

**STATE BAR OF NEVADA  
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY**

**Formal Opinion No. 22  
July 28, 1995**

**QUESTION** - Whether sending a written offer of employment at light duty as prescribed by NAC 616.085(1) by employer's counsel directly to an employee without a copy to the known counsel of the employee is a violation of Supreme Court Rule 182.

**ANSWER** - Mailing the notice to the employee without mailing a copy to known counsel for the employee is a violation of Supreme Court Rule 182.

**AUTHORITIES RELIED ON**

Nevada Supreme Court Rule 182, NAC 616.085(1); Holiday Inn vs. Barnett, 103 Nev. 60, 732 P.2d 1376 (1987); Annotated Model Rules of Professional Conduct (2nd Ed.) American Bar Association 1992, A.B.A. Comm. on Ethics Informal Opinion 1373 (1976), A.B.A. Informal Decision 570 (1962), In re Marrietta, 569 P.2d 921 (1977), Crane v. State Bar of Cal., 635 P.2d 163 (1981), NRCP 5.

**DISCUSSION**

Nevada Supreme Court Rule 182 provides as follows:

"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."

NAC 616.085 regarding offers of employment sets forth the following applicable general requirements:

"(1) An offer of employment at light duty to an injured employee by his employer must

- (a) be in writing;
- (b) be mailed to both the insured and the injured employee,....)

Three separate questions have been asked concerning the interplay between this regulation and SCR 182, which present variations on the same theme:

- (a) Is an offer of employment at light duty tendered by employer's counsel B to the employee, who is represented by attorney C, a violation of SCR 182?
- (b) If the offer of employment at light duty is generated by counsel B but presented to the employer for transmittal on the employer's letterhead to C's client with a copy to C is there a violation of Supreme Court Rule 182?
- (c) What ethical implications are there if the offer of employment at light duty mentioned in question (b) is communicated by the employer to the injured worker without a copy to attorney C?

Nevada's Supreme Court Rule 182 is identical to ABA Model Rule of Professional Conduct 4.2. The purpose of the rule is twofold: to insure that lawyers do not take advantage of unrepresented laypersons and to preserve the lawyer-client relationship. Annotated Model Rules at page 424. NAC 616.085(1) does not specifically provide for an employer's attorney to contact an employee, and when read in light of the purpose behind SCR 182, such a contact would appear to be specifically prohibited.

The Nevada case of Holiday Inn v. Barnett, 103 Nev. 60,732 P.2d 1376 (1987), illustrates the Nevada Supreme Court's view of the interplay between the SIRS statutes and the Supreme Court Rules. The Holiday Inn case dealt with a statute, NRS 616.567(2), whereas the issue in question pertains to a regulation. Nevertheless, NRS 616.567(2) describes the party to receive the communication in language similar to the regulation in question. The statute reads ".,.,the insure shall send a written notice of its intention to close the claim to the claimant...addressed to the last known address of the claimant."

In that case, the Supreme Court held that the appeal period specified in NRS 616.567(2) did not begin to run until counsel for the claimant was notified of the notice of closure of claim. 103 Nev. at 64. The employer, although notified of the existence of counsel for the claimant, and having been requested to send all correspondence to claimant's attorney, nevertheless directly communicated with the claimant on a number of occasions. The opinion clearly implies that the party doing the communicating was the employer's attorney, because the opinion relies upon SCR 182. The Supreme Court found that this conduct was expressly forbidden by SCR 182's predecessor statute, and that the conduct was, in fact, "reprehensible." 103 Nev. at 64-65. This decision is in harmony with SCR 182 and not in conflict with it.

The answer is different under the facts of question (b), where the offer of employment is drafted by counsel to be sent on the employer's letterhead. NAC 616.085 clearly requires the employer to communicate the offer of light duty to his employee in writing. The fact that counsel for the employer drafted the offer makes no material difference.

The answer relating to the facts of question (c) is squarely answered by *Holiday Inn v. Barnett*, supra. The lawyer is the agent of the party for litigation purposes. Included within the prohibition of SCR 182 are direct settlement negotiations with an opposing party. After the service of the initial complaint, NRCP 5 requires service upon the lawyer unless a court orders otherwise.

Two A.B.A. Opinions reach similar conclusions as to factual situation (a). In informal Opinion 1373, The Committee on Ethics was asked whether sending a defendant a copy of a form letter addressed to his attorney which contained a plea bargain offer was unethical. The Opinion concluded that it was, because it violated the DR prohibiting communication to a represented client. Informal Decision 570 found a similar violation where a plaintiff's attorney sent counsel for the insurance carrier a letter and copied the insurance company's president.

While a lawyer has no duty to discourage a client from speaking directly to another lay party, the lawyer may not direct the client to communicate with the represented party in contravention of SCR 182. In re *Marrietta*, 223 Kansas 11, 569 P.2d 921 (1977). Once the initial communication of the written offer of employment at light duty by the employer is complete, as required by NAC 616.085, all further correspondence and negotiations are required to be handled between counsel, unless the exceptions in SCR 182 are met.

## **CONCLUSION**

NAC 616.085 authorizes and appears to require the employer to directly communicate to the employee in writing an offer of employment at light duty. NAC 616.085 does not authorize an employer's counsel to contact a represented employee, as that constitutes a violation of SCR 182.

*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.*