would have the benefit of Stanley's actions, and the trick or artifice would be attributed to Bauman. With regard to agency, an agent-principal relationship "may be implied from the parties' words or conduct and the circumstances of the particular case." The court concluded that Bauman's request to "keep an eye out" for suitable property, his prior acquisition of property through Stanley, and Bauman's acquiescence to Stanley's actions created an implied agency. Thus, specific performance was denied to Bauman.

**"Some people see things that are and ask, Why?
Some people dream of things that never were and ask, Why not?
Some people have to go to work and don't have time for all that."
George Carlin**

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Student Outline

Opening Quiz...

List the Four basic elements of a “Contract” – or is it Five?

A “Brokerage Agreement” can be oral. T F

What duties does a licensee owe to “All Parties”?

What are the “Duties Owed” of an Agent to a client?

NAC 645.605 states in part “6. Has breached his obligation of absolute fidelity to his principal’s interest or his obligation to deal fairly with all parties to a real estate transaction.” - **Who is a “Party” to a real estate transaction?**

What does C.I.C.C.H. stand for at the Nv. R.E.D.?

What does “Preponderance of the evidence” mean?