STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 27
(Initially Issued September 10, 2001)
(Revised and Reissued May 25, 2005)[1]

QUESTION

May opposing counsel make ex parte contact with lower level employees of a corporate defendant where the corporation is represented by counsel?

ANSWER

Yes, within limits. In *Palmer v. Pioneer Inn Associates, Ltd.*, 59 P.3d 1237 (Nev. 2002), the Nevada Supreme Court engaged in an extensive interpretation of Nevada SCR 182 and determined to apply it to organizational entities according to a "managing-speaking agent" test, in which an attorney is precluded from ex parte contact with a person affiliated with the adverse entity only if the person qualifies as a managing-speaking agent (defined by the Court as someone with supervisory control or authorization to speak for the entity as to the matter that is the subject of the conflict). *See* 59 P.3d at 1238, 1244-45 and 1248 (test applies to "those representatives who are in a position to speak for and bind the organization during the course of litigation").

AUTHORITIES RELIED UPON

Nevada Supreme Court Rule 182.

Official comment to Model Rule 4.2.

Palmer vs. Pioneer Inn Associates, 59 P.3d 1237 (Nev. 2002)

Cases and authorities cited herein.

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[1] The Committee first considered this issue prior to the Nevada Supreme Court's decision in *Palmer v. Pioneer Inn Assocs.*, 59 P.3d 1237 (Nev. 2002) and based much of the Committee's analysis on a federal trial court opinion in the matter, *Palmer v. Pioneer Hotel & Casino*, 19 F. Supp. 2d 1157 (D. Nev. 1998). The Nevada Supreme Court, the decisions of which clearly bind members of the State Bar of Nevada, took a significantly different approach to the application of Nevada SCR 182 than did the federal trial court. Consequently, the Committee has revised Opinion No. 27 significantly in light of the Nevada Supreme Court's *Palmer v. Pioneer Inn* analysis.

DISCUSSION

This opinion discusses the ethical issues raised in Nevada when counsel for a party suing a corporation engages in ex parte contacts with "lower level" employees of the corporation. Nevada Supreme Court Rule 182, which governs the issue, states:

> 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 SCR 182 is based on ABA Model Rule 4.2. Comments to the Model Rules were not adopted, but may be used as guidance for interpretation. *See* Nevada SCR 150(2).

Personal interviews of witnesses by counsel are the time honored means by which an attorney develops and refines his case. *See IBM v. Edelstein*, 526 F.2d 37 (S.D.N.Y., 1975). Interviews are one method of satisfying an attorney's obligations under Rule 11 to conduct a reasonable inquiry to ensure that a claim is well grounded in fact. *See* Nev. R, Civ. P. 11. The purpose of Rule 182 is to protect laypersons from being taken advantage of by lawyers, to protect the attorney-client relationship, and to prevent the inadvertent disclosure of privileged information. *See In re Discipline of Schaeffer*, 25 P.3d 191, 198 (Nev. 2001). The issue arises in connection with contacting non-managerial corporate employees. Ex parte contact with managerial employees of a corporation is prohibited by the Rule. *See Cronin v. Eighth Judicial District Court*, 105 Nev. 635, 781 P.2d 1150 (1989). The issue in the case of corporations, and other organizational entities as well, is: Which individuals constitute the represented party?

Some courts embrace the position that no corporate employees, even lower level employees, should be contacted ex parte when that corporation is represented. *See, e.g., Public Service Elec. & Gas Co. v. Associated Elec. & Gas Ins. Svcs., Ltd.*, 745 F. Supp. 1037 (D.N.J. 1996) (superseded by Rule and Reg.). The majority take the position that some communication may take place. *See Niesig v. Team I*, 76 N.Y.S. 2d 363, 558 N.E. 2d 1030 (1990).

The scope of corporate employees covered by the Rule has been broadened by courts over the years. The narrowest test is the control group test. Those courts which adopt the control group test, reason that the maximum amount of information should be readily available through informal discovery. *See Fair Automotive Repair, Inc. v. Car-X Service Systems, Inc.*, 128 Ill. App. 3d 763, 471 N.E.2d 554 (Ill. App. 1984). In *Wright v. Group Health Hospital*, 691 P.2d 564 (Wash 1984), the Court used a "managing-speaking" agent test that defines a manager as one who in words or actions bind the corporation ("speaker-manager"). By identifying a speaker-manager as the party, the Court reasoned that the purpose of the Rule was satisfied by preventing an adverse attorney from contacting someone who could bind the corporation. *See* 691 P.2d at 569. The *Wright* Court refused to distinguish between employees who witnessed the damaging act from the employees who caused it, reasoning that the Rule is not meant to shield a corporation from discovery of the facts of a matter, even if they are prejudicial. *See* 691 P.2d at

569.

Other courts have followed a "binding admission" approach. *See Strawser vs. Exxon Co.*, U.S.A., 843 P.2d 613, 621 (Wyo. 1992). In *Strawser*, the court allowed the plaintiff to interview all of Exxon's employees except the following:

> (1) Those who may legally bind Exxon by their having acted or failed to act in the alleged course of defaming Strawser or invading the Strawsers' privacy; (2) those whose actual conduct in the claimed incidence may be imputed to Exxon; and (3) those employees implementing the advice of Exxon's counsel.

The ABA Model Rule takes the position that the proscription of the Rule applies only to (1) managers, (2) persons whose act or omission would bind the corporation, or (3) employees whose statement may constitute an admission. The Comment to Model Rule 4.2 says:

> (4) In the case of an organization, this Rule prohibits communications ...with persons having a managerial responsibility...and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The Nevada Supreme Court has addressed the application of SCR 182 in detail in *Palmer v. Pioneer Inn Associates, , Ltd.*, 59 P.3d 1237 (Nev. 2002). The *Palmer* court adopted the "managing-speaking agent" test of the Washington Supreme Court in *Wright v. Group Health, supra*, to define who is meant as a person with managerial responsibility.

The controversy over application of Nevada SCR 182 began when Dena Palmer applied for work as a waitress at the Pioneer Inn Hotel and Casino in Reno. Palmer alleged that she also discussed possible positions as a deli food server and restaurant supervisor with the Hotel's food and beverage director. Palmer maintained that she was told that she would be hired as a restaurant supervisor but upon arriving for work was told that she "had been rejected by one of Pioneer's general managers because she was pregnant." *See Palmer v. Pioneer Inn*, 59 P.3d at 1238. Pioneer contended that Palmer was not hired because she did not complete the Hotel's standard hiring process.

Palmer retained counsel, who advised Pioneer that litigation was likely and eventually brought suit against Pioneer in state court. The case was removed by Pioneer to federal court. Pioneer retained counsel and informed Palmer's counsel that Pioneer was represented. Later, an executive sous chef at the Hotel contacted Palmer's attorney, informing Palmer's counsel that he had witnessed the interview at issue and that the Food and Beverage Manager had indeed stated that he had hired Palmer for the position she sought. The Sous Chef's statements were obviously helpful to Palmer's case in that the tended to confirm her version of events and impeach the Hotel's version. The Hotel complained, however, that Palmer's counsel had violated Nevada SCR 182 in speaking to the Sous Chef because he held a supervisory position at the Hotel and

was thus part of the Hotel for purposes of legal representation in the controversy. According to the Hotel, this constituted a violation of the Rule in that Palmer's counsel had spoken to a "represented person" within the meaning of Rule 182 and its ABA counterpart Rule 4.2. (The ABA amended Rule 4.2 in 1995 to refer to "person" while Rule 182 speaks of a "party". For purposes of *Palmer v. Pioneer*, the terms are essentially synonymous because the Hotel was asserting that for purposes of Rule 182, the Sous Chef was in fact part of the Hotel's corporate organization.).

Pioneer than moved to disqualify Palmer's counsel on the basis of counsel's alleged violation of Nevada SCR 182 because of the ex parte contact with the Sous Chef. The issue was initially heard by a federal magistrate judge, who 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 [the Food and Beverage Manager]) "because 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.

See Palmer v. Pioneer Inn, 59 P.3d at 1239-40. *See also Palmer v. Pioneer Inn Associates*, 19 F. Supp. 2d 1157 (D. Nev. 1998).

Thereafter, with the Sous Chef's affidavit testimony excluded, Pioneer obtained summary judgment as to two of Palmer's claims. The remaining claims were tried to a jury, which found for Pioneer. Palmer appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit found significant variance in the manner in which courts across the country had interpreted ABA Model Rule 4.2. It also found no definitive Nevada precedent on the matter and elected to certify to the Nevada Supreme Court the question of Rule 182's application to the facts presented by the *Palmer v. Pioneer Hotel* litigation. *See Palmer v. Pioneer Inn Associates, Ltd.*, 257 F.3d 999 (9th Cir. 2001). The Supreme Court accepted the certification and also received amicus briefs on the issue from the State Bar of Nevada and the Nevada Trial Lawyers Association.

In answering the certified question, the Nevada Supreme Court in *Palmer v. Pioneer Inn* adopted a "managing-speaking agent" test for applying Nevada SCR 182 to corporate persons. Under this test, an attorney may not engage in ex parte communication (absent consent or authorization pursuant to other substantive law) if the person is a managing agent who is

authorized to speak for the company about the subject matter of the litigation or dispute. The Nevada Supreme Court's analysis meant that the Sous Chef, although a supervising employee, was not a representative of the Hotel in the *Palmer* dispute for purposes of the managing-speaking agent test. Consequently, Palmer's counsel did not violate Rule 182 as interpreted by the Nevada Supreme Court.

The *Palmer* case then returned to the U.S. Court of Appeals for the Ninth Circuit to consider Palmer's appeal of the federal trial court's grant of summary judgment as to some of her claims and a jury finding in favor of Pioneer In as to her other claims. The Ninth Circuit reversed "the district court's grant of summary judgment and its exclusion of the employee's affidavit and remand[ed] for trial. *See Palmer v. Pioneer Inn Assocs., Ltd.*, 338 F.3d 981 (9th Cir. 2003).

In *Palmer v. Pioneer Inn*, the Nevada Supreme Court discussed the background, purpose and rationale of the anti-contact rule as well as the different interpretative approaches to applying the rule where the person or party in question is an entity such as a corporation or government agency rather than a natural person. The Court sets forth a comprehensive discussion of the anti-contact rule, its purpose, and application. According to the Court:

> The primary purpose of the rule is to protect the attorney-client relationship from intrusion by opposing counsel. It protects parties form 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.
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> The rule's protections undisputedly extend to organizational parties, who must act through their directors and employees. Accordingly, at least some of the organizations'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 become how to apply the rule in a way that best balances the competing policies,

See Palmer v. Pioneer Inn, 59 P.3d at 1240-41 (footnotes omitted).

In striking this balance, the Court reviewed the commentary to the ABA Model Rules and the tests used by other jurisdictions. In particular, the Court noted with approval comments to the 2002 ABA revisions to the Model Rule, which states:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization' lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. . . . . In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization.

See Palmer v. Pioneer Inn, 59 P.3d at 1241-42 (footnotes omitted).

The Nevada Supreme Court also addressed the various tests for applying the anti-contact rule to organizations of other courts, discussing leading cases, and classifying them on a rough continuum from the most protective to the least protective of the organization in terms of preventing contact with employees by lawyers for opposing parties.

> At one extreme is the "blanket" test, which prohibits contact with current and former employees of an organizational client; at the other is the "control group" test, which covers only high-level management employees. Several tests fall in the middle, including a party-opponent admission test, a case-by-case balancing test, and a "managing-speaking agent" test. Finally, a test crafted by the New York Court of Appeals expressly disclaims any reliance on the former comment, but is admittedly based on the "managing-speaking agent" test.

See 59 P.3d at 1237, 1242. *See, e.g., Public Serv. Elec. & Gas. v. Associated Elec. & Gas*, 745 F. Supp. 1037 (D.N.J. 1990)(leading blanket test opinion); *Coal v. Appalachian Power Co.*, 903 F. Supp. 975 (S.D.W. Va. 1995)(leading part-opponent test opinion); *Wright by Wright v. Group Health Hosp.*, 103 Wn.2d 192, 691 P.2d 564 (Wash. 1984)(leading managing-speaking agent test); *Fair Automotive v. Car-X Service Systems*, 128 Ill. App. 3d 763, 471 N.E.2d 554, 560, 84 Ill. Dec. 25 (Ill. App. Ct. 1984)(leading control group test); *Baisley v. Missiquoi Cemetery Ass'n*, 167 Vt. 473, 708 A. 2d 924 (Vt. 1998)(example of case-by-case balancing); *Niesig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (N.Y. 1990)(enunciating New York test that exempts "mere witnesses" form anti-contract rule but forbids contact with persons whose acts or omissions would be binding on the entity in litigation as a practical matter).

The federal trial court in *Palmer v. Pioneer Hotel* had adopted the party-opponent test, essentially holding that if a statement from a company employee would be admissible under Fed. R. Evid. 801(d)(2)(the party-opponent exception to the hearsay rule) and its state counterparts, opposing counsel should not have ex parte contact with the employee. In addition to the federal

court in *Palmer*, this test has support from some influential commentators. *See* Vol. II GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 38:6 at p. 38-9 (3d ed. 2001). But, as the Nevada Supreme Court observed in *Palmer*:

> The drawback of this test is that it essentially covers all or almost all employees, since any employee could make statements concerning a matter within the scope of his or her employment, and thus could potentially be included within the rule. Thus, the party-opponent admission test can effectively serve as a blanket test, thus frustrating the search for truth. An attorney attempting to comply with Rule 11's requirements would be faced with two unenviable choices. The first option would be not to contact a person who might be the best, if not the only, source of corroborating information. This option would ensure that the attorney complies with SCR 182's prohibitions, but would result in the attorney's failure to comply with Rule 11. The second option would be for the attorney to second-guess what an employee might say, in an attempt to determine whether contact might be permissible, which would result in the attorney risking an SCR 182 violation.

See 59 P.3d at 1243-44 (footnotes omitted).

The New York test set forth in *Niesig v. Team I* also has significant support in that *Niesig* is essentially the standard set forth in the AMERICAN LAW INSTITUTE RESTATEMENT (SECOND) OF THE LAW GOVERNING LAWYERS § 100 (2000). This *Restatement* test was viewed by the Nevada Supreme Court as "considerably narrower" than the party-opponent admission test because under the *Restatement* approach and *Niesig*, the organization remains free to contradict the employee's statements or to impeach the employee. *See* 59 P.3d at 1247. Nonetheless, the two tests are similar in that the New York-*Niesig-Restatement* test is quite protective of the organization because it includes in the prohibited realm of conflict the statements of employees whose conduct "may be imputed to the organization." *See* 59 P.3d at 1246-47. The *Niesig* approach was also supported by the State Bar of Nevada in its amicus brief in *Palmer v. Pioneer Inn.*

After the *Palmer v. Pioneer Inn* decision, it is now clear that Nevada SCR 182 utilizes a "managing-speaking agent" test for determining which adverse entity employees are off limits to counsel and that neither the *Restatement-Niesig* "ability to bind the company" test nor the "admission by a party-opponent" test applies to Nevada SCR 182. Despite the pedigree supporting the party-opponent and New York-*Niesig* tests, the Nevada Supreme Court rejected them in favor of the managing-speaking agent test because it

> best balances the policies at stake when considering what contact with an organization's representatives is appropriate. 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 ample opportunity for an adequate Rule 11 investigation.

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> In particular, the managing-speaking agent test best fulfills this purpose by not being over-inclusive. In particular, the managing-speaking agent test adopted by this 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. Finally, while any non-blanket rule has some uncertainty, we conclude that the test is sufficiently clear to provide significant guidance to counsel.

See 59 P.3d at 1248 (footnotes omitted). The Court also noted that it was not adopting ABA Model Rule 4.2's comment and was not adopting the ABA's 2002 comment, "which essentially tracks the New York test. Rather, SCR 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*." *See* 59 P.3d at 1248 (footnotes omitted). *See also Wright v. Group Health Hosp.*, 691 P.2d at 569 (Wash. 1984):

> [The function of anti-contact rule] is to preclude the interviewing of those corporate employees who have the authority to bind the corporation. [Employees should be viewed as within the anti-contact rule where they have] managing authority sufficient to give them the right to speak for, and bind, the corporation. . . . 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.

See also Palmer v. Pioneer Inn, 59 P.3d at 1248 (citing this excerpt of *Wright v. Group Health Hospital* with approval and also noting that where attorney-client privilege applies to employee communication's with organization's counsel, the privilege protects only communications and not the facts or the employee's knowledge). *See also Upjohn v. United States*, 449 U.S. 383, 395-96 (1982). *See also Cronin v. District Court*, 105 Nev. 635, 781 P.2d 1150 (1989)(contact with managerial level employees of corporation falls within SCR 182); *In re Discipline of Schaefer*, 117 Nev. 496, 25 P.3d 191, *as modified* 31 P.3d 365 (Nev. 2001), *cert. denied*, 534 U.S. 1131 (2002)(lawyer representing self in litigation remains subject to SCR 182).

Currently pending before the Nevada Supreme Court are recommendations from the State Bar of Nevada to amend SCR 182 to conform to the current version of ABA Model Rule 4.2 as amended by the ABA during 2002. Proposed Revised Nevada SCR 182 would read as follows (changes from current Rule 182 are indicated by redlining and strikeout):

> In representing a client, a lawyer shall not communicate about the subject of the representation with a ~~party~~ person 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 to do so by law or a court order.

Adoption of this proposed revised version of SCR 182 (ABA Model Rule 4.2) would not

affect the precedential value of the *Palmer v. Pioneer Inn* decision nor would it impact this Opinion's analysis of the anti-contact provisions of Rule 182.

CONCLUSION

The approach of the Nevada Supreme Court in *Palmer v. Pioneer Inn* strikes a balance allowing informal and inexpensive discovery while providing a represented party with the advice and protection of counsel. An employee of an organization may be interviewed by counsel for an adverse party unless the employee is a managing-speaking agent of the organization.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar