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IN YOUR CLIENT'S BEST INTERESTS - ETHICAL CONSIDERATIONS:¹

For attorneys representing organizations, who is the client is one of the most significant issues for the attorney to determine. Organizations can only act through individuals², and often attorneys confuse the individual with the organization. Problems for attorneys occur when the individuals, whether managers or officers and/or directors of organizations are accused of illegal harassment or discrimination and expose the organization to significant liability. Furthermore, what happens when the manager, officer and/or director is terminated and sues the organization for wrongful termination?

In Nevada an attorney has an obligation to not disclose confidential communications of the client. See Nevada Supreme Court Rules, Rule 156 and Nevada Revised Statute 49.095. A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Nevada Revised Statute 49.055.

¹The following material is not intended to constitute legal advice. Prior to making any decisions on the information contained herein you should seek out and discuss with an attorney any questions or decisions you are about to make concerning the legal issues set forth herein.

²See Nevada Supreme Court Rules, Rule 163: A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Therefore, it is crucial for an attorney to determine who is the client, otherwise the attorney may inadvertently disclose confidential information.

Not only does an attorney have an obligation to not disclose confidential client information, but the attorney has a obligation to not represent a client if the representation of the client is directly adverse to another client. Nevada Supreme Court Rules, Rule 157(1). In addition, an attorney who represents a party may not communicate about the subject of the representation with a party the lawyer knows to be represented by another attorney. Nevada Supreme Court Rules, Rule 182.

Determining the appropriate application of these rules frequently become complex in employment matters because organizations employ numerous individuals, who at various times and who for various reasons act for the organization in different circumstances.

A. Avoiding Conflicts of Interest - Determining Who the Client Is:

When an individual hires an attorney, it is simple to determine who is the client. However, the analysis is never that simple when an organization retains an attorney. On close examination, defining who is the client can be very imprecise. For attorneys, the difficulty in defining exactly who you represent at the beginning of employment disputes often leads to embarrassing and costly problems and may not only force your withdrawal from the case, but may also lead to sanctions and disciplinary action.

Most employers are some type of organization. They can be Corporations, Limited Liability Companies, or some combination of the two, sole proprietorships, partnerships, or public entities/agencies established by statute or constitutional

provision. Attorneys deal with organizations through individuals. Over the course of time, friendships occur and the line between attorney, client, and friend tends to blur. However, at all times the Nevada Rules of Professional Conduct require the attorney representing an organization to proceed as reasonably necessary in the best interest of the organization. Furthermore:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (a) Asking reconsideration of the matter;
- (b) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (c) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

Nevada Supreme Court Rules, Rule 163. In the event the person with the highest authority in the organization insists upon taking action, or refuses to act, in a manner that is clearly a violation of law and is likely to result in substantial injury to the organization, the attorney may resign. Nevada Supreme Court Rules, Rule 163(3).

Nevada Rules of Professional Conduct allow an attorney to represent both an

organization and any of its directors, officers, employees, members, shareholders or other constituents, subject to Nevada's Conflict of Interest Rule, Rule 157. Rule 157 states:

1. A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (a) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (b) Each client consents, preferably in writing, after consultation.
2. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
 - (a) The lawyer reasonably believes the representation will not be adversely affected; and
 - (b) The client consents, preferably in writing, after consultation.

When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Nevada Supreme Court Rules, Rule 157. A terminated employee often sues both the organization and the individuals allegedly involved in his or her termination.³ However determining whether such joint representation is permissible requires careful consideration of the facts and potential liability of particular case. Many times the organization and the individual sued will have a common interest in joint representation. The lawsuit or claim against the organization and the individual usually concern virtually identical legal and factual issues so that joint representation by a single attorney is both cost effective and will hopefully lead to a more cohesive and effective defense.

However, when representing multiple clients in a single matter, an attorney shall

³While there is no individual liability under most discrimination statutes, individuals are commonly sued under various civil torts. These torts range from intentional and/or negligent infliction of emotional distress, tortious interference with economic advantage, assault and/or battery to defamation.

discuss with all the clients the implications of the common representation and the advantages and risks involved. Nevada Supreme Court Rules, Rule 157(2).

If a potential conflict of interest exists between the organization and the individual, both client's must be informed of the potential conflict and each client consents, "preferably in writing", after consultation. Nevada Supreme Court Rules, Rule 157(1). Although not technically required under the Nevada Rules of Professional Conduct a wise attorney will advise the individual to obtain independent legal advise prior to consenting to joint representation. Furthermore, the attorney needs to discuss with the organization the possibility that it may desire at some point in the litigation to disavow the alleged acts of the individual named defendants. This is particularly true when an individual has been sued for a tort which he or she is personally liable and the terminated employee is attempting to seek joint and several liability for both compensatory and punitive damages. In this case, the organization may want to disavow the individual's actions.

Attorneys representing organizations need to exercise care that they do not inadvertently establish attorney-client relationships which were not intended by the attorney nor authorized by the organization. An attorney has an obligation when dealing with an organization's directors, officers, employees, members, shareholders or other constituents, to explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the attorney is dealing. Nevada Supreme Court Rules, Rule 163(4).

However, attorney client relationships are easily and sometimes thoughtlessly

entered into. In **Perkins v. West Coast Lumber Co.**, 62 P. 57, 129 Cal. 427, 429 (1900), the California Supreme Court stated: "When a party seeking legal advice consults an attorney at law and secures that advice, the relation of attorney and client is established *prima facie*." The absence of an agreement with respect to the fee to be charged does not prevent the relationship from arising. Once the attorney client relationship occurs the potential conflict of interest has been created.

B. Ex-Parte Contacts – A Touchy Situation:

In employment related cases, it is rare that current or former employees are not witnesses which provide the information upon which the Plaintiff wants to build his or her case and the organization intends to use to defend against the plaintiff's case. Plaintiff's attorneys often wish to consult with current and former employees of an organization without the consent or knowledge of opposing counsel (ex parte contacts). This is usually done to help Plaintiff's counsel determine whether a potential case exists and because it is cheaper, i.e., depositions cost money. In addition, many times an employee is more willing to privately and openly discuss the case with Plaintiff's counsel if it is done informally and without the knowledge of the organization's counsel.

The Nevada Rules of Professional Conduct concerning ex-parte conduct are clear:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Nevada Supreme Court Rules, Rule 182. However, this Rule does not establish

whether an current or ex-employee is a "party."

Until December of 2002 this issue in Nevada was constantly disputed by attorneys representing organizations. These attorneys commonly claimed that all current employees and many ex-employees are considered represented "parties" by the organization's counsel and could only be spoken to with the consent of the organization's counsel. Strangely such consent was rarely if ever given. However, on December 27, 2002 the Nevada Supreme Court issued its decision in **Palmer v. Pioneer Inn Associates, Ltd.**, 118 Nev. Adv. Op. No. 95, 59 P.3d 1237 (2002) which significantly clarifies this issue.

In **Palmer**, the Ninth Circuit Court of Appeals requested that the Nevada Supreme Court answer two certified questions:

1. In applying Supreme Court Rule 182 to an employee of a represented corporation, does Nevada apply the portion of the commentary to Model Rule 4.2 barring ex parte contact with an employee "whose statement may constitute an admission on the part of the organization"?
2. If so, does Nevada interpret that portion of the commentary by analogy to Fed.R.Evid. 801(d)(2)(D), by application of agency principles, or by a different analysis?

118 Nev. at ____, 59 P.3d at 1238. The Nevada Supreme Court recognized that simply answering these questions would not resolve the issues actually presented by the Ninth Circuit. As a result, the Nevada Supreme Court rephrased the questions as follows:

What test does Nevada use in applying Supreme Court Rule 182 to an employee of a represented organization?

118 Nev. at ____, 59 P.3d at 1238. The Court then stated:

The federal district court determined that if an employee's statement qualifies as a party-opponent admission under FRE 801(d)(2)(D), then contact with the

employee falls within SCR 182's prohibition. We conclude that the better test is the "managing-speaking agent" test. We adopt this test, as set forth in this opinion, in determining whether contact with an employee of a represented organization is barred by SCR 182.

118 Nev. at ____, 59 P.3d at 1238.

The **Palmer** case involved issues relating to the Pioneer Inn's decision to not hire a pregnant woman. Dena Palmer applied for work as a waitress at the Pioneer Inn Hotel and casino in Reno, Nevada. She allegedly met with and discussed possible positions as a deli food server and a restaurant supervisor with Greg Zamora, the Food and Beverage Director. Palmer alleged that Greg Zamora told her that she would be hired as a restaurant supervisor. However, when she arrived for work Zamora then told her she had been rejected by one of Pioneer's general managers because she was pregnant. 118 Nev. at ____, 59 P.3d at 1238.

Immediately after Palmer determined she was not hired, she retained an attorney who informed the Pioneer that he intend to file an action on her behalf. A few days latter Palmer lodged a complaint with the Equal Employment Opportunity Commission. The Pioneer retained counsel to represent it in the matter, and its counsel sent a letter to Palmer's attorney informing him that they were representing the Pioneer. 118 Nev. at ____, 59 P.3d at 1239.

Approximately one month later a executive sous chef at the Pioneer contacted Palmer's attorney. Following their discussion, the sous chef signed an affidavit, prepared by Palmer's attorney, which stated: "during the month of January, 1997, I witness[e]d Mr. Greg Zamora interviewing ... [Palmer] ... I inquired of Mr. Zamora

whether he intended to hire [her] at which time Mr. Zamora told me that he had already hired her." The sous chef's job was a supervisory position that involved running Pioneer's main kitchen. 118 Nev. at ____, 59 P.3d at 1239.

After litigation ensued Pioneer moved to disqualify Palmer's counsel under SCR 182 based on his ex parte contact with the sous chef. The federal magistrate judge found that the sous chef was a supervisor who had responsibility for interviewing and hiring cooks, dishwashers, and sous chefs, although not waitresses, servers, or restaurant supervisors. The magistrate concluded that, even though the sous chef was not involved in hiring waitresses, food servers, or restaurant supervisors (any of the positions Palmer claims to have discussed with Zamora), "[b]ecause his job responsibilities included hiring employees, he was in a position to make statements concerning the hiring policies of Pioneer." The magistrate then held that counsel's contact with the sous chef constituted ex parte contact with a represented party under SCR 182, and sanctioned counsel by excluding the affidavit obtained by the contact, precluding the sous chef from testifying about the information contained in the affidavit, and awarding fees and costs of \$2,800 to Pioneer. After Palmer filed an objection, the federal district court affirmed the magistrate's order in its entirety. 118 Nev. at ____, 59 P.3d at 1239.

The Court stated that the primary purpose of Nevada Supreme Court Rules, Rule 182 is to:

The primary purpose of the rule is to protect the attorney-client relationship from intrusion by opposing counsel. It protects parties from unprincipled attorneys and safeguards the attorney-client privilege. It also promotes counsel's effective

representation of a client by routing communication with the other side through counsel, who can present the information in a way most favorable to the client. Sanctions for violating the rule have included disqualification of counsel, monetary sanctions, exclusion of information obtained by ex parte contact, prohibition on the use of such information at trial, and production to the organization's counsel of information obtained by ex parte contact, including all or part of the work product connected with the contact.

The rule's protections undisputedly extend to organizational parties, who must act through their directors and employees. Accordingly, at least some of the organization's agents must be viewed as the equivalent of a "party" for the rule to have any effect. A conflict between policies arises, however. On one hand, the rule's protective purposes are best served by defining this pool of agents broadly. On the other hand, defining the pool more narrowly fosters the use of informal discovery methods, which further the prompt and cost-effective resolution of disputes. Moreover, a narrower definition affords a reasonable opportunity for pre-litigation investigation under Rule 11. The question then becomes how to apply the rule in a way that best balances the competing policies.

118 Nev. at ____, 59 P.3d at 1240 - 1241.

The Nevada Supreme Court concluded that the managing-speaking agent test best balances the policies at stake when considering what contact with an organization's representatives is appropriate. The Court stated that the test protects from overbearance by opposing counsel those representatives who are in a position to speak for and bind the organization during the course of litigation, while still providing Plaintiff's counsel ample opportunity for an adequate Rule 11 investigation. 118 Nev. at ____, 59 P.3d at 1247 - 1248.

The Nevada Supreme Court also concluded that the United States Supreme Court's reasoning in *Upjohn*, while explicitly addressing only the attorney-client privilege, applies with equal force to the no-contact rule, in that the purpose of Nevada Supreme Court Rule 182 is to protect the attorney-client relationship, not to protect an

organization from the discovery of adverse facts. The Nevada Supreme Court stated that the managing-speaking agent test best fulfills this purpose by not being over-inclusive. In particular, the managing-speaking agent test adopted by the Nevada Supreme Court does not protect the organization at the expense of the justice system's truth-finding function by including employees whose conduct could be imputed to the organization based simply on the doctrine of respondeat superior. 118 Nev. at ____, 59 P.3d at 1248.

The Nevada Supreme Court held that Nevada Supreme Court Rule 182

should be interpreted according to the managing-speaking agent test as set forth by the Washington Supreme Court in *Wright by Wright v. Group Health Hospital*: [103 Wash.2d 192, 691 P.2d 564, 569 (1984)].

[T]he best interpretation of "party" in litigation involving corporations is only those employees who have the legal authority to "bind" the corporation in a legal evidentiary sense, *i.e.*, those employees who have "speaking authority" for the corporation.... It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts. Rather, the rule's function is to preclude the interviewing of those corporate employees who have the authority to *bind* the corporation.

... [E]mployees should be considered "parties" for the purposes of the disciplinary rule if, under applicable [state] law, they have managing authority sufficient to give them the right to speak for, and bind, the corporation.

In applying this test, we specifically note that an employee does not "speak for" the organization simply because his or her statement may be admissible as a party-opponent admission. Rather, the inquiry is whether the employee can bind the organization with his or her statement. Also, an employee for whom counsel has not been retained does not become a "represented party" simply because his or her conduct may be imputed to the organization; while any confidential communications between such an employee and the organization's counsel would be protected by the attorney-client privilege, the facts within that employee's knowledge are generally not protected from revelation through *ex parte* interviews by opposing counsel.

