

## MEMORANDUM

**TO:** Board of Trustees

**FROM:** Steven J. Pinkerton  
General Manager

Jason D. Guinasso, Esq.  
District General Counsel

**SUBJECT:** Review, discuss, and possibly request a Petition for Judicial Review of Office of Attorney General File No. 13897-257 Findings of Fact and Conclusions of Law – Open Meeting Law Complaint filed by Mr. Frank Wright

**DATE:** January 28, 2019

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### **I. RECOMMENDATION**

That the Board of Trustees makes a motion to authorize District Legal Counsel to file a Petition for Judicial Review of the Office of Attorney General (OAG) File No. 13897-257 Findings of Fact and Conclusions of Law.

### **II. EXECUTIVE SUMMARY**

On November 27, 2017, Mr. Frank Wright complained that an alleged meeting between the IVGID Board of Trustees and District Legal Counsel, held on November 15, 2017, was a violation of the Open Meeting Law (OML).

With respect to the actual issue presented to the OAG by Mr. Wright's complaint, the OAG concluded that IVGID did not violate the OML when it attempted to hold an attorney-client non-meeting with District Legal Counsel.

However, after reviewing the OML Complaint for over fourteen months, the OAG took the extraordinary step of reaching findings and conclusions on an issue that was not presented to the OAG. In this regard, the OAG found that, *"the Board violated the OML by taking action authorizing the initiation of the Lawsuit during its Attorney-Client Session."*

IVGID disagrees with this part of the decision reached by the OAG because it exceeds the scope of the OML Complaint, is an untimely decision, and is otherwise not supported by substantial evidence.

That being said, the OAG's Findings of Fact and Conclusions of Law are academic and do not penalize IVGID in any way.

### III. BACKGROUND

On November 27, 2017, Frank Wright filed an OML Complaint with the OAG under File No. 13897-257. In this complaint, Mr. Wright specifically alleged:

*"Incline Village General Improvement District held announcement, closed, secret meeting of five Board Members outside the view of the Public."*

**See Exhibit A (November 27, 2017 Complaint of Frank Wright).** Mr. Wright complained that an alleged meeting between the IVGID Board of Trustees and District Legal Counsel on November 15, 2017, was a violation of the OML. Mr. Wright's complaint was a hearsay narrative of *"one resident who attended the regular board meeting but was still present and unnoticed and sitting in the room."* Mr. Wright allegations were based off the information provided by his *"witness"* that *"Chairman [sic] continued with the unannounced and not publicly posted meeting."* Mr. Wright restates the events in a way that is both false and misleading, by stating his *"witness"* saw two Trustees reject the special meeting as a violation of the OML and proceeded to walk out (Trustees Matthew Dent and Tim Callicrate). It was also at this time that Mr. Wright's *"witness"* was approached by Director of Finance Gerry Eick, whom escorted her to the door, and closed the door after she left the room. Mr. Wright appears to argue that the litigation non-meeting should have been noticed as a meeting under the OML.

Notably, the OML Complaint did **not** allege that, *"The Board took action to approve the initiation of litigation during a closed session."* In fact, the OML complaint is completely devoid of this allegation, any facts giving rise to such allegation, or any other fact that would require an OAG investigation into such allegation.

Nevertheless, the OAG claims to have conducted an "investigation" into the foregoing allegations. **See Exhibit B at 1:14-25 (OAG FoFCoL).** This investigation is said to have included, *"witness interviews, as well as, Complaint and Supplements to the Complaint."* However, no statements from witness interviews or Supplements to the Complaint were ever provided to IVGID so it could review and respond. Nothing in the Findings of Fact cites or references the *"witness interviews"* or provides any facts related thereto. Further, no indication of when the *"Supplements to the Complaint"* were given to the OAG and when.

On November 30, 2017, the OAG sent a correspondence to IVGID Chairwoman Kendra Wong and requested a response to Mr. Wright's OML Complaint. **See Exhibit C (November 30, 2017 Letter to Chair Wong from OAG)**. However, the OAG failed to copy District Legal Counsel. Consequently, District Legal Counsel did not receive the OAG's correspondence and had to request an extension of time to respond which was granted.

Meanwhile, on December 14, 2017, the OAG send emails to each of the five IVGID Board Trustees requesting to conduct telephonic interviews. **See Exhibit D (OAG Emails to Trustees)**. This request was met with vigorous opposition from District Legal Counsel because the OAG is prohibited by sections 1.3 and 4.2 of the Nevada Rules of Professional Conduct from communicating with Trustees directly without consent of District Legal Counsel. **See Exhibit E (Email String Objecting to OAG direct communication with IVGID Trustees)**. District Legal Counsel respectfully requested that any further communications with IVGID Trustees go through his office. Further, District Legal Counsel offered to schedule the interviews for the OAG. In response, the OAG agreed to having District Legal Counsel schedule the interview, but later the OAG decided not to conduct the interviews.

On December 22, 2017, District Legal Counsel provided the District's response to Mr. Wright OML Complaint. **See Exhibit F (December 22, 2017, IVGID Response)**. District Legal Counsel pointed out that Mr. Wright was not even present at the conclusion of the November 15, 2017 Board of Trustees meeting, so his assertions that there was a "closed" or "secret meeting" are not credible or reliable and are otherwise false assertions. Indeed, whether Mr. Wright had standing to bring this OML complaint without firsthand knowledge of the alleged facts that he asserted support his charge that there was a violation of the OML, is an open question that has not been addressed in the OML, by the OAG in any published opinion, or within the OAG's Open Meeting Law Manual.

Mr. Wright's complaint was clearly meritless. IVGID did not conduct a "closed, secret meeting" of the Board of Trustees. NRS 241.015(3)(b)(2) is clear when it excludes from the definition of "Meeting," for purposes of the OML, a meeting of a quorum of a public body:

*"[t]o receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both."*

Section 3.05 of the OAG's Open Meeting Law Manual further explains:

*A meeting held for the purpose of having an attorney-client discussion of potential and existing litigation pursuant to NRS 241.015(3)(b)(2) is not a meeting for purposes of the Open Meeting Law and does not have to be open to the public. In fact, no agenda is required to be posted and no notice is required to be provided to any member of the public. See OMLO 2002-21 (May 20, 2002) ...*

*It is important to note that a public body may deliberate "collectively to examine, weigh and reflect upon the reasons for or against the action," which connotes collective discussion in an attorney-client conference. See NRS 241.015(2); Dewey v. Redevelopment Agency, 119 Nev. 87, 97, 64 P.3d 1070, 1077 (2003), OMLO 2001-09 (March 28, 2001) and OMLO 2002-13 (March 22, 2003).*

On November 15, 2017, at approximately 9:55 p.m., Chairwoman Wong called for a five-minute break and stated the Board meeting would resume session at 10:00 p.m. The livestream video of November 15, 2017 can be viewed at the following link: <https://livestream.com/accounts/3411104> identified as **Exhibit "G"**. Before the IVGID Board of Trustees resumed its meeting, the power went out. At that time, Chairwoman Wong removed General Business Items G through K from the agenda and moved them to the agenda for the next meeting. Chairwoman Wong allowed for the final public comment period, even though the power had gone out, and once everyone had an opportunity to speak, Chairwoman Wong adjourned the regular meeting.

Immediately thereafter, Chairwoman Wong asked the Trustees to stay to participate in a litigation non-meeting. As she attempted to commence the meeting, a member of the public would not leave the room after multiple requests, so Chairwoman Wong asked Gerry Eick, Director of Finance, to escort the person out of the room. Once the litigation non-meeting commenced, District Legal Counsel asked Trustee Matthew Dent to excuse himself because of a conflict-of-interest regarding the subject of the litigation non-meeting. Trustee Callicrate objected to Trustee Dent being asked to leave.

Consequently, District Legal Counsel concluded the litigation non-meeting and offered to meet with each Trustee individually. The litigation non-meeting did not last more than ten minutes. Subsequently, District Legal Counsel did follow up with each Trustee and was able to meet with four of the five Trustees individually by phone or in person.

On January 5, 2018, the OAG sent a letter to IVGID requesting a supplemental response to Mr. Wright's OML Complaint. **See Exhibit H (January 5, 2018, OAG Letter)**. As stated in the letter, the question(s) the OAG asked IVGID to address was the following:

*Did the Board initiate any state or federal court lawsuit in 2017? If yes, did the Board initiate the lawsuit(s) by taking action during a public meeting?*

This was a strange question for the OAG to be asking given the fact that this question was far outside the scope of Mr. Wright's OML Complaint. It was not a question the OAG had jurisdiction or authority to investigate. Nevertheless, District Legal Counsel provided a supplemental response on January 18, 2018. **See Exhibit I (IVGID Supplemental Response)**. District Legal Counsel explained that the **IVGID Board** did **not** initiate any state or federal court lawsuit in 2017. However, in May of 2017, the IVGID **General Manager** authorized a lawsuit in Washoe County District Court under Case No. CV17-00922, to obtain declaratory and injunctive relief with respect to the provisions of a contract between IVGID and a local company.

Six months transpired without any contact from the OAG.

However, after the litigation ended with a negotiated settlement agreement, District Legal Counsel provided the OAG with another supplemental response informing the OAG that there had been a change to IVGID Policy 3.1.0. **See Exhibit I (IVGID Second Supplemental Response)**. Thereafter, the OAG did not act on Mr. Wright's Complaint until issuing Findings of Fact and Conclusions of Law on January 17, 2019.

#### **IV. OAG Findings of Fact and Conclusions of Law**

With respect to the actual issue presented to the OAG by Mr. Wright's Complaint, the OAG concluded that IVGID did **not** violate the OML when it attempted to hold an attorney-client non-meeting with District Legal Counsel.

However, the OAG took the extraordinary step of reaching findings and conclusions on an issue that was not presented to the OAG. In this regard, the OAG found that, *"the Board violated the OML by taking action authorizing the initiation of the Lawsuit during its Attorney-Client Session."*

IVGID disagrees with this part of the decision reached by the OAG because it exceeds the scope of the OML Complaint, is an untimely decision, and is otherwise not supported by substantial evidence.

On June 29, 2017, after IVGID had filed its lawsuit in May of 2017, a three-judge panel of the Nevada Supreme Court concluded:

*Since filing an appeal involves the commitment of public funds, we hold that the decision to file a notice of appeal requires an “action” by the public body. Just as a public body would need to meet in an open meeting to determine other material steps in the litigation process, such as initiating a lawsuit or agreeing to a settlement, it must also authorize an appeal of an adverse determination in an open meeting.*

Comm'n on Ethics v. Hansen, 133 Nev. Adv. Op. 39, 396 P.3d 807, 809–10 (Nev. 2017), reh'g denied (Sept. 29, 2017), reconsideration en banc granted (Dec. 20, 2017).

However, the holding in Hansen does not apply to IVGID's cause of action. In this regard, the Court in Hansen specifically stated:

*The dissent's analysis presupposes that the authority to file a notice of appeal is (1) delegable and (2) was delegated in this case. The dissent also cites City of San Antonio v. Aguilar, 670 S.W.2d 681 (Tex. App. 1984), rejecting a Texas Open Meeting Act appeal filed by a city attorney based on the city attorney's separate authority under the city's ordinances.*

*Here, whether the authority to file a notice of appeal is delegable is not germane to our analysis because the record does not show and nothing in the statutes or regulations concerning the Ethics Commission provides for a grant or delegation of decision-making authority to the Commission's chair, director, or legal counsel to file a notice of appeal without action by the Commission as a whole*

Id.

Here, the IVGID General Manager, with the authority delegated to him by the IVGID Board of Trustees, authorized the lawsuit to obtain declaratory and injunctive relief with respect to the provisions of the contract between IVGID and a local company. The expenditure of public funds for contracted legal fees and costs, as well as the value of the lawsuit, was and remains to date less than \$50,000, which is within the authority delegated to the General Manager under IVGID Policy 3.1.0 (f) & (g), Resolution No. 1480 and under Section 3 of the contract for legal services the District has entered into with General Counsel.

The Nevada Open Meeting Law (“OML”) does not apply to decisions and actions of the General Manager of a “public body.” While the IVGID Board of Trustees, which was formed in accordance within the provisions of NRS Chapter 318, is a “public body” under NRS 241.015(4), the General Manager acting within the powers delegated to him by the Board of Trustees is not a “public body” subject to the provisions of the OML.

