

COLDWELL BANKER PREMIER REALTY
BLUNIVERSITY
A *PREMIER* TRAINING & EDUCATION SERIES

ADVERTISING AND ANTI-TRUST
- REDUCING RISK

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OBJECTIVES

As a result of this course, you will be able to do the following:

- Explain what constitutes advertising and what does not
- Site the rational behind the advertising laws as they currently exist
- Avoid violating any anti-trust laws
- Demonstrate their knowledge of Advertising do's and don'ts based on Article 12 of the REALTOR Code of Ethics
- Describe when and how to use their license in their advertising
- Avoid common risks that can occur when advertising

ADVERTISING AND ANTI TRUST - REDUCING RISK

Advertising – what it is

“Advertisement” means the attempt by publication, dissemination, solicitation, or circulation to induce, directly or indirectly, any person to enter into any obligation to lease or to acquire any title or interest in any property.

Advertising includes printed materials such as business cards, stationery, signs, billboards, pre-printed forms, and other documents used in a real estate transaction.

Advertising laws are applicable in face-to-face solicitations such as door-to-door canvassing, listing and other presentations; any live or recorded presentations; “selling” seminars; and open houses.

Advertising includes all “electronic” formats such as broadcasts made by radio, television, or other electronic means, including, without limitation, unsolicited electronic mail (email) and the internet. Nevada law defines advertising by email to mean material that advertises for commercial purposes the availability or the quality of real property, goods, or services, made with the intent to solicit a person to purchase such real property, goods or services.

“Advertorials” are paid-for news articles and are subject to the advertising laws. It is an advertisement in the form of an editorial or feature story and is often found in the Sunday newspaper real estate section. Advertorials may focus on a specific licensee, a real estate team, a brokerage firm, or the features of a property or subdivision.

Advertising laws are applicable regardless of the type of

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media used.

In addition, there may be specific laws for the use of certain media such as email or the internet.

Advertising - What It Isn't

Not all information disseminated about a property or a licensee's services is advertising. For example, legitimate news articles and non-purchased media interviews, a licensee's or brokerage's reputation, statements made in restricted members – only multiple listing service, are not considered advertising. Though not subject to advertising laws, there may be other laws or rules that control the content of those items. For example, a multiple listing service may have rules regarding what comments may be placed on the service.

ADVERTISING LAWS

Presenting a True Picture

The main reason advertising laws exist is to control commerce for the public good by requiring merchants to present a true picture of what is being sold. Truth in advertising is such an integral concept to our free-market economy that the law provides for civil penalties for a violation and has made intentional false advertising a crime. A court has the authority to order such false advertising stopped through an injunctive action. Interestingly, actual deception of a consumer is unnecessary (in other words, the

consumer does not need to have been actually deceived); any statement with the tendency to deceive is subject to the law.

Other laws that fall under the True Picture purpose include the federal Truth-in-Lending laws and Nevada's Deceptive Trade Practices statutes. Various real estate statutes require licensees to advertise in an honest and truthful manner. Intentional misrepresentation, deceit or fraud by a real estate licensee is a felony criminal act subjecting the licensee to imprisonment.

Promoting Fair Trade

Some advertising laws are designed to ensure fair trade and competition in the open market. These are the state and federal anti-trust laws. The real estate licensee is subject to both sets of laws.

Controlling Unwanted Intrusions

Recently, a number of advertising laws and restrictions were passed to protect the public against aggressive or unwanted intrusions into the public's privacy. The telemarketing laws, solicitation rules are examples of such laws.

Fostering Equal Access

Finally, many advertising laws are designed to ensure that members of various protected classes have equal access to advertised services and properties. These rules are found in the fair housing laws.

SOURCES OF ADVERTISING LAW

Advertising laws are found in federal, state, county, city, and local laws, statutes, codes, and ordinances. Many of the state statutes echo federal law. For example, anti-discrimination housing laws are found in both federal and state law.

Generally, federal law is the controlling law and any state law in conflict with federal law will not be enforced. However, at times, federal law allows state law to take precedence if that law is within certain parameters. For example, the federal “Do Not Call” laws provided that a state may make “Do Not Call” laws that are more restrictive than the federal law, but it will not allow state laws that are more lenient than the federal law. Nevada’s “Do Not Call” laws are more restrictive and thus are the controlling law in Nevada. Nevada real estate licensees who are “cold calling” are required to follow the stricter Nevada “Do Not Call” laws.

In addition to federal and state laws and regulations, a real estate licensee may be subject to various local advertising restrictions. These restrictions range from controlling the size and placement of signs, to door-to-door solicitation hours.

There are various administrative regulations that impact a licensee's advertising. When applicable, these regulations have the force and effect of law. In Nevada, the regulations are codified in the Nevada Administrative Code and the cites have the designation of NAC. The Nevada Real Estate Commission, and the Real Estate Division with Commission approval, promulgates regulations. (NRS 645.190). The Real Estate Division oversees enforcement of those regulations. If a licensee is found in violation of an advertising regulation, the RED may grant a licensee up to 10 days to correct any deficiency. After a hearing it may suspend or revoke a real estate license if the licensee fails to timely correct the noticed deficiency.

LAWS APPLICABLE TO ALL ADVERTISING

Anti-trust and unfair Trade Practices

The anti-trust laws cover four main areas of activity: monopolies, tying arrangements, boycotting and price fixing. The two areas that are most subject to advertising restrictions are boycotting and price fixing. Most anti-trust violations in advertising occur verbally with face-to-face presentations.

Boycotting occurs when the government finds there is a consensus among members of a trade or profession to isolate or limit a specific competitor's access to the market. In real estate, this has occurred when "traditional" brokerages advertised against "discount" brokerages; however, it can occur whenever two or more brokerages agree to not cooperate with a specific brokerage or other real estate related service provider. Activities considered by the federal government that may indicate boycotting are when licensees or brokers publish disparaging remarks against other agents, brokerages, or a competitor's services.

Price fixing occurs when two or more competitors agree to a common marketing price and subsequently modify their prices to conform to that agreement. Price fixing among real estate brokerages based on their association within the Realtor® boards has been an issue since the 1950s.

Claims of price fixing occur when various brokers advertise their rates are the "prevailing", "common", "fixed" or "standard" rates in the area, thereby implying there is a common scheme for price fixing among competitors. Having common market rates is not, in and of itself, illegal unless two or more brokers from different brokerages have appeared to have agreed to charge the same rate.

Brokers should establish in their office policies and procedures, an independent justification for the prices the broker charges based on the broker's cost of doing business and required profit.

The licensee must be careful as an anti-trust violation can occur not only when prices are similar, but when

competitors set the same terms as one another. For example, brokers agreeing to take only six-month listings and informing sellers that no broker accepts less than a six-month listing can be a violation.

The conspiracy part (two or more brokers) of an anti-trust violation claim need not be based on a formal agreement between competitors to price fix. A general casual conversation between competitors that results in common terms or prices is sufficient to warrant the charge of anti-trust.

Deceptive Trade Practices

Licensee advertising is also covered under Nevada's Deceptive Trade Practices statutes. These statutes provide that a person engages in a "deceptive trade practice" if he or she knowingly makes a false representation as to:

- the source of goods or services for sale or lease
- the affiliation, association or certification by another entity
- the characteristics, uses, alterations or quantities of goods or services
- advertising goods or services without the intent to sell them as advertised
- advertising "free" services with the intent to receive payment in undisclosed costs
- making false or misleading statements of fact

- fraudulently altering any contract; or knowingly making any other false representation.

ADVERTISING BROKERAGE AND SERVICES

General Restrictions

All advertising, whether for a licensee's services or a client's property, must not be false or misleading and must provide a true and accurate picture of what is being sold.

All advertising, whether for services or a client's property, and whether paid for by the licensee, the client, or the broker, is done under the auspices and supervision of the broker who retains ultimate legal control and liability for the advertising.

As all real estate transactions occur under the auspices of a broker, any advertisement, whether about a licensee's services or a client's property, must indicate the brokerage firm's name in prominence. In determining whether the brokerage name is "in prominence", the Real Estate Division (RED) will consider the style, size and color of the type or font used and the location of the name of the brokerage firm as it appears in the advertisement.

Brokerage Signs

Each broker is required to erect a sign in a conspicuous place identifying the brokerage at the broker's place of business. The brokerage name, or the name under which

the broker does business, must be clearly identified. If the broker has more than one office, each office must have a similar sign. The sign must be readable from the nearest public sidewalk, street or highway.

Franchises and Fictitious Names

If a broker is advertising under the name of a franchise, the broker must incorporate in a conspicuous way the real, fictitious or corporate name under which the brokerage is licensed. If applicable, there must also be an acknowledgement that each office is independently owned and operated.

A broker may not operate or advertise under a fictitious name without first registering the fictitious name and obtaining a certificate from the county clerk. This name must then be filed with the Nevada Real Estate Division and the broker may not use more than one name for each license under which the broker operates.

For Sale Signs

The Nevada Administrative Code provides only one licensee may place a "for sale" sign on a property unless otherwise authorized by owner.

A licensee may not advertise or place any sign on a property when that property is exclusively listed for sale by another broker unless the licensee obtains the prior written consent of the broker with whom the property is listed.

Additionally, the listing broker cannot give or withhold such consent without the knowledge of the property's owner.

Teams

The following are the regulations regarding the formation and identification of teams, including regulations about team advertising.

1. A team must have two or more members. A single person cannot be, nor advertise, as a team.
2. Team members must be employed by the same broker. A team may not be composed of members who work for different brokerages.
3. The team name must incorporate the last name of one of the team members. For example, Sally Young and Mary Smith may form "The Young Team".
4. Team names must not use a trade name nor may the team name be deceptively similar to a name under which another person or entity is lawfully doing business. The test of whether a name is "deceptively similar" is whether a person of average intelligence would be misled by the name. It does not require actual deception or intent to deceive.

In addition to these rules, any team advertising must comply with all other applicable advertising laws and regulations.

Licensee Status

Advertising rules require the licensee to disclose upfront the licensee's status as a real estate licensee. The licensee who advertises to acquire, lease or dispose of any interest in a time share or real property is required to disclose in the advertisement if the licensee has an active or inactive license and his or her status as a salesperson, broker or broker-salesperson.

If the licensee has an actual ownership interest in the property, the licensee may state the property is for sale or lease by "owner-broker" or "owner-agent", whichever is applicable. This requirement to disclose the licensee's status in the advertisement is applicable if the purchaser or seller is a member of the licensee's immediate family, the licensee's firm or any member of the firm, or any entity in which the licensee has an interest as owner.

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REALTOR CODE OF ETHICS - Article 12

REALTORS® shall be honest and truthful in their real estate communications and shall present a true picture in their advertising, marketing, and other representations. REALTORS® shall ensure that their status as real estate professionals is readily apparent in their advertising, marketing, and other representations, and that the recipients of all real estate communications are, or have been, notified that those communications are from a real estate professional. (Amended 1/08)

- Standard of Practice 12-1

Unless they are receiving no compensation from any source for their time and services, REALTORS® may use the term “free” and similar terms in their advertising and in other representations only if they clearly and conspicuously disclose:

- 1) by whom they are being, or expect to be, paid;
- 2) the amount of the payment or anticipated payment;
- 3) any conditions associated with the payment, offered product or service, and;
- 4) any other terms relating to their compensation. (Amended 1/20)

- Standard of Practice 12-2 Deleted (1/20)
- Standard of Practice 12-3

The offering of premiums, prizes, merchandise discounts or other inducements to list, sell, purchase, or lease is not, in itself, unethical even if receipt of the benefit is contingent on listing, selling, purchasing, or leasing through the REALTOR® making the offer. However, REALTORS® must exercise care and candor in any such advertising or other public or private representations so that any party interested in receiving or otherwise benefiting from the REALTOR®'s offer will have clear, thorough, advance understanding of all the terms and conditions of the offer. The offering of any inducements to do business is subject to the limitations and restrictions of state law and the ethical obligations established by any applicable Standard of Practice. (Amended 1/95)

- Standard of Practice 12-4

REALTORS® shall not offer for sale/lease or advertise property without authority. When acting as listing brokers or as subagents, REALTORS® shall not quote a price different from that agreed upon with the seller/landlord. (Amended 1/93)

- Standard of Practice 12-5

Realtors® shall not advertise nor permit any person employed by or affiliated with them to advertise real estate services or listed property in any medium (e.g., electronically, print, radio, television, etc.) without disclosing the name of that Realtor®'s firm in a reasonable and readily apparent manner either in the advertisement or in electronic advertising via a link to a display with all required disclosures. (Adopted 11/86, Amended 1/16)

- Standard of Practice 12-6

REALTORS®, when advertising unlisted real property for sale/lease in which they have an ownership interest, shall disclose their status as both owners/landlords and as REALTORS® or real estate licensees. (Amended 1/93)

- Standard of Practice 12-7

Only REALTORS® who participated in the transaction as the listing broker or cooperating broker (selling broker) may claim to have “sold” the property. Prior to closing, a cooperating broker may post a “sold” sign only with the consent of the listing broker. (Amended 1/96)

- Standard of Practice 12-8

The obligation to present a true picture in representations to the public includes information presented, provided, or displayed on REALTORS®' websites. REALTORS® shall use reasonable efforts to ensure that information on their websites is current. When it becomes apparent that information on a REALTOR®'s website is no longer current or accurate, REALTORS® shall promptly take corrective action. (Adopted 1/07)

- Standard of Practice 12-9

REALTOR® firm websites shall disclose the firm's name and state(s) of licensure in a reasonable and readily apparent manner.

Websites of REALTORS® and non-member licensees affiliated with a REALTOR® firm shall disclose the firm's name and that REALTOR®'s or non-member licensee's state(s) of licensure in a reasonable and readily apparent manner. (Adopted 1/07)

- Standard of Practice 12-10

REALTORS®' obligation to present a true picture in their advertising and representations to the public includes Internet content, images, and the URLs and domain names they use, and prohibits REALTORS® from:

- 1) engaging in deceptive or unauthorized framing of real estate brokerage websites;
- 2) manipulating (e.g., presenting content developed by others) listing and other content in any way that produces a deceptive or misleading result;
- 3) deceptively using metatags, keywords or other devices/methods to direct, drive, or divert Internet traffic; or
- 4) presenting content developed by others without either attribution or without permission, or
- 5) otherwise misleading consumers, including use of misleading images. (Adopted 1/07, Amended 1/18)

- Standard of Practice 12-11

REALTORS® intending to share or sell consumer information gathered via the Internet shall disclose that possibility in a reasonable and readily apparent manner. (Adopted 1/07)

- Standard of Practice 12-12

REALTORS® shall not:

- 1) use URLs or domain names that present less than a true picture, or

2) register URLs or domain names which, if used, would present less than a true picture. (Adopted 1/08)

- Standard of Practice 12-13

The obligation to present a true picture in advertising, marketing, and representations allows REALTORS® to use and display only professional designations, certifications, and other credentials to which they are legitimately entitled. (Adopted 1/08)

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ADVERTISING Q&A

LICENSE NUMBER, ADVERTISING AND USE OF NICKNAME

Licensees are required to have their license number on advertising. Preceding zeros before or letters after the license number are not required. The definition of “advertisement” has been extended to include media, sales literature, brochures or flyers, and social media.

Licensees may use a nickname to advertise services under certain conditions:

- Nickname is not misleading as to the identity, affiliation, or nature of the services of the licensee
- Nickname does not use any combination of numbers and spaces
- Nickname cannot be discriminatory
- Complies with NRS 645.

FAQ's:

Q. Do licensees have to put the full number?

A. Licensees need to include the license designation letter (S., B. or BS., etc.) but they do not need to include any zeros at the beginning of the number. They also do not need to include letters after the license number such as INDV, LLC, etc.

Q. Is there any requirement for specific font, size, or location where the license number should be placed?

A. No, there is no specific requirements regarding size, prominence, location, etc. However, we must be able to locate and identify it. The language in the regulations reads “...in a conspicuous way...” If anyone must search extensively to find it, then it does not meet the intent of the regulation.

Q. Does license number need to be on all signs?

A. If a licensee's name is on the sign, then their license number should be on it. If it is a generic "open house" sign with no specific agent or brokerage identified, then no. If it is a sign advertising the brokerage (but no specific agent), then the broker's number should be included.

Q. Do I need to include my license number on all social media adds/posts?

A. If you add/post links back to your main page and your main page has your license number somewhere on it (either in the page name itself or on the "About" section, then that is sufficient). We just need to be able to locate the number.

Q. Are there differences in requirements based on media one advertises on?

A. Advertising real estate on billboards, television, bus stops, shopping carts, websites, social media, radio etc. Whichever medium you use, the same rules apply. (NRS 645.315 and NAC 645.610).

Q. What steps can be taken to avoid the risks of non-compliance if posts lack the required brokerage name?

A. Save your brokerage name where it can be easily pulled in with each real estate or related post. Name or rename your social media page or timeline to include your brokerage name.

These steps help protect you in the event you forget to add your brokerage name to the real estate post, which could happen.

As a final suggestion for resolving the issue of including brokerage names in social media advertising, licensees are advised to refrain from using their personal social media page or timeline to promote their real estate business. Instead, it is recommended to maintain a separate real estate business page. While not a requirement, generally it makes for good business practice to keep personal and business matters separate.

RISK REDUCTION

The following are examples of words or phrases occasionally used by salespeople that would permit a judge or jury to infer that real estate brokers/salespeople are engaged in an illegal conspiracy:

1. I'd like to lower the commission rate, but our professional association has a rule....
2. "This is the rate that everyone charges."
3. The Listing Service will not accept less than a 120-day listing.
4. "Before you list with ABC Realty, you should know that nobody works on their listings."
5. If John Doe was really professional (or ethical), he would have joined our professional association.
6. "The best way to deal with John Doe is to boycott him."
7. No member of our professional association will accept a listing for less than ninety days.
8. "Let him stay in his own market. This is our territory."

Below are prevention tips:

1. Do not discuss fees, charges, or business practices with competitors anywhere. This includes tennis courts, golf course or during a house party.
2. Be clear and specific in all written correspondence.
3. Be sure you know what you are talking about and to whom.
4. Avoid conversations about how commissions were negotiated and how you reached your own office decisions with anyone but the folks in your own firm.
5. Do not keep dual or secret files of documents.