118 Nev. at ____, 59 P.3d at 1248.

C. Applying the Rules of Professional Conduct to Your Case:

In the majority of cases an employment lawyer is retained after a charge of discrimination is filed with either the Nevada Equal Rights Commission or the Equal Employment Opportunity Commission or a complaint is filed in District Court. In either case the attorney must immediately identify the scope of his or her representation and to resolve any potential or actual conflicts of interest raised by the contemplated representation.

If in the past, the attorney has not represented the organization, conflict checks must be done for the organization, the named defendants, its individual partners, members, directors and shareholders, particularly where they hold a controlling interest. If there is a potential or actual conflict the attorney must disclose the conflict and obtain the written consent of the parties. See Nevada Supreme Court Rules, Rule 157.

Once the attorney has determined whether there is a conflict between or among present or former clients and the proposed defendants, the attorney must then determine whether there are potential or actual conflicts between or among the organization and the named individual defendants for the specific case the attorney has been retained. This is particularly important in cases where an organizational client may need to disavow or terminate a named defendant-employee's employment. If the attorney has already begin a joint defense of the organization and the named defendant, this actual conflict of interest identified could require the attorney to withdraw from representation of both clients.

When actual conflicts are identified either between individual named defendants

and/or the organization and an individual named defendant, one or more separate counsel may need to be engaged. Needless to say, it is doubtful that the individual named defendants will be able to afford independent counsel. Therefore, in most cases the organizational client will need to pay for the individual named defendant's independent counsel. Nevada Supreme Court Rules, Rule 158(6) states:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (a) The client consents after consultation;
- (b) There is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (c) Information relating to representation of a client is protected as required by Rule 156.

Obviously few organizational clients wish to pay for an individual named defendant's counsel and their own counsel at the same time. However, failure to do so can lead to a situation where the individual named defendant has no choice but to enter into a settlement which is detrimental to the organization.

Once discovery commences the attorney must remember the scope of his or her representation. Thus, if that representation includes one or more individual named defendants as well as their employer, the attorney must be certain to include the named defendants in tactical decisions concerning discovery and case strategy. While attorneys have an obligation to expedite litigation consistent with the interests of the client, this obligation does not preclude an attorney from granting a reasonable request from opposing counsel for an accommodation, such as an extension of time, or from disagreeing with a client's wishes on administrative and tactical matters, such as scheduling depositions, the number of depositions to be taken, and the frequency and

use of written discovery requests. See Nevada Supreme Court Rules, Rule 171.

In pursuing discovery, attorneys must be careful to avoid contacts with the Plaintiff without the consent of his or her counsel. This can become difficult where the attorney has an ongoing relationship with the organization and where the Plaintiff in a pending matter also has supervisory responsibility for the organization. A situation can arise where the attorney may have a need as the attorney for the organization in another matter to consult with the Plaintiff/Supervisor in his or her capacity as a supervisor for matters unrelated to the litigation. Such consultation where unavoidable should be undertaken only with the knowledge and consent of opposing counsel.

An attorney deals with an organization through individuals associated with the organization. If the representative of the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, attorney's in Nevada are required to proceed as is reasonably necessary in the best interest of the organization. See Nevada Supreme Court Rules, Rule 163. In determining how to proceed, the attorney shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the attorney's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. See Nevada Supreme Court Rules, Rule 163. Any action taken by the attorney must be designed to minimize disruption of

the organization and the risk of revealing information relating to the representation to persons outside the organization. The actions taken by the attorney may include, but are not limited to:

- (a) Asking reconsideration of the matter;
- (b) Advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (c) Referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

Nevada Supreme Court Rules, Rule 163. If the highest authority that can act on behalf of the organization insists upon continuing to act or continuing to refuse to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, the attorney may withdraw. See Nevada Supreme Court Rules, Rule 163(3).

D. Maintaining Communication and Confidentiality:

One major key to successful representation of a client involves effective and continuing communication between the client and the attorney about significant developments in a case. Furthermore, an attorney must keep a client reasonably informed about the status of the matter and promptly comply with reasonable requests for information. Finally, an attorney must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. See Nevada Supreme Court Rules, Rule 153. Therefore, any attorney who fails to pass on a settlement offer to his or her client has violated his or her obligation to allow

the client to make informed decisions.

At all times during and after the conclusion of the attorney's representation of a client, the attorney must maintain confidential client information. Nevada Supreme Court Rules, Rule 156 states:

1. A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections 2 and 3.
2. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.
3. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (a) To prevent or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action; or
 - (b) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

This rule imposes a duty on all attorneys to keep client information to themselves and not to reveal professional secrets. **McKay v. Board of county Comm'rs**, 103 Nev. 490, 746 P.2d 124 (1987).

Respectfully Submitted,

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