Additionally, the “actions” of the General Manager are not subject to the Nevada OML. In this regard, “action” under the OML is defined to mean, “decision,” “commitment or promise made,” or “an affirmative vote” taken, by “a majority of the members present, whether in person or by means of electronic communication, during a meeting of a public body.” NRS 241.015(1)(a),(b),(c). The actions taken by the General Manager in May of 2017, to authorize the lawsuit now being considered by the Court to obtain injunctive relief and to enforce the provisions of a contract with a company that contracted with the District are within the authority delegated to him and do not constitute an unauthorized expenditure of public funds.

Notably, when the District Court had jurisdiction over the litigation between IVGID and this local company, under Case No. CV17-00922, the local company made a similar argument to the Court as is articulated by the OAG in the Findings of Fact and Conclusions of Law. However, the District Court granted IVGID’s preliminary injunction and rejected the argument that there was an “unauthorized expenditure of public funds” when the District General Manager approved the litigation in accordance with his authority.

## **V. ALTERNATIVES**

Do not approve Petition for Judicial Review. The OAG’s Findings of Fact and Conclusions of Law are academic and do not penalize IVGID in any way.

## **VI. COMMENTS**

While this is a petition for judicial review, we are treating it like the initiation of a lawsuit and bringing it before the Board of Trustees in accordance with Policy 3.1.0, 0.6 Rules of Proceedings, subparagraph h. which reads “*The General Manager must obtain Board of Trustees authorization, at a public meeting, to initiate any lawsuit.*” Additionally, the cost of doing the petition for judicial review will not exceed \$5,000 and while that is within the General Manager’s authority, we again want to bring it forth as a decision that the Board of Trustees gets to make.

# OPINION

OFFICE OF THE ATTORNEY GENERAL  
STATE OF NEVADA

rec'd 1-22-2019  
JAL

In the matter of:

THE INCLINE VILLAGE GENERAL  
IMPROVEMENT DISTRICT BOARD OF  
TRUSTEES

OAG FILE NO.: 13897-257

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**BACKGROUND**

Frank Wright filed a Complaint (Complaint) with the Office of the Attorney General (OAG) alleging violations of the Nevada Open Meeting Law (OML) by the Incline Village General Improvement District (IVGID) Board of Trustees (Board). The Complaint alleges that the Board violated the OML as follows:

**ALLEGATION NO. 1: The Board took action to approve the initiation of a lawsuit during a closed session.**

**ALLEGATION NO. 2: The Board held a closed meeting that was not properly noticed to the public.**

The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040. The OAG's investigation of the Complaint included witness interviews as well as a review of the following: the Complaint and Supplements to the Complaint; the Response and Supplemental Response to the Complaint from the Board's legal counsel; affidavits and recorded statements from members of the Board as well as staff members of the Board; the Board's agendas and minutes from its 2017 and 2018 meetings; and court filings with the Second Judicial District Court of Nevada.

After investigating the Complaint, the OAG determines that the Board violated the OML by failing to properly notice and approve the initiation of a lawsuit during a public meeting. The OAG finds that the Board's closed session following its November 15, 2017,

1 meeting constituted an attempted attorney-client session that was exempt from the OML's  
2 requirements.

### 3 FINDINGS OF FACT

4 1. The Board is a "public body" as defined in NRS 241.015(4) and is subject to  
5 the OML.

6 2. The Board is comprised of five (5) elected voting members.

7 3. On or about April 28, 2017, the Board's legal counsel, Jason Guinasso, met  
8 with Board Chair Kendra Wong, Vice Chair Philip Horan, and Trustee Peter Morris during  
9 a closed attorney-client session (Attorney-Client Session). Board Trustee Tim Callicrate  
10 did not attend the Attorney-Client session. Trustee Matthew Dent also did not attend the  
11 Attorney-Client session after the Board's legal counsel asked him to leave the session due  
12 to an alleged conflict of interest.

13 4. A quorum of Board members were present at the Attorney-Client session.

14 5. During the Attorney-Client Session, IVGID's General Manager, General  
15 Counsel, and staff members discussed the impending initiation of a lawsuit with  
16 Governance Sciences Group, Inc. (GSGI) with the Board members in attendance.

17 6. On or about May 12, 2017, the Board, by and through its General Manager and  
18 General Counsel, initiated a lawsuit (Lawsuit) in the Second Judicial District Court of Nevada  
19 against GSGI in case number CV17-00922.

20 7. The Board did not authorize the Lawsuit during a public meeting.

21 8. Neither the Board's Policies and Practices, its Policy and Procedure  
22 Resolutions, nor its retainer agreement with legal counsel grant the authority to the  
23 Board's General Manager or legal counsel to initiate lawsuits on behalf of the Board.<sup>1</sup>

24 9. Policy 3.1.0(g) of the Board's Policies and Practices governs claims involving  
25 the Incline Village General Improvement District (IVGID), and it provides the following:  
26

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27 <sup>1</sup> The OAG notes that a public body's authority to delegate power to initiate lawsuits,  
28 or other materials steps in a legal process, is not addressed in this Opinion. Rather, the  
OAG finds that the Board did not delegate its authority to initiate lawsuits through its  
existing policies or resolutions.

1 "The General Manager and General Counsel, and their designees,  
2 are **authorized to negotiate on behalf of IVGID**, the  
3 settlement of all property damage, personal injury, or liability  
4 claims, unless otherwise ordered by the Board of Trustees. Final  
5 Settlement of such claims may be authorized by the General  
6 Manager, provided the amount attributed to IVGID is less than  
7 the amounts per occurrence, including all sources of payment  
(insurance, risk reserve, operating funds, or working capital). For  
claims that exceed the amount, those must be approved by the  
Board, the General Manager may authorize and accept a  
tentative settlement, which shall not be final and binding upon  
IVGID, unless and until approved by the Board of Trustees."

8 10. The Board's Policy and Procedure Resolution 1480 governs personnel  
9 management and it provides that IVGID's General Manager "shall be responsible for  
10 coordinating the work of [IVGID's legal counsel] with the activities of IVGID staff, and the  
11 Board of Trustees."

12 11. Term 4.1.6 of the Board's retainer agreement with legal counsel, of the law firm  
13 Reese Kintz Guinasso, LLC, provides that legal counsel shall "prosecute or defend litigation,  
14 as directed by the IVGID General Manager, including mediation, validation proceedings, and  
15 arbitrations before administrative boards, arbitrators, mediators, courts of all levels of the  
16 county, state or federal governments and report to the IVGID General Manager on that  
17 litigation regularly."

18 12. On November 15, 2017, the Board held a public meeting ("Meeting").

19 13. Following the Meeting, the Board's members entered a closed attorney-client  
20 conference to discuss pending litigation matters with their legal counsel. Members of the  
21 public were asked to leave or were escorted out of the meeting venue. Board Trustees Tim  
22 Callicrate and Matthew Dent left the attorney-client conference prior to the start of the  
23 session.

24 ...

25 ...

26 ...

27 ...

28 ...

## LEGAL STANDARDS AND CONCLUSIONS OF LAW

1. **The Board violated the OML by failing to take action during a Public Meeting authorizing the initiation of the Lawsuit.**

In enacting the OML, “the Legislature finds and declares that all public bodies exist to aid in the conduct of the people’s business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.” NRS 241.010(1); *McKay v. Bd. of Supervisors*, 102 Nev. 644, 651 (1986). While public bodies may hold closed attorney-client conferences to receive information regarding potential or existing litigation from their attorney and to deliberate towards a decision on the litigation, the “legal advice” exception to the OML does not extend to actions taken by the bodies. See NRS 241.015(3)(b)(2). Rather, a decision that “transcends ‘discussion or consultation’ and entails a ‘commitment’ of public funds,” including initiating a lawsuit, requires action during a properly noticed public meeting. See *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 568, 20 P.3d 1148, 1149 (Ariz. Ct. App. 2000), *as amended* (Mar. 22, 2001).

Under the OML, a “meeting” is “[t]he gathering of members of a public body at which a quorum is present, whether in person or by means of electronic communication, to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.” NRS 241.015(3)(a)(1). The OML defines a quorum as “a simple majority of the membership of a public body or another proportion established by law.” NRS 241.015(5).

Exceptions to the OML’s requirements, including the ability to hold closed attorney-client sessions, “must not be used to circumvent the spirit or letter of this chapter to deliberate or act, outside of an open and public meeting, upon a matter over which the public body has supervision, control, jurisdiction or advisory powers.” NRS 241.016(4).

Here, the Board violated the OML by taking action authorizing the initiation of the Lawsuit during its Attorney-Client Session. As at least three of the Board members attended the Attorney-Client Session, a quorum of the Board was present. While the Board

1 members could meet with their legal counsel for an attorney-client session without noticing  
2 the session pursuant to the OML, their session could not extend the deliberation regarding  
3 the Lawsuit into taking action to initiate the Lawsuit. In exceeding permissible  
4 deliberation regarding the Lawsuit, and taking action to approve initiation of the Lawsuit,  
5 the Board exceeded the purview of a closed attorney-client session. By using the OML's  
6 attorney-client exception to take action regarding the Lawsuit, the Board circumvented the  
7 spirit of the OML to take all action during open and public meetings during which members  
8 of the public may participate.

9       The Board argues that the authority to initiate the Lawsuit was delegated to its  
10 General Manager and General Counsel through the Board's Policies and Practices, its  
11 Policy and Procedure Resolutions, and its retainer agreement with legal counsel. However,  
12 a careful reading of the noted documents fails to support the Board's claim. Policy 3.1.0(g),  
13 which the Board argues delegates authority to initiate lawsuits, is silent regarding the  
14 initiation of lawsuits. Rather, it allows the General Counsel and General Manager to  
15 "negotiate on behalf of IVGID" the settlement of property damage, personal injury, or  
16 liability claims. The settlement of an existing claim is clearly different from the initiation  
17 of a lawsuit. Policy and Procedure Resolution 1480 governs personnel management of  
18 IVGID employees and it provides that the General Manager is responsible for coordinating  
19 the work of the Board's legal counsel with the activities of IVGID's staff and Board. Policy  
20 and Procedure Resolution 1480 does not contemplate the delegation of the Board's  
21 authority to initiate lawsuits. Finally, the Board's reliance on the retainer agreement with  
22 legal counsel is misplaced given that the retainer agreement is silent regarding the  
23 initiation of a lawsuit. Notwithstanding the fact that the retainer agreement is merely a  
24 contract for payment, not a policy or resolution adopted by the Board, the agreement does  
25 not authorize the Board's General Manager or legal counsel to initiate lawsuits. While  
26 "prosecution" of litigation on behalf of the Board may include strategy decisions, filing  
27 briefs, and representing the Board during hearings, the retainer agreement does not  
28 delegate authority to the General Manager or legal counsel to initiate lawsuits or "charge"

1 misconduct on behalf of the Board. Absent action by the Board to delegate the authority to  
2 initiate lawsuits to its General Counsel or General Manager, the Board was obligated to  
3 take action to initiate the Lawsuit during a public meeting. The fact that the Lawsuit was  
4 filed shortly after the Attorney-Client Session evidences Board approval, tacit or otherwise,  
5 to initiate the Lawsuit.

6 Ultimately, the Board took action during its closed Attorney-Client Session to  
7 authorize the initiation of the Lawsuit, when it had not delegated the authority to initiate  
8 lawsuits to its staff, and it therefore violated the OML.

9 **2. The Board did not violate the OML by holding a Closed Attorney-Client**  
10 **Conference that was not noticed to the Public.**

11 The OML requires that "all meetings of public bodies must be open and public, and  
12 all persons must be permitted to attend any meeting of these public bodies" unless  
13 otherwise provided by specific statute. Nevada Revised Statute (NRS) 241.020(1). The  
14 OML defines a meeting to include the following: "the gathering of members of a public body  
15 at which a quorum is present, whether in person or by means of electronic communication,  
16 to deliberate toward a decision or to take action on any matter over which the public body  
17 has supervision, control, jurisdiction or advisory power" or "any series of gatherings of  
18 members of a public body at which: (I) Less than a quorum is present, whether in person  
19 or by means of electronic communication, at any individual gathering; (II) The members of  
20 the public body attending one or more of the gatherings collectively constitute a quorum;  
21 and (III) The series of gatherings was held with the specific intent to avoid the provisions  
22 of this chapter. NRS 241.015(3).

23 A meeting does not include a gathering, or series of gatherings, of a quorum of the  
24 members of a public body, when the purpose of the gathering is for the members to receive  
25 information from the public body's attorney regarding potential or existing litigation  
26 involving a matter over which the public body has supervision, control, jurisdiction, or  
27 advisory power, and/or to deliberate toward a decision on the matter. NRS 241.015(3)(b)(2).

28 ...

1 Here, following the conclusion of the Board's November 15, 2017, meeting, the  
2 Board's members entered into a closed attorney-client session with their counsel to discuss  
3 existing litigation. The record, including affidavits from the Board's members and counsel,  
4 indicate that the closed attorney session never proceeded based on objections to the session  
5 by Trustee Callicrate.<sup>2</sup> As the Board did not conduct a closed meeting without notice to  
6 the public, it did not violate the OML. Moreover, even if the closed attorney-client session  
7 had occurred, the Board would not have committed an OML violation so long as the session  
8 was limited to discussion and deliberation on existing litigation that did not extend to  
9 action by the Board.

#### 10 SUMMARY AND INCLUSION OF AGENDA ITEM

11 If the Attorney General investigates a potential OML violation and makes findings  
12 of fact and conclusions of law that a public body has taken action in violation of the OML,  
13 "the public body must include an item on the next agenda posted for a meeting of the public  
14 body which acknowledges the findings of fact and conclusions of law." NRS 241.0395. The  
15 public body must treat the opinion of the Attorney General as supporting material for the  
16 agenda item in question for the purpose of NRS 241.020. *Id.*

17 Here, upon investigating the present Complaint, the OAG makes a findings of fact  
18 and conclusions of law that the Board committed an OML violation by taking action to  
19 authorize the initiation of the Lawsuit during its closed Attorney-Client Session.  
20 Therefore, the Board must place an item on its next Board Meeting agenda in which the  
21 Board acknowledges the present Findings of Fact and Conclusions of Law ("Opinion")  
22 which results from the OAG investigation in the matter of Attorney General File No. 13897-  
23 257. The Board must also include the OAG Opinion in the supporting materials for its next  
24 meeting.

25  
26 <sup>2</sup> At the start of the closed attorney session, the Board's counsel, Mr. Guinasso, asked  
27 Trustee Dent to leave due to an alleged conflict of interest on Trustee Dent's part. Trustee  
28 Callicrate argued that Trustee Dent should be allowed to participate in the session. When  
Board Chair Wong and Counsel Guinasso refused to allow Trustee Dent to participate in  
the session, Counsel Guinasso cancelled the session and indicated that he would address  
the legal matters with each trustee individually.

1 The OAG further notes that had it timely learned of the OML violation regarding  
2 the initiation of the Lawsuit, that it would have filed suit in district court to have the action  
3 declared void. Through no fault of Mr. Wright, who appears to have filed his Complaint  
4 promptly after learning about the initiation of the Lawsuit during the closed session, the  
5 OAG learned of the Board's initiation of the Lawsuit outside the OML's 60-day deadline for  
6 the OAG to commence a suit to have the action declared void. As such, the OAG's only  
7 available recourse is to require the Board's compliance with the agenda inclusion  
8 requirements pursuant to NRS 241.0395.

9 DATED: January 17, 2019.

10 AARON D. FORD  
11 Attorney General

12 By:   
13 CAROLINE BATEMAN  
14 First Assistant Attorney General

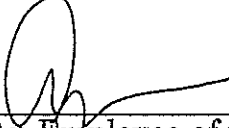
**CERTIFICATE OF SERVICE**

I hereby certify that on the 18 day of January, 2019, I served the **FINDINGS OF FACT AND CONCLUSIONS OF LAW** by depositing a copy of the same in the United States mail, properly addressed, postage prepaid, **CERTIFIED MAIL** addressed as follows:

Frank Wright  
P.O. Box 186  
36 Somers Loop  
Crystal Bay, NV 89402  
Certified Mail No. 7014 2120 0003 0404 8554

Kendra Wong, Chair  
Incline Village General Improvement District  
893 Southwood Blvd.  
Incline Village, NV 89451  
Certified Mail No. 7014 2120 0003 0404 8578

Jason Guinasso  
Hutchison & Steffen  
500 Damonte Ranch Parkway, Ste. 980  
Reno, NV 89521  
Certified Mail No. 7014 2120 0003 0404 8561

  
\_\_\_\_\_  
An Employee of the  
Office of the Attorney General  
State of Nevada

# SUPPLEMENT TO THE RESPONSE



500 DAMONTE RANCH PARKWAY, SUITE 980  
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JASON D. GUINASSO  
PARTNER  
JGUINASSO@HUTCHILEGAL.COM

January 19, 2018

*Via Electronic Mail- CBateman@ag.nv.gov  
& Hand Delivery to:*

Ms. Caroline Bateman, Chief Deputy Attorney General  
State of Nevada Office of The Attorney General  
Boards and Open Government Division  
555 E. Washington Ave., Suite 3900  
Las Vegas, NV 89101

**Re: SUPPLEMENTAL RESPONSE OF INCLINE VILLAGE GENERAL IMPROVEMENT  
DISTRICT BOARD OF TRUSTEES- OPEN MEETING LAW COMPLAINT, WRIGHT, FRANK  
O.A.G. FILE NO. 13897-257 IN RESPONSE TO OAG'S REQUEST FOR ADDITIONAL  
INFORMATION**

Dear Ms. Bateman:

We received your letter dated January 5, 2018, on January 11, 2018, notifying the Incline Village General Improvement District (herein referenced as "IVGID" or "District") that you needed additional information in response to the above referenced complaint by Frank Wright alleging that IVGID has violated the Nevada Open Meeting Law ("OML"). Please accept this correspondence as IVGID's supplemental response.

**I. Issues Presented**

As stated in your letter, the question(s) you would like IVGID to address include the following:

Did the Board initiate any state or federal court lawsuit in 2017? If yes, did the Board initiate the lawsuit(s) by taking action during a public meeting?

**II. Answer**

**No, the IVGID Board did not initiate any state or federal court lawsuit in 2017.**

However, in May of 2017, the IVGID General Manager authorized a lawsuit in Washoe County District Court under Case No. CV17-00922, to obtain declaratory and injunctive relief with respect to the provisions of a contract between IVGID and a company called Governance Sciences Group, Inc. **See Exhibit A (Summons, Complaint, Motion for Preliminary Injunctive Relief); Exhibit B (Order Denying Motion to Dismiss); Exhibit C (Order Granting Preliminary Injunction).** The contracted fees and costs, as well as the value of the law suit, is less than \$50,000 and within the authority delegated to the General Manager's under IVGID Policy 3.1.0 (f) & (g), Resolution No. 1480 and under Section 3 of the contract for legal services the District has entered into with legal counsel. **See Exhibit D (Policy 3.1.0; Resolution No. 1480; Copy of Legal Counsel Contract with IVGID).**


Ms. Caroline Bateman, Chief Deputy Attorney General  
State of Nevada Office of The Attorney General  
January 19, 2018

### III. Closing Remarks

Please do not hesitate to call or write me if you have any further questions or need any further information.

Thank you for the opportunity to respond to the Open Meeting Law Complaint of Frank Wright, A.G. File No. 13897-257.

Sincere regards,



HUTCHISON & STEFFEN, LLC  
Jason D. Guinasso, Esq.

Encl.

cc: Chairwoman Kendra Wong  
General Manager Steve Pinkerton  
District Clerk Susan Herron

JDG:bf

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EXHIBIT A

EXHIBIT A

Code: 4085

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE  
INCLINE VILLAGE GENERAL  
IMPROVEMENT DISTRICT, a General  
Improvement District,

Plaintiff / Petitioner / Joint Petitioner,

Case. No. CV17-00922

vs.

Dept. No. 8

GOVERNANCE SCIENCES GROUP, INC.,  
Delaware Corporation; and DOES 1-50 inclusive,  
Defendant / Respondent / Joint Petitioner.

SUMMONS

**TO THE DEFENDANT: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND IN WRITING WITHIN 20 CALENDAR DAYS. READ THE INFORMATION BELOW VERY CAREFULLY.**

A civil complaint or petition has been filed by the plaintiff(s) against you for the relief as set forth in that document (see complaint or petition). When service is by publication, add a brief statement of the object of the action. See Nevada Rules of Civil Procedure, Rule 4(b).  
The object of this action is: \_\_\_\_\_

1. If you intend to defend this lawsuit, you must do the following within 20 calendar days after service of this summons, exclusive of the day of service:
  - a. File with the Clerk of the Court, whose address is shown below, a formal written answer to the complaint or petition, along with the appropriate filing fees, in accordance with the rules of the Court, and;
  - b. Serve a copy of your answer upon the attorney or plaintiff(s) whose name and address is shown below.
2. Unless you respond, a default will be entered upon application of the plaintiff(s) and this Court may enter a judgment against you for the relief demanded in the complaint or petition.

Dated this \_\_\_\_\_ day of MAY 16 2017, 20\_\_\_\_.

Issued on behalf of Plaintiff(s): Incline Village  
General Improvement District, a General Improvement  
District  
Name: Jason D. Guinasso, Esq.  
Address: 190 W. Huffaker Lane, Suite 402  
Reno, NV 89511  
Phone Number: (775) 832-6800

JACQUELINE BRYANT  
CLERK OF THE COURT

By: \_\_\_\_\_  
Deputy Clerk  
Second Judicial District Court  
75 Court Street  
Reno, Nevada 89501

CODE 1067

IN THE SECOND JUDICIAL DISTRICT COURT  
IN AND FOR THE COUNTY OF WASHOE

Incline Village General Improvement District, a  
General Improvement District,  
Plaintiff(s),

CASE NO: CV17-00922

VS.

Governance Sciences Group, Inc., a Delaware  
Corporation; and DOES 1-50,  
Defendant(s),

DECLARATION OF SERVICE

STATE OF NEVADA  
COUNTY OF WASHOE

ss.:

JENLEE KNIGHT PARKER R -067702, being duly sworn says: That at all times herein Affiant was and is a citizen of the United States, over 18 years of age, and not a party to nor interested in the proceedings in which this Affidavit is made.

That Affiant received copy(ies) of the SUMMONS; COMPLAINT; MOTION FOR PRELIMINARY INJUNCTIVE RELIEF on 5/19/2017 and served the same on 5/26/2017 at 3:30 PM by delivery and leaving a copy with:

Kevin Lyons - Registered Agent, pursuant to NRS 14.020 as a person of suitable age and discretion, of the office of Kevin Lyons, registered agent for Governance Sciences Group, Inc., at the registered address of:

703 Tyner Way, Incline Village, NV 89451

A description of Kevin Lyons is as follows

Gender	Color of Skin/Race	Hair	Age	Height	Weight
Male	White	Black	36-40	5'6 - 6'0	160-180 Lbs

Other Features: Goatee and hair with gray streaks

Pursuant to NRS 239B.030 this document does not contain the social security number of any person.

Affiant does hereby affirm under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on: 5/30/2017

by JENLEE KNIGHT PARKER R -067702

Registration: R-067702

No notary is required per NRS 53.045

X   
JENLEE KNIGHT PARKER R -067702  
Registration: R-067702  
Reno Carson Messenger Service, Inc #322  
185 Martin St.  
Reno, NV 89509  
(775) 322-2424  
www.renocarson.com



Order#: R10956 NVPRF411

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SECOND JUDICIAL DISTRICT COURT  
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION  
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, \_\_\_\_\_

SUMMONS AND DECLARATION OF SERVICE

(Title of Document)

filed in case number: CV17-00922

☒ Document does not contain the social security number of any person

- OR -

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

\_\_\_\_\_  
(State specific state or federal law)

- or -

☐ For the administration of a public program

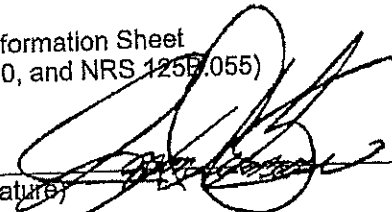
- or -

☐ For an application for a federal or state grant

- or -

☐ Confidential Family Court Information Sheet  
(NRS 123.130, NRS 125.230, and NRS 125B.055)

Date: 6/2/17

(Signature) 

Jason D. Guinasso, Esq.  
(Print Name)

Incline Village General Improvement District  
(Attorney for)

1 **CODE: \$1425**  
2 JASON D. GUINASSO, ESQ. (SBN# 8478)  
3 REESE KINTZ GUINASSO, LLC  
4 190 W Huffaker Lane, Suite 402  
5 Reno, Nevada 89511  
6 Telephone: (775) 832-6800  
7 Facsimile: (775) 832-6801  
8 jguinasso@rkglawyers.com  
9 *Attorney for Plaintiff*

6 **SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
7 **IN AND FOR THE COUNTY OF WASHOE**  
8

9 INCLINE VILLAGE GENERAL  
10 IMPROVEMENT DISTRICT, a General  
11 Improvement District,

12 Plaintiff,

13 vs.

14 GOVERNANCE SCIENCES GROUP,  
15 INC., a Delaware Corporation; and DOES 1-  
16 50 inclusive,

17 Defendant.

Case No.:

Dept. No.:

**COMPLAINT**

18 Plaintiff, INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT  
19 ("Plaintiff") hereby brings this Complaint against Defendant, GOVERNANCE SCIENCES  
20 GROUP, INC., and DOES 1 through 50, inclusive, ("Defendant") and alleges as follows:

21 **I. PARTIES, JURISDICTION, AND VENUE**

22 1. Plaintiff, INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT  
23 ("TVGID"), is a special purpose district organized under Chapter 318 of the Nevada Revised  
24 Statutes, and is located on the North Shore of Lake Tahoe.

25 ///



Reese Kintz  
Guinasso  
190 W Huffaker Ln  
Suite 402  
Reno, NV 89511  
(775) 833-8746

1           2.     Defendant, GOVERNANCE SCIENCES GROUP, INC. ("GSGI") is, upon  
2 information and belief, a Delaware Corporation, registered as a Foreign Corporation with  
3 the State of Nevada, with its place of business in Incline Village, Nevada.

4           3.     This Court has subject matter jurisdiction over this matter and personal  
5 jurisdiction over the Defendant.

6           4.     This Court is the appropriate venue for this lawsuit pursuant to N.R.S. §§  
7 13.010 and 13.040.

8           5.     Plaintiff does not know the true names and capacities of Defendants sued  
9 herein as DOES 1 through 50, inclusive, and therefore sues the Defendants by fictitious  
10 names. Plaintiff is informed and believes, and thereon alleges, that each of these fictitiously  
11 named Defendants is responsible in some actionable manner and therefore Plaintiff's  
12 damages hereafter alleged were proximately caused by their conduct. Plaintiff will move to  
13 amend this Complaint to assert the theories of liability against Defendants if and when they  
14 are ascertained.

15           6.     Plaintiff is unaware of the basis of liability as to some or all of the fictitious  
16 Defendants sued herein as DOES 1 through 50, inclusive, but believes and thereon alleges  
17 the liability arises out of the same general facts that are set forth herein. Plaintiff will move  
18 to amend this Complaint to assert the theories of liability against Defendants if and when  
19 they are ascertained.

## 20                               II.     GENERAL ALLEGATIONS

21           7.     Beginning in 2013, GSGI approached IVGID to beta test its survey platform  
22 services, wherein GSGI provided services to allow IVGID to send surveys to its customers,  
23 and GSGI would provide analysis of the results of such surveys.

24     ///

25     ///



Reese Kintz,  
Guinasso  
190 W. Hoffaker Ln.  
Suite 402  
Reno, NV 89511  
(775) 853-8746

1           8.     The purpose of the relationship between GSGI and IVGID was to allow  
2 GSGI to develop a platform in which IVGID was able to put forth surveys to its customers,  
3 receiving feedback on a range of topics, to allow IVGID to better serve its customers.

4           9.     On April 6, 2015 and April 17, 2015, in order to further develop a customer  
5 data list to allow GSGI to provide surveys to IVGID's customers, IVGID sent  
6 correspondence to its customers, inviting them to sign up for the service, and participate in  
7 the program. A true and correct copy of said April 6, 2015 and April 17, 2015  
8 correspondence is attached hereto at Exhibit 1.

9           10.    On May 10, 2016, GSGI entered into a Services Agreement ("Agreement")  
10 with IVGID, wherein GSGI agreed to provide continuing standard tier "FlashVote" services  
11 and surveys to IVGID. A true and correct copy of the Agreement is attached hereto at  
12 Exhibit 2.

13           11.    The Agreement service term commenced on May 1, 2016, and was set to run  
14 until April 30, 2017.

15           12.    The purpose of the Agreement was for GSGI to provide survey services,  
16 wherein IVGID would develop questions to pose to its customers, and GSGI would compile  
17 a list of IVGID customers on behalf of IVGID through IVGID's request for its customers to  
18 sign up for the service, and GSGI would publish an electronic survey to such customers.

19           13.    Section 3.1 of the Agreement defines "Proprietary Information" of IVGID as  
20 "non-public data provided by Customer to Company to enable the provision of the Services  
21 ("Customer Data") such as non-public citizen email addresses or other non-public data."

22           14.    Section 3.1 of the Agreement states that GSGI was "(i) to take reasonable  
23 precautions to protect such Proprietary Information, and (ii) not to use (except in  
24 performance of the Services or as otherwise permitted herein) or divulge to any third person  
25 any such Proprietary Information."



Reese Clinic,  
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Suite 402  
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(775) 853-8746

1           15.     Section 3.2 of the Agreement states that IVGID "shall own all right title and  
2 interest in and to the Customer Data."

3           16.     GSGI was retained to provide survey services, with the understanding that  
4 IVGID was able to control the content of such surveys.

5           17.     On numerous occasions, GSGI attempted to redraft the survey language  
6 prepared by IVGID, and presented by IVGID for GSGI to publish within the contracted  
7 survey services.

8           18.     GSGI's redraft of the survey language submitted by IVGID was beyond the  
9 terms of the Agreement, and beyond the expertise of GSGI.

10          19.     On July 28, 2016, GSGI sent a FlashVote survey on behalf of a client other  
11 than IVGID, with such survey stating, "This survey was sent on behalf of the Incline Village  
12 General Improvement District", with GSGI using IVGID's Customer Data, prepared on  
13 behalf of IVGID, to distribute such survey.

14          20.     On November 30, 2016, GSGI indicated its refusal to provide services and  
15 publish survey question language as drafted and requested by IVGID.

16          21.     On November 30, 2016, GSGI provided notice to IVGID of its intention to  
17 terminate said Agreement.

18          22.     On December 1, 2016, IVGID provided GSGI a list of matters pertaining to  
19 termination of the above referenced Agreement, requesting GSGI to: 1) refund fees  
20 advanced for the remainder of the Contract service term; and 2) deliver both an electronic  
21 and paper copy of the database along with all other Customer Data in the possession and  
22 control of GSGI.

23          23.     GSGI has refunded the fees advanced for the remainder of the Contract  
24 service term, however, GSGI has refused and continues to refuse to turn over said Customer  
25 Data to IVGID.



Reese Kink,  
Guinasso  
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Reno, NV 89511  
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1 24. On February 8, 2017, GSGI sent an invitation to participate in FlashVote  
2 services on behalf of the Truckee Meadows Regional Planning Agency, using the IVGID  
3 Customer Data prepared on behalf of IVGID to distribute such invitation.

4 25. On April 10, 2017, GSGI sent an invitation to participate in FlashVote  
5 services, stating: "This survey was sent on behalf of IVGID Trustee Matthew Dent to the  
6 FlashVote community for IVGID, NV." The invitation stated the "Incline Village General  
7 Improvement District and FlashVote thank you for your input!"

8 26. The April 10, 2017 FlashVote invitation was sent using the IVGID Customer  
9 Data prepared on behalf of IVGID, and without approval from IVGID.

10 27. GSGI has been, and is now using the Customer Data prepared on behalf of  
11 IVGID for other customers, in violation of the Agreement.

### 12 III. CLAIMS FOR RELIEF

#### 13 FIRST CLAIM FOR RELIEF

#### 14 Declaratory Relief 15 (Against all Defendants)

16 28. Plaintiff repeats and incorporates all preceding allegations.

17 29. GSGI created a customer database, based on information provided by IVGID  
18 to its customers, requesting they sign up for the survey service, and based on the Agreement  
19 entered into between IVGID and GSGI.

20 30. Pursuant to the Agreement, the Customer Data is owned by IVGID, and must  
21 be returned upon termination of the Agreement.

22 31. GSGI has refused to turn said Customer Data over to IVGID, and continues  
23 to use Customer Data for customers other than IVGID.

24 ///

25 ///

1 32. An actual controversy has arisen and now exists between IVGID and GSGI  
2 concerning their respective rights, entitlements, obligations, and duties under the  
3 Agreement.

4 33. IVGID requests a declaratory judgment determining the parties' rights under  
5 the Agreement, and specifically pertaining to ownership of Customer Data.

6 34. Plaintiff has been forced to retain counsel to prosecute this action and is  
7 entitled to recovery of reasonable attorneys' fees and costs incurred herein.

8 **SECOND CLAIM FOR RELIEF**

9 **Injunctive Relief**  
10 **(Against all Defendants)**

11 35. Plaintiff repeats and incorporates all preceding allegations.

12 36. GSGI is obligated under the Agreement to return all Customer Data  
13 developed as part of the Agreement to IVGID, as IVGID is the owner of said Customer  
14 Data. GSGI has failed or refused to provide such information to IVGID.

15 37. GSGI continues to use such Customer Data for the benefit of other  
16 customers, other than IVGID, in violation of said Agreement.

17 38. The use by GSGI of IVGID's Customer Data, causes IVGID irreparable  
18 injury.

19 39. Compensatory damages are inadequate relief for improper use of IVGID's  
20 Customer Data.

21 40. IVGID therefore requests that this Court enter a permanent injunction  
22 requiring GSGI to turn over all Customer Data developed on behalf of IVGID to IVGID,  
23 destroying record of same from GSGI's servers, once said information is transmitted.  
24 IVGID request this court enter a mandatory injunction requiring GSGI to cease using said  
25 Customer Data, developed on behalf of IVGID, for the benefit of other customers.



Reese Kline,  
Quinn & Co.  
190 W. Huffaker Ln.  
Suite 402  
Reno, NV 89511  
(775) 853-8746

1 WHEREFORE, Plaintiff prays for relief as follows:

2 a. For a declaratory judgment determining the parties' rights under the  
3 Agreement;

4 b. For a permanent injunction requiring GSGI to: 1) turn over all Customer Data  
5 developed on behalf of IVGID to IVGID; 2) destroy all records of Customer Data from  
6 GSGI's servers, once said information is transmitted; and 3) cease using said Customer  
7 Data, developed on behalf of IVGID, for the benefit of other customers.

8 c. For attorney's fees and costs; and

9 d. For such other and further relief as the Court may deem just and proper.

10 **Affirmation**

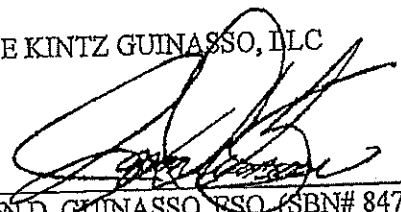
11 **(Pursuant to NRS 239B.030)**

12 The undersigned does hereby affirm that the preceding document filed in this court  
13 does not contain the social security number of any person.

14 DATED this 10<sup>th</sup> day of May, 2017.

REESE KINTZ GUINASSO, LLC

16 By:

17   
18 JASON D. GUINASSO, ESQ. (SBN# 8478)  
19 Attorney for Plaintiff  
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List of Exhibits  
Case No. (Not Yet Assigned)  
Incline Village General Improvement District v. Governance Sciences Group, Inc.  
COMPLAINT

Exhibit No.	Document	Page Count
Exhibit 1	- Correspondence dated April 6, 2015 and April 17, 2015	2 pages
Exhibit 2	- "FlashVote" Services Agreement	4 pages



Reese Kintz,  
Guinn & Co.  
190 W. Hollaker Ln.  
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(775) 853-8746

EXHIBIT 1

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EXHIBIT 1



April 6, 2015

Dear Incline Village/Crystal Bay Parcel Owner,

Happy 2015! Your new Board of Trustees and I are looking forward to working with you to make Incline Village and Crystal Bay the best possible place to live and visit. IVGID needs your help to do a better job of serving YOU - our constituents.

Do you have one minute a month to help make IVGID better?

We have partnered with FlashVote (an independent "good government" service) to collect your anonymous input at least once per month, with brief surveys that you can complete in one minute or less. FlashVote ensures that all questions are concise, unbiased and meaningful to citizens. You can make your voice heard by computer, smartphone or phone. You even receive results at the end of each survey period - typically only a few days after a survey starts. Civic responsibility has never been more convenient.

If you are already signed up as a FlashVote beta user, thank you for participating! You don't need to do anything. If you have not already signed up, please take a few minutes now to join over 400 of your friends and neighbors who are already FlashVote users in the IVGID district. Your participation is anonymous to IVGID and your personal data stays private:

- Please go to [www.flashvote.com/ivgid](http://www.flashvote.com/ivgid)
- Complete the sign up process once and you can be heard many times in the future

After you sign up, you can expect FlashVote to email you surveys about IVGID activities starting this month. You will get the immediate satisfaction of having your voice heard by IVGID as we work toward creating better local government for you. IVGID may also offer some optional rewards through FlashVote to thank you for your civic participation. We are excited to launch this new feedback system for you, and look forward to hearing from as many of you as possible. For questions or more information about IVGID, please contact Susan Herron (775-832-1207 or [sah@ivgid.org](mailto:sah@ivgid.org)). For questions or more information about FlashVote please contact Kevin Lyons (510-593-4901 or [kevin@flashvote.com](mailto:kevin@flashvote.com)).



Best regards,

Steve Pinkerton  
General Manager

P.S. Please make note of our Summer Appreciation Week during June when some IVGID facilities will be available at no additional charge to picture pass holders. Free Golf will be available Friday, 6/12 to Sunday, 6/14 and free Recreation Center and Tennis Center access will be available from Friday, 6/19 to Sunday, 6/21.

ADMINISTRATIVE OFFICES • 893 SOUTHWOOD BOULEVARD • INCLINE VILLAGE, NV 89451  
PH: (775) 832-1100 FX: (775) 832-1122 • [WWW.YOURTAHOEPLACE.COM](http://WWW.YOURTAHOEPLACE.COM)



GENERAL IMPROVEMENT DISTRICT

April 17, 2015

Dear Incline Village/Crystal Bay Parcel Owner,

Happy 2015! Your new Board of Trustees and I are looking forward to working with you to make Incline Village and Crystal Bay the best possible place to live and visit. IVGID needs your help to do a better job of serving YOU - our constituents.

Do you have one minute a month to help make IVGID better?

We have partnered with FlashVote (an independent "good government" service) to collect your anonymous input at least once per month, with brief surveys that you can complete in one minute or less. FlashVote ensures that all questions are concise, unbiased and meaningful to citizens. You can make your voice heard by computer, smartphone or phone. You even receive results at the end of each survey period - typically only a few days after a survey starts. Civic responsibility has never been more convenient.

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- Please go to [www.flashvote.com/ivgid](http://www.flashvote.com/ivgid)
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Best regards,

Steve Pinkerton  
General Manager

P.S. Please make note of our Summer Appreciation Week during June when some IVGID facilities will be available at no additional charge to picture pass holders. Free Golf will be available Friday, 6/12 to Sunday, 6/14 and free Recreation Center and Tennis Center access will be available from Friday, 6/19 to Sunday, 6/21.

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PH: (775) 832-1100 FX: (775) 832-1122 • [WWW.YOURTAHOEPLACE.COM](http://WWW.YOURTAHOEPLACE.COM)

EXHIBIT 2

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EXHIBIT 2



### SAAS SERVICES ORDER FORM

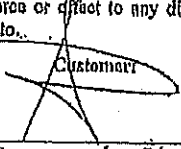
Customer: Incline Village General Improvement District	Contact: Steve Pinkerton
Address: 893 Southwood Boulevard	Phone: 775-832-1206
Incline Village, NV 89451	E-Mail: steve.pinkerton@ivgid.org
Services: Governance Sciences Group, Inc. ("the Company") will provide the Standard Tier of FlashVote services (the "Service(s)"). This is a program of up to 12 monthly Stock FlashVote Surveys and up to 6 Custom FlashVote Surveys which may be added or substituted.	
Launch services, additional Custom FlashVote Surveys and other Premium features are available as options for additional and separate fees.	
Services Fees: \$4,900.00 per year, payable in advance, subject to the terms of Section 4 herein.	Initial Service Term: One Year (May 1, 2016 to April 30, 2017)
Implementation Services: Company will use commercially reasonable efforts to provide Customer the services described in the Statement of Work ("SOW") attached as Exhibit A hereto ("Implementation Services"), and Customer shall pay Company the Implementation Fee in accordance with the terms herein.	
Implementation Fee (one-time): \$0 (Waived by Company)	

### SAAS SERVICES AGREEMENT

This SaaS Services Agreement ("Agreement") is entered into on this 10<sup>th</sup> day of May, 2016 (the "Effective Date") between Governance Sciences Group, Inc. with a place of business in Incline Village, Nevada ("Company"), and the Customer listed above ("Customer"). This Agreement includes and incorporates the above Order Form, as well as the attached Terms and Conditions and contains among other things, warranty disclaimers, liability limitations and use limitations. There shall be no force or effect to any different terms of any related purchase order or similar form unless signed by both parties hereto.

Governance Sciences Group, Inc.:

By: \_\_\_\_\_  
Name: Kavin Lyons  
Title: CEO

By:   
Name: Steven J. Pinkerton  
Title: General Manager



## TERMS AND CONDITIONS

### 1. SAAS SERVICES AND SUPPORT

1.1 Subject to the terms of this Agreement, Company will use commercially reasonable efforts to provide Customer the Services.

1.2 Subject to the terms hereof, Company will provide Customer with reasonable technical support services in accordance with the terms set forth in Exhibit B.

### 2. RESTRICTIONS AND RESPONSIBILITIES

2.1 Customer will not, directly or indirectly, reverse engineer, decompile, disassemble or otherwise attempt to discover the source code, object code or underlying structure, ideas, know-how or algorithms relevant to the Services or any software, documentation or data related to the Services ("Software"); modify, translate, or create derivative works based on the Services or any Software (except to the extent expressly permitted by Company or authorized within the Services); use the Services or any Software for timesharing or service bureau purposes or otherwise for the benefit of a third; or remove any proprietary notices or labels.

2.2 Further, Customer may not remove or export from the United States or allow the export or re-export of the Services, Software or anything related thereto, or any direct product thereof in violation of any restrictions, laws or regulations of the United States Department of Commerce, the United States Department of Treasury, Office of Foreign Assets Control, or any other United States or foreign agency or authority. As defined in FAR section 2.101, the Software and documentation are "commercial items" and according to DFAR section 252.227-7014(a)(1) and (5) are deemed to be "commercial computer software" and "commercial computer software documentation." Consistent with DFAR section 227.7202 and FAR section 12.212, any use, modification, reproduction, release, performance, display, or disclosure of such commercial software or commercial software documentation by the U.S. Government will be governed solely by the terms of this Agreement and will be prohibited except to the extent expressly permitted by the terms of this Agreement.

2.3 Customer represents, covenants, and warrants that Customer will use the Services only in compliance with Company's standard published policies then in effect (the "Policy") and all applicable laws and regulations. Although Company has no obligation to monitor Customer's use of the Services, Company may do so and may prohibit any use of the Services it believes may be (or alleged to be) in violation of the foregoing.

2.4 Customer shall be responsible for obtaining and maintaining any equipment and auxiliary services needed to connect to, access or otherwise use the Services, including, without limitation, phones, modems, hardware, servers, software, operating systems, networking, web servers and the like

(collectively, "Equipment"). Customer shall also be responsible for maintaining the security of the Equipment, Customer account, passwords (including but not limited to administrative and user passwords) and files, and for all uses of Customer account or the Equipment with or without Customer's knowledge or consent.

### 3. CONFIDENTIALITY; PROPRIETARY RIGHTS

3.1 Each party (the "Receiving Party") understands that the other party (the "Disclosing Party") has disclosed or may disclose business, technical or financial information relating to the Disclosing Party's business (hereinafter referred to as "Proprietary Information" of the Disclosing Party). Proprietary Information of Company includes non-public information regarding features, functionality and performance of the Services. Proprietary Information of Customer includes non-public data provided by Customer to Company to enable the provision of the Services ("Customer Data") such as non-public citizen email addresses or other non-public citizen data. The Receiving Party agrees: (i) to take reasonable precautions to protect such Proprietary Information, and (ii) not to use (except in performance of the Services or as otherwise permitted herein) or divulge to any third person any such Proprietary Information. The Disclosing Party agrees that the foregoing shall not apply with respect to any information that the Receiving Party can document (a) is or becomes generally available to the public, or (b) was in its possession or known by it prior to receipt from the Disclosing Party, or (c) was rightfully disclosed to it without restriction by a third party, or (d) was independently developed without use of any Proprietary Information of the Disclosing Party or (e) is required to be disclosed by law.

3.2 Customer shall own all right, title and interest in and to the Customer Data. Company shall own and retain all right, title and interest in and to (a) the Services and Software, all improvements, enhancements or modifications thereto, (b) any software, applications, inventions or other technology developed in connection with Implementation Services or support; and (c) all intellectual property rights related to any of the foregoing.

3.3 Notwithstanding anything to the contrary, Company shall have the right to collect and analyze data and other information relating to the provision, use and performance of various aspects of the Services and related systems and technologies (including, without limitation, information concerning Customer Data and data derived therefrom), and Company will be free (during and after the term hereof) to (i) use such information and data to improve and enhance the Services and for other development, diagnostic and corrective purposes in connection with the Services and other Company offerings, and (ii) disclose such data solely in aggregate or other de-identified form in connection with its business. No rights or licenses are granted except as expressly set forth herein.

#### 4. PAYMENT OF FEES

4.1 Customer will pay Company the then applicable fees described in the Order Form for the Services and Implementation Services in accordance with the terms therein (the "Fees"). If Customer's use of the Services requires the payment of additional fees (per the terms of this Agreement), Customer shall be billed for such usage and Customer agrees to pay the additional fees in the manner provided herein. Company reserves the right to change the Fees or applicable charges and to institute new charges and Fees at the end of the Initial Service Term or then-current renewal term, upon thirty (30) days prior notice to Customer (which may be sent by email). If Customer believes that Company has billed Customer incorrectly, Customer must contact Company no later than 60 days after the closing date on the first billing statement in which the error or problem appeared, in order to resolve an adjustment or credit. Inquiries should be directed to Company's customer support department.

4.2 Company may choose to bill through an invoice, in which case, full payment for invoices issued in any given month must be received by Company thirty (30) days after the mailing date of the invoice. Unpaid amounts are subject to a finance charge of 1.5% per month on any outstanding balance, or the maximum permitted by law, whichever is lower, plus all expenses of collection and may result in immediate termination of Service. Customer shall be responsible for all taxes associated with Services other than U.S. taxes based on Company's net income.

#### 5. TERM AND TERMINATION

5.1 Subject to earlier termination as provided below, this Agreement is for the Initial Service Term as specified in the Order Form, and shall be automatically renewed for additional periods of the same duration as the Initial Service Term (collectively, the "Term"), unless either party requests termination at least thirty (30) days prior to the end of the then-current term.

5.2 In addition to any other remedies it may have, either party may also terminate this Agreement upon thirty (30) days' notice (or without notice in the case of nonpayment), if the other party materially breaches any of the terms or conditions of this Agreement. Customer will pay in full for the Services up to and including the last day on which the Services are provided. All sections of this Agreement which by their nature should survive termination will survive termination, including, without limitation, accrued rights to payment, confidentiality obligations, warranty disclaimers, and limitations of liability.

#### 6. WARRANTY AND DISCLAIMER

Company shall use reasonable efforts consistent with prevailing industry standards to maintain the Services in a manner which minimizes errors and interruptions in the Services and shall perform the Implementation Services in a professional and workmanlike manner. Services may be temporarily unavailable for scheduled maintenance or for unscheduled

emergency maintenance, either by Company or by third-party providers, or because of other causes beyond Company's reasonable control, but Company shall use reasonable efforts to provide advance notice in writing or by e-mail of any scheduled service disruption. HOWEVER, COMPANY DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR FREE; NOR DOES IT MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED FROM USE OF THE SERVICES. EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION, THE SERVICES AND IMPLEMENTATION SERVICES ARE PROVIDED "AS IS" AND COMPANY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.

#### 7. INDEMNITY

Company shall hold Customer harmless from liability to third parties resulting from infringement by the Service of any United States patent or any copyright or misappropriation of any trade secret, provided Company is promptly notified of any and all threats, claims and proceedings related thereto and given reasonable assistance and the opportunity to assume sole control over defense and settlement; Company will not be responsible for any settlement it does not approve in writing. The foregoing obligations do not apply with respect to portions or components of the Service (i) not supplied by Company, (ii) made in whole or in part in accordance with Customer specifications, (iii) that are modified after delivery by Company, (iv) combined with other products, processes or materials where the alleged infringement relates to such combination, (v) where Customer continues allegedly infringing activity after being notified thereof or after being informed of modifications that would have avoided the alleged infringement, or (vi) where Customer's use of the Service is not strictly in accordance with this Agreement. If, due to a claim of infringement, the Services are held by a court of competent jurisdiction to be or are believed by Company to be infringing, Company may, at its option and expense (a) replace or modify the Service to be non-infringing provided that such modification or replacement contains substantially similar features and functionality, (b) obtain for Customer a license to continue using the Service, or (c) if neither of the foregoing is commercially practicable, terminate this Agreement and Customer's rights hereunder and provide Customer a refund of any prepaid, unused fees for the Service.

#### 8. LIMITATION OF LIABILITY

NOTWITHSTANDING ANYTHING TO THE CONTRARY, EXCEPT FOR BODILY INJURY OR A PERSON, COMPANY AND ITS SUPPLIERS (INCLUDING BUT NOT LIMITED TO ALL EQUIPMENT AND TECHNOLOGY SUPPLIERS), OFFICERS, AFFILIATES, REPRESENTATIVES, CONTRACTORS AND EMPLOYEES

SHALL NOT BE RESPONSIBLE OR LIABLE WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT OR TERMS AND CONDITIONS RELATED THERETO UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY; (A) FOR ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY OR CORRUPTION OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY OR LOSS OF BUSINESS; (B) FOR ANY INDIRECT, EXEMPLARY, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES; (C) FOR ANY MATTER BEYOND COMPANY'S REASONABLE CONTROL; OR (D) FOR ANY AMOUNTS THAT, TOGETHER WITH AMOUNTS ASSOCIATED WITH ALL OTHER CLAIMS, EXCEED THE FEES PAID BY CUSTOMER TO COMPANY FOR THE SERVICES UNDER THIS AGREEMENT IN THE 12 MONTHS PRIOR TO THE ACT THAT GAVE RISE TO THE LIABILITY, IN EACH CASE, WHETHER OR NOT COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

#### 9. MISCELLANEOUS

If any provision of this Agreement is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable. This Agreement is not assignable, transferable or sublicensable by Customer except with Company's prior written consent. Company may transfer and assign any of its rights and obligations under this Agreement without consent. This Agreement is the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements, communications and other understandings relating to the subject matter of this Agreement, and all waivers and modifications must be in a writing signed by both parties, except as otherwise provided herein. No agency, partnership, joint venture, or employment is created as a result of this Agreement and Customer does not have any authority of any kind to bind Company in any respect whatsoever. In any action or proceeding to enforce rights under this Agreement, the prevailing party will be entitled to recover costs and attorneys' fees. All notices under this Agreement will be in writing and will be deemed to have been duly given when received, if personally delivered; when receipt is electronically confirmed, if transmitted by facsimile or e-mail; the day after it is sent, if sent for next day delivery by recognized overnight delivery service; and upon receipt, if sent by certified or registered mail, return receipt requested. This Agreement shall be governed by the laws of the State of Nevada without regard to its conflict of laws provisions.

1 JASON D. GUINASSO, ESQ. (SBN# 8478)  
2 REESE KINTZ GUINASSO, LLC  
3 190 W Huffaker Lane, Suite 402  
4 Reno, Nevada 89511  
5 Telephone: (775) 832-6800  
6 Facsimile: (775) 832-6801  
7 [jguinasso@rkglawyers.com](mailto:jguinasso@rkglawyers.com)  
8 *Attorney for Plaintiff*

9 **SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

10 **IN AND FOR THE COUNTY OF WASHOE**

11 INCLINE VILLAGE GENERAL  
12 IMPROVEMENT DISTRICT, a General  
13 Improvement District,

14 Plaintiff,

15 vs.

16 GOVERNANCE SCIENCES GROUP,  
17 INC., a Delaware Corporation; and DOES  
18 1-50 inclusive,

19 Defendant.

Case No.:

Dept. No.:

**MOTION FOR PRELIMINARY  
INJUNCTIVE RELIEF**

20 Plaintiff, INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT ("Plaintiff"  
21 or "IVGID") moves this Court for issuance of a preliminary injunction according to NRS  
22 Chapter 33 and NRCP Rule 65. This Motion is supported by the Complaint filed in this matter,  
23 exhibits, affidavit attached hereto, and the Points and Authorities that follow. Further, Plaintiff  
24 requests oral argument should this Court find it beneficial to its decision.  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff is seeking a preliminary injunction to prevent Defendant, GOVERNANCE  
3 SCIENCES GROUP, INC. ("GSGI"), from using IVGID's customer data on behalf of GSGI's  
4 other customers, without the express authorization from IVGID, and in violation of a Services  
5 Agreement, entered May 10, 2016, between GSGI and IVGID. Plaintiff seeks to prevent this  
6 improper use of IVGID customer data, until the rights of the parties can be established.

7 **I. STATEMENT OF RELEVANT FACTS**

8 IVGID is a special purpose district organized under Chapter 318 of the Nevada  
9 Revised Statutes, and is located on the North Shore of Lake Tahoe.<sup>1</sup> GSGI is, upon  
10 information and belief, a Delaware Corporation, registered as a Foreign Corporation with the  
11 State of Nevada, with its place of business in Incline Village, Nevada.<sup>2</sup>

12 Beginning in 2013, GSGI approached IVGID to beta test its survey platform services,  
13 wherein GSGI provided services to allow IVGID to send surveys to its customers, and GSGI  
14 would provide analysis of the results of such surveys.<sup>3</sup> The purpose of the relationship between  
15 GSGI and IVGID was to allow GSGI to develop a platform in which IVGID was able to put  
16 forth surveys to its customers, receiving feedback on a range of topics, to allow IVGID to  
17 better serve its customers.<sup>4</sup>

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23 <sup>1</sup> See Affidavit of Steven Pinkerton in Support of Plaintiff's Motion for Preliminary Injunctive Relief at ¶ 2,  
attached as Exhibit 1.

24 <sup>2</sup> Exhibit 1 ¶ 3.

25 <sup>3</sup> Exhibit 1 ¶ 4.

<sup>4</sup> Exhibit 1 ¶ 5.



1 On April 6, 2015 and April 17, 2015, in order to further develop a customer data list  
2 to allow GSGI to provide surveys to IVGID's customers, IVGID sent correspondence to its  
3 customers, inviting them to sign up for the service, and participate in the program.<sup>5</sup>

4 On May 10, 2016, GSGI entered into a Services Agreement ("Agreement") with  
5 IVGID, wherein GSGI agreed to provide continuing standard tier "FlashVote" services and  
6 surveys to IVGID.<sup>6</sup> The Agreement service term commenced on May 1, 2016, and was set to  
7 run until April 30, 2017.<sup>7</sup> The purpose of the Agreement was for GSGI to provide survey  
8 services, wherein IVGID would develop questions to pose to its customers, and GSGI would  
9 compile a list of IVGID customers on behalf of IVGID through IVGID's request for its  
10 customers to sign up for the service, and GSGI would publish an electronic survey to such  
11 customers.<sup>8</sup>

12 Section 3.1 of the Agreement defines "Proprietary Information" of IVGID as "non-  
13 public data provided by Customer to Company to enable the provision of the Services  
14 ("Customer Data") such as non-public citizen email addresses or other non-public data."<sup>9</sup>  
15 Section 3.1 of the Agreement also states that GSGI was "(i) to take reasonable precautions to  
16 protect such Proprietary Information, and (ii) not to use (except in performance of the Services  
17 or as otherwise permitted herein) or divulge to any third person any such Proprietary  
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22 <sup>5</sup> A true and correct copy of said April 6, 2015 and April 17, 2015 correspondence is attached hereto at Exhibit  
23 2; see also Exhibit 1 ¶ 6.

24 <sup>6</sup> A true and correct copy of the Agreement is attached hereto at Exhibit 3; see also Exhibit 1 ¶ 7.

25 <sup>7</sup> Exhibit 3 at page 1.

<sup>8</sup> Exhibit 1 ¶ 8.

<sup>9</sup> Exhibit 3 at page 2.



1 Information.”<sup>10</sup> Section 3.2 of the Agreement states that IVGID “shall own all right title and  
2 interest in and to the Customer Data.”<sup>11</sup>

3 GSGI was retained to provide survey services, with the understanding that IVGID was  
4 able to control the content of such surveys.<sup>12</sup> On numerous occasions, GSGI attempted to  
5 redraft the survey language prepared by IVGID, and presented by IVGID for GSGI to publish  
6 within the contracted survey services.<sup>13</sup>

7 On July 28, 2016, GSGI sent a FlashVote survey on behalf of a client other than  
8 IVGID, with such survey stating, “This survey was sent on behalf of the Incline Village  
9 General Improvement District”, with GSGI using IVGID’s Customer Data, prepared on behalf  
10 of IVGID, to distribute such survey.<sup>14</sup>

11 On November 30, 2016, GSGI indicated its refusal to provide services and publish  
12 survey question language as drafted and requested by IVGID.<sup>15</sup> Also on November 30, 2016,  
13 GSGI provided notice to IVGID of its intention to terminate said Agreement.<sup>16</sup>

14 On December 1, 2016, IVGID provided GSGI a list of matters pertaining to  
15 termination of the above-referenced Agreement, requesting GSGI to: 1) refund fees advanced  
16 for the remainder of the Contract service term; and 2) deliver both an electronic and paper  
17 copy of the database along with all other Customer Data in the possession and control of  
18  
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20 <sup>10</sup> Exhibit 3 at page 2.

21 <sup>11</sup> Exhibit 3 at page 2.

22 <sup>12</sup> Exhibit 1 ¶ 9.

23 <sup>13</sup> Exhibit 1 ¶ 10.

24 <sup>14</sup> See FlashVote Survey, dated July 28, 2016, attached at Exhibit 4; see also Exhibit 1 ¶ 11.

25 <sup>15</sup> See Correspondence from GSGI to IVGID, dated November 30, 2016, attached at Exhibit 5; see also Exhibit  
1 ¶ 12.

<sup>16</sup> *Id.*



1 GSGI.<sup>17</sup> GSGI has refunded the fees advanced for the remainder of the Contract service term,  
2 however, GSGI has refused and continues to refuse to turn over said Customer Data to  
3 IVGID.<sup>18</sup>

4 On February 8, 2017, GSGI sent an invitation to participate in FlashVote services on  
5 behalf of the Truckee Meadows Regional Planning Agency, using the IVGID Customer Data  
6 prepared on behalf of IVGID to distribute such invitation.<sup>19</sup>

7 On April 10, 2017, GSGI sent an invitation to participate in FlashVote services,  
8 stating: "This survey was sent on behalf of IVGID Trustee Matthew Dent to the FlashVote  
9 community for IVGID, NV."<sup>20</sup> The invitation stated the "Incline Village General  
10 Improvement District and FlashVote thank you for your input!"<sup>21</sup>

11 The April 10, 2017 FlashVote invitation was sent using the IVGID Customer Data  
12 prepared on behalf of IVGID, and without approval from IVGD.<sup>22</sup>

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20 <sup>17</sup> See Correspondence from IVGID to GSGI, dated December 1, 2016, attached at Exhibit 6; see also Exhibit  
21 1 ¶ 13.

22 <sup>18</sup> Exhibit 1 ¶ 14.

23 <sup>19</sup> See FlashVote Survey, dated February 8, 2017, attached at Exhibit 7; see also Exhibit 1 ¶ 15.

24 <sup>20</sup> See FlashVote Survey, dated April 10, 2017, attached at Exhibit 8; see also Exhibit 1 ¶ 16.

25 <sup>21</sup> *Id.*

<sup>22</sup> *Id.*



## II. LEGAL ARGUMENT

### A. Preliminary Injunction

A Preliminary Injunction may issue after notice to the adverse party. NRS 33.010 provides general guidelines for when injunctive relief is available, and states that an injunction may be granted in the following cases:

1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.
3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

A preliminary injunction is also available "if an applicant can show a likelihood of success on the merits and a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy."<sup>23</sup> The Court's decision to grant a preliminary injunction "is within the sound discretion of the district court, whose decision will not be disturbed on appeal absent an abuse of discretion."<sup>24</sup>

This case involves the Plaintiff's rights to customer data pursuant to said attached Agreement, with the data compiled by GSGI on behalf of Plaintiff. After termination of the Agreement, and in violation of the terms thereof, GSGI continues to use the proprietary customer data of Plaintiff on behalf of other clients, without the permission of Plaintiff. The



<sup>23</sup> Dangberg Holdings Nevada, L.L.C. v. Douglas Cty. & its Bd. of Cty. Comm'rs, 115 Nev. 129, 142, 978 P.2d 311, 319 (1999).

<sup>24</sup> *Id.*

1 Agreement expressly restricts GSGI from divulging to any third person this proprietary  
2 information, which is owned by IVGID.<sup>25</sup>

3 IVGID has a right and obligation to protect the information of its constituents, and to  
4 take action to stop others from distributing information in its name, or the name of its  
5 constituents, when such distribution is not authorized by IVGID. Allowing GSGI to continue  
6 to use this data in violation of the Agreement puts Plaintiff at risk of irreparable injury,  
7 opening Plaintiff up to potential liabilities for GSGI's claim to be providing information on  
8 behalf of IVGID, without Plaintiff's permission, and distributing information to IVGID  
9 constituents, not sanctioned by IVGID. The fact that GSGI is clearly using data owned by  
10 IVGID, and without the express permission of IVGID, demonstrates IVGID's likelihood of  
11 success on the merits of its claim, being the ownership of such data as provided by the  
12 Agreement, as well as supports Plaintiff's assertion that it will suffer irreparable injury if the  
13 Defendant is not enjoined to stop the use of Plaintiff's customer data.

14 NRS 33.010 (1), in pertinent part, holds that an injunction must issue:

15 When it shall appear by the complaint that the plaintiff is  
16 entitled to the relief demanded, and such relief or any part  
17 thereof consists in restraining the commission ... of the act  
complained of, either for a limited period or perpetually.

18 Plaintiff is seeking to restrain the commission of an act, being use of proprietary data.  
19 Permitting unauthorized use of Plaintiff's proprietary data will cause Plaintiff irreparable  
20 harm, and such action is in violation of Plaintiff's rights.

21 Plaintiff is requesting the actions by Defendant be enjoined until the various rights and  
22 interests are clarified and legally established. Compensatory damages may be due should  
23 Defendant's actions be allowed; however, money is not sufficient to compensate Plaintiff for



25 <sup>25</sup> Exhibit 3 at page 2.

1 its loss during litigation, allowing Defendant to continue to use IVGID's customer data,  
2 without IVGID's approval.

3 **B. Security**

4 The Nevada Rules of Civil Procedure 65(c) provides as follows:

5 No restraining order or preliminary injunction shall issue except  
6 upon the giving of security by the applicant, in such sum as the court  
7 deems proper, for the payment of such costs and damages as may be  
8 incurred or suffered by any party who is found to have been  
9 wrongfully enjoined or restrained. **No such security shall be  
10 required of the State or of an officer or agency thereof.**  
11 (Emphasis added)

12 The proper amount of security that should be required in this case is *de minimus*.  
13 However, as Plaintiff is a special purpose district organized under Chapter 318 of the Nevada  
14 Revised Statutes, it is exempt from posting a bond.

15 **III. CONCLUSION**

16 Plaintiffs have proven that they are entitled to a preliminary injunction because they  
17 are likely to succeed on the merits of the claim, seeking a declaratory judgment on the issue  
18 of ownership of proprietary information, which is clearly stated in the Agreement entered  
19 between the parties.

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1 For the same reasons, Plaintiff now seeks a preliminary injunction, Plaintiff also seeks  
2 permanent injunctive relief. At this stage, Plaintiff seeks to retain the status quo while the  
3 rights of the parties are established, to keep Defendant from using such data it compiled on  
4 behalf of IVGID for other customers, directly harming IVGID.

5 **Affirmation**  
6 **(Pursuant to NRS 239B.030)**

7 The undersigned does hereby affirm that the preceding document filed in this court  
8 does not contain the social security number of any person.

9 DATED this 10<sup>th</sup> day of May 2017.

REESE KINTZ GUINASSO, LLC

10 By:

11 JASON H. GUINASSO, ESQ. (SBN# 8478)  
12 *Attorney for Plaintiff*



13 Reese Kintz,  
14 Guinasso  
15 90 W Huffaker Ln  
16 Suite 402  
17 Reno, NV 89511  
18 775) 857-8746

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List of Exhibits  
Case No. (Not Yet Assigned)  
Incline Village General Improvement District v. Governance Sciences Group, Inc.  
MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

Exhibit No.	Document	Page Count
Exhibit 1	- Affidavit of Steven Pinkerton	4 pages
Exhibit 2	- April 6, 2015 and April 17, 2015 Correspondence	2 pages
Exhibit 3	- "FlashVote" Services Agreement	4 pages
Exhibit 4	- FlashVote Survey, dated July 28, 2016	1 page
Exhibit 5	- Correspondence from GSGI to IVGID, dated November 30, 2016	1 page
Exhibit 6	- Correspondence from IVGID to GSGI dated December 1, 2016	2 pages
Exhibit 7	- FlashVote Survey, dated February 8, 2017	1 page
Exhibit 8	- FlashVote Survey, dated April 10, 2017	1 page



EXHIBIT 1

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EXHIBIT 1

1 AFFIDAVIT OF STEVEN PINKERTON IN SUPPORT OF PLAINTIFF'S MOTION

2 FOR PRELIMINARY INJUNCTIVE RELIEF

3 STATE OF NEVADA       )  
  ) ss.  
4 COUNTY OF WASHOE    )

5 Steven Pinkerton, Affiant herein, after first being duly sworn under oath, and under  
6 penalty of perjury, deposes and says:

- 7 1. I am the General Manager of the Incline Village General Improvement District  
8 ("IVGID"), and familiar with the subject matter of IVGID's Motion for Preliminary  
9 Injunctive Relief ("Motion").
- 10 2. IVGID is a special purpose district organized under Chapter 318 of the Nevada  
11 Revised Statutes, and is located on the North Shore of Lake Tahoe.
- 12 3. GSGI is, upon my information and belief, a Delaware Corporation, registered as a  
13 Foreign Corporation with the State of Nevada, with its place of business in Incline  
14 Village, Nevada.
- 15 4. Beginning in 2013, GSGI approached IVGID to beta test its survey platform  
16 services, wherein GSGI provided services to allow IVGID to send surveys to its  
17 customers, and GSGI would provide analysis of the results of such surveys.
- 18 5. The purpose of the relationship between GSGI and IVGID was to allow GSGI to  
19 develop a platform in which IVGID was able to put forth surveys to its customers,  
20 receiving feedback on a range of topics, to allow IVGID to better serve its  
21 customers.
- 22 6. On April 6, 2015 and April 17, 2015, in order to further develop a customer data list  
23 to allow GSGI to provide surveys to IVGID's customers, IVGID sent  
24 correspondence to its customers, inviting them to sign up for the service, and  
25



Reesa Kintz,  
Guinasso  
190 W Huffaker Ln  
Suite 402  
Reno, NV 89511  
(775) 853-8746

1 participate in the program. A true and correct copy of such correspondence is  
2 attached to the Motion at Exhibit 2.

3 7. On May 10, 2016, GSGI entered into a Services Agreement ("Agreement") with  
4 IVGID, wherein GSGI agreed to provide continuing standard tier "FlashVote"  
5 services and surveys to IVGID. A true copy of said Agreement is attached to the  
6 Motion at Exhibit 3.

7 8. The purpose of the Agreement was for GSGI to provide survey services, wherein  
8 IVGID would develop questions to pose to its customers, and GSGI would compile a  
9 list of IVGID customers on behalf of IVGID through IVGID's request for its  
10 customers to sign up for the service, and GSGI would publish an electronic survey to  
11 such customers.

12 9. GSGI was retained by IVGID to provide survey services, with the understanding that  
13 IVGID was able to control the content of such surveys.

14 10. On numerous occasions, GSGI attempted to redraft the survey language prepared by  
15 IVGID, and presented by IVGID for GSGI to publish within the contracted survey  
16 services.

17 11. On July 28, 2016, GSGI sent a FlashVote survey on behalf of a client other than  
18 IVGID, with such survey stating "This survey was sent on behalf of the Incline  
19 Village General Improvement District", with GSGI using IVGID's Customer Data,  
20 prepared on behalf of IVGID, to distribute such survey. A true and correct copy of  
21 the July 28, 2016 FlashVote survey, is attached to the Motion at Exhibit 4.

22 12. On November 30, 2016, GSGI indicated its refusal to provide services and publish  
23 survey question language as drafted and requested by IVGID. Also on November 30,  
24 2016, GSGI provided notice to IVGID of its intention to terminate said Agreement.  
25



1 A true and correct copy of such November 30, 2016 Correspondence, is attached to  
2 the Motion at Exhibit 5.

3 13. On December 1, 2016, IVGID provided GSGI a list of matters pertaining to  
4 termination of the above referenced Agreement, requesting GSGI to: 1) refund fees  
5 advanced for the remainder of the Contract service term; and 2) deliver both an  
6 electronic and paper copy of the database along with all other Customer Data in the  
7 possession and control of GSGI. A true and correct copy of such November 30, 2016  
8 Correspondence, is attached to the Motion at Exhibit 6.

9 14. GSGI has refunded the fees advanced for the remainder of the Contract service term,  
10 however, GSGI has refused and continues to refuse to turn over said Customer Data  
11 to IVGID.

12 15. On February 8, 2017, GSGI sent an invitation to participate in FlashVote services on  
13 behalf of the Truckee Meadows Regional Planning Agency, using the IVGID  
14 Customer Data prepared on behalf of IVGID to distribute such invitation. A true and  
15 correct copy of the February 8, 2017 FlashVote survey, is attached to the Motion at  
16 Exhibit 7.

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Reese Kiniz,  
Guinasso  
190 W Huffaker Ln  
Suite 402  
Reno, NV 89511  
(775) 853-8746

1 16. On April 10, 2017, GSGI sent an invitation to participate in FlashVote services,  
2 stating: "This survey was sent on behalf of IVGID Trustee Matthew Dent to the  
3 FlashVote community for IVGID, NV." A true and correct copy of the April 10,  
4 2017 FlashVote survey, is attached to the Motion at Exhibit 8. The invitation stated  
5 the "Incline Village General Improvement District and FlashVote thank you for your  
6 input!" The April 10, 2017 FlashVote invitation was sent using the IVGID Customer  
7 Data prepared on behalf of IVGID, and without approval from IVGD.  
8

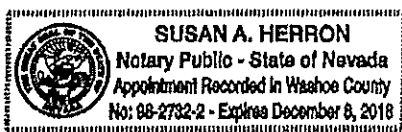
9 FURTHER AFFIANT SAYETH NAUGHT.

10 Dated this 10<sup>th</sup> day of May, 2017.

11  
12   
13 Steven Pinkerton

14 SUBSCRIBED AND SWORN TO before me

15 this 10<sup>th</sup> day of May, 2017.



22   
23 Notary Public  
24  
25



Reece Kintz,  
Quinasso  
100 W Huinker Ln  
Suite 402  
Reno, NV 89511  
(775) 853-8746

EXHIBIT 2

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EXHIBIT 2

April 6, 2015

Dear Incline Village/Crystal Bay Parcel Owner,

Happy 2015! Your new Board of Trustees and I are looking forward to working with you to make Incline Village and Crystal Bay the best possible place to live and visit. IVGID needs your help to do a better job of serving YOU - our constituents.

Do you have one minute a month to help make IVGID better?

We have partnered with FlashVote (an independent "good government" service) to collect your anonymous input at least once per month, with brief surveys that you can complete in one minute or less. FlashVote ensures that all questions are concise, unbiased and meaningful to citizens. You can make your voice heard by computer, smartphone or phone. You even receive results at the end of each survey period - typically only a few days after a survey starts. Civic responsibility has never been more convenient.

If you are already signed up as a FlashVote beta user, thank you for participating! You don't need to do anything. If you have not already signed up, please take a few minutes now to join over 400 of your friends and neighbors who are already FlashVote users in the IVGID district. Your participation is anonymous to IVGID and your personal data stays private:

- Please go to [www.flashvote.com/ivgid](http://www.flashvote.com/ivgid)
- Complete the sign up process once and you can be heard many times in the future

After you sign up, you can expect FlashVote to email you surveys about IVGID activities starting this month. You will get the immediate satisfaction of having your voice heard by IVGID as we work toward creating better local government for you. IVGID may also offer some optional rewards through FlashVote to thank you for your civic participation. We are excited to launch this new feedback system for you, and look forward to hearing from as many of you as possible. For questions or more information about IVGID, please contact Susan Herron (775-832-1207 or [sah@ivgid.org](mailto:sah@ivgid.org)). For questions or more information about FlashVote please contact Kevin Lyons (510-593-4901 or [kevin@flashvote.com](mailto:kevin@flashvote.com)).



Best regards,

  
Steve Pinkerton  
General Manager

P.S. Please make note of our Summer Appreciation Week during June when some IVGID facilities will be available at no additional charge to picture pass holders. Free Golf will be available Friday, 6/12 to Sunday, 6/14 and free Recreation Center and Tennis Center access will be available from Friday, 6/19 to Sunday, 6/21.

ADMINISTRATIVE OFFICES • 893 SOUTHWOOD BOULEVARD • INCLINE VILLAGE, NV 89451  
PH: (775) 832-1100 FX: (775) 832-1122 • [WWW.YOURTAHOEPLACE.COM](http://WWW.YOURTAHOEPLACE.COM)



April 17, 2015

Dear Incline Village/Crystal Bay Parcel Owner,

Happy 2015! Your new Board of Trustees and I are looking forward to working with you to make Incline Village and Crystal Bay the best possible place to live and visit. IVGID needs your help to do a better job of serving YOU - our constituents.

Do you have one minute a month to help make IVGID better?


We have partnered with FlashVote (an independent "good government" service) to collect your anonymous input at least once per month, with brief surveys that you can complete in one minute or less. FlashVote ensures that all questions are concise, unbiased and meaningful to citizens. You can make your voice heard by computer, smartphone or phone. You even receive results at the end of each survey period -- typically only a few days after a survey starts. Civic responsibility has never been more convenient.

If you are already signed up as a FlashVote beta user, thank you for participating! You don't need to do anything. If you have not already signed up, please take a few minutes now to join over 400 of your friends and neighbors who are already FlashVote users in the IVGID district. Your participation is anonymous to IVGID and your personal data stays private:

- Please go to [www.flashvote.com/ivgid](http://www.flashvote.com/ivgid)
- Complete the sign up process once and you can be heard many times in the future

After you sign up, you can expect FlashVote to email you surveys about IVGID activities starting this month. You will get the immediate satisfaction of having your voice heard by IVGID as we work toward creating better local government for you. IVGID may also offer some optional rewards through FlashVote to thank you for your civic participation. We are excited to launch this new feedback system for you, and look forward to hearing from as many of you as possible. For questions or more information about IVGID, please contact Susan Herron (775-832-1207 or [sah@ivgid.org](mailto:sah@ivgid.org)). For questions or more information about FlashVote please contact Kevin Lyons (510-593-4901 or [kevin@flashvote.com](mailto:kevin@flashvote.com)).

Best regards,

  
Steve Pinkerton  
General Manager

P.S. Please make note of our **Summer Appreciation Week** during June when some IVGID facilities will be available at no additional charge to picture pass holders. Free Golf will be available Friday, 6/12 to Sunday, 6/14 and free Recreation Center and Tennis Center access will be available from Friday, 6/19 to Sunday, 6/21.

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PH: (775) 832-1100 FX: (775) 832-1122 • [WWW.YOURTAHOEPLACE.COM](http://WWW.YOURTAHOEPLACE.COM)



EXHIBIT 3

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EXHIBIT 3



### SAAS SERVICES ORDER FORM

Customer: Incline Village General Improvement District	Contact: Steve Pinkerton
Address: 893 Southwood Boulevard	Phone: 775-832-1206
Incline Village, NV 89451	E-Mail: steve_pinkerton@ivgid.org
Services: Governance Sciences Group, Inc ("the Company") will provide the Standard Tier of FlashVote services (the "Service(s)"). This is a program of up to 12 monthly Stock FlashVote Surveys and up to 6 Custom FlashVote Surveys which may be added or substituted.	
Launch services, additional Custom FlashVote Surveys and other Premium features are available as options for additional and separate fees.	
Services Fees: \$4,900.00 per year, payable in advance, subject to the terms of Section 4 herein.	Initial Service Term: One Year (May 1, 2016 to April 30, 2017)
Implementation Services: Company will use commercially reasonable efforts to provide Customer the services described in the Statement of Work ("SOW") attached as Exhibit A hereto ("Implementation Services"), and Customer shall pay Company the Implementation Fee in accordance with the terms herein.	
Implementation Fee (one-time): \$0 (Waived by Company)	

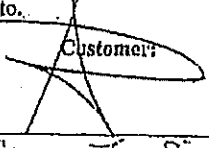
### SAAS SERVICES AGREEMENT

This SaaS Services Agreement ("Agreement") is entered into on this 10<sup>th</sup> day of May, 2016 (the "Effective Date") between Governance Sciences Group, Inc. with a place of business in Incline Village, Nevada ("Company"), and the Customer listed above ("Customer"). This Agreement includes and incorporates the above Order Form, as well as the attached Terms and Conditions and contains among other things, warranty disclaimers, liability limitations and use limitations. There shall be no force or effect to any different terms of any related purchase order or similar form unless signed by both parties hereto.

Governance Sciences Group, Inc.:

By: \_\_\_\_\_  
Name: Kevin Lyons  
Title: CEO

Customer:

By:   
Name: Steven J. Pinkerton  
Title: General Manager



## TERMS AND CONDITIONS

### 1. SAAS SERVICES AND SUPPORT

1.1 Subject to the terms of this Agreement, Company will use commercially reasonable efforts to provide Customer the Services.

1.2 Subject to the terms hereof, Company will provide Customer with reasonable technical support services in accordance with the terms set forth in Exhibit B.

### 2. RESTRICTIONS AND RESPONSIBILITIES

2.1 Customer will not, directly or indirectly: reverse engineer, decompile, disassemble or otherwise attempt to discover the source code, object code or underlying structure, ideas, know-how or algorithms relevant to the Services or any software, documentation or data related to the Services ("Software"); modify, translate, or create derivative works based on the Services or any Software (except to the extent expressly permitted by Company or authorized within the Services); use the Services or any Software for timesharing or service bureau purposes or otherwise for the benefit of a third; or remove any proprietary notices or labels.

2.2 Further, Customer may not remove or export from the United States or allow the export or re-export of the Services, Software or anything related thereto, or any direct product thereof in violation of any restrictions, laws or regulations of the United States Department of Commerce, the United States Department of Treasury Office of Foreign Assets Control, or any other United States or foreign agency or authority. As defined in FAR section 2.101, the Software and documentation are "commercial items" and according to DFAR section 252.227-7014(a)(1) and (5) are deemed to be "commercial computer software" and "commercial computer software documentation." Consistent with DFAR section 227.7202 and FAR section 12.212, any use, modification, reproduction, release, performance, display, or disclosure of such commercial software or commercial software documentation by the U.S. Government will be governed solely by the terms of this Agreement and will be prohibited except to the extent expressly permitted by the terms of this Agreement.

2.3 Customer represents, covenants, and warrants that Customer will use the Services only in compliance with Company's standard published policies then in effect (the "Policy") and all applicable laws and regulations. Although Company has no obligation to monitor Customer's use of the Services, Company may do so and may prohibit any use of the Services it believes may be (or alleged to be) in violation of the foregoing.

2.4 Customer shall be responsible for obtaining and maintaining any equipment and ancillary services needed to connect to, access or otherwise use the Services, including, without limitation, phones, modems, hardware, servers, software, operating systems, networking, web servers and the like

(collectively, "Equipment"). Customer shall also be responsible for maintaining the security of the Equipment, Customer account, passwords (including but not limited to administrative and user passwords) and files, and for all uses of Customer account or the Equipment with or without Customer's knowledge or consent.

### 3. CONFIDENTIALITY; PROPRIETARY RIGHTS

3.1 Each party (the "Receiving Party") understands that the other party (the "Disclosing Party") has disclosed or may disclose business, technical or financial information relating to the Disclosing Party's business (hereinafter referred to as "Proprietary Information" of the Disclosing Party). Proprietary Information of Company includes non-public information regarding features, functionality and performance of the Service. Proprietary Information of Customer includes non-public data provided by Customer to Company to enable the provision of the Services ("Customer Data") such as non-public citizen email addresses or other non-public citizen data. The Receiving Party agrees: (i) to take reasonable precautions to protect such Proprietary Information, and (ii) not to use (except in performance of the Services or as otherwise permitted herein) or divulge to any third person any such Proprietary Information. The Disclosing Party agrees that the foregoing shall not apply with respect to any information that the Receiving Party can document (a) is or becomes generally available to the public, or (b) was in its possession or known by it prior to receipt from the Disclosing Party, or (c) was rightfully disclosed to it without restriction by a third party, or (d) was independently developed without use of any Proprietary Information of the Disclosing Party or (e) is required to be disclosed by law.

3.2 Customer shall own all right, title and interest in and to the Customer Data. Company shall own and retain all right, title and interest in and to (a) the Services and Software, all improvements, enhancements or modifications thereto, (b) any software, applications, inventions or other technology developed in connection with Implementation Services or support, and (c) all Intellectual property rights related to any of the foregoing.

3.3 Notwithstanding anything to the contrary, Company shall have the right to collect and analyze data and other information relating to the provision, use and performance of various aspects of the Services and related systems and technologies (including, without limitation, information concerning Customer Data and data derived therefrom), and Company will be free (during and after the term hereof) to (i) use such information and data to improve and enhance the Services and for other development, diagnostic and corrective purposes in connection with the Services and other Company offerings, and (ii) disclose such data solely in aggregate or other de-identified form in connection with its business. No rights or licenses are granted except as expressly set forth herein.

#### 4. PAYMENT OF FEES

4.1 Customer will pay Company the then applicable fees described in the Order Form for the Services and Implementation Services in accordance with the terms therein (the "Fees"). If Customer's use of the Services requires the payment of additional fees (per the terms of this Agreement), Customer shall be billed for such usage and Customer agrees to pay the additional fees in the manner provided herein. Company reserves the right to change the Fees or applicable charges and to institute new charges and Fees at the end of the Initial Service Term or then-current renewal term, upon thirty (30) days prior notice to Customer (which may be sent by email). If Customer believes that Company has billed Customer incorrectly, Customer must contact Company no later than 60 days after the closing date on the first billing statement in which the error or problem appeared, in order to receive an adjustment or credit. Inquiries should be directed to Company's customer support department.

4.2 Company may choose to bill through an invoice, in which case, full payment for invoices issued in any given month must be received by Company thirty (30) days after the mailing date of the invoice. Unpaid amounts are subject to a finance charge of 1.5% per month on any outstanding balance, or the maximum permitted by law, whichever is lower, plus all expenses of collection and may result in immediate termination of Service. Customer shall be responsible for all taxes associated with Services other than U.S. taxes based on Company's net income.

#### 5. TERM AND TERMINATION

5.1 Subject to earlier termination as provided below, this Agreement is for the Initial Service Term as specified in the Order Form, and shall be automatically renewed for additional periods of the same duration as the Initial Service Term (collectively, the "Term"), unless either party requests termination at least thirty (30) days prior to the end of the then-current term.

5.2 In addition to any other remedies it may have, either party may also terminate this Agreement upon thirty (30) days' notice (or without notice in the case of nonpayment), if the other party materially breaches any of the terms or conditions of this Agreement. Customer will pay in full for the Services up to and including the last day on which the Services are provided. All sections of this Agreement which by their nature should survive termination will survive termination, including, without limitation, accrued rights to payment, confidentiality obligations, warranty disclaimers, and limitations of liability.

#### 6. WARRANTY AND DISCLAIMER

Company shall use reasonable efforts consistent with prevailing industry standards to maintain the Services in a manner which minimizes errors and interruptions in the Services and shall perform the Implementation Services in a professional and workmanlike manner. Services may be temporarily unavailable for scheduled maintenance or for unscheduled

emergency maintenance, either by Company or by third-party providers, or because of other causes beyond Company's reasonable control, but Company shall use reasonable efforts to provide advance notice in writing or by e-mail of any scheduled service disruption. HOWEVER, COMPANY DOES NOT WARRANT THAT THE SERVICES WILL BE UNINTERRUPTED OR ERROR FREE; NOR DOES IT MAKE ANY WARRANTY AS TO THE RESULTS THAT MAY BE OBTAINED FROM USE OF THE SERVICES. EXCEPT AS EXPRESSLY SET FORTH IN THIS SECTION, THE SERVICES AND IMPLEMENTATION SERVICES ARE PROVIDED "AS IS" AND COMPANY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT.

#### 7. INDEMNITY

Company shall hold Customer harmless from liability to third parties resulting from infringement by the Service of any United States patent or any copyright or misappropriation of any trade secret, provided Company is promptly notified of any and all threats, claims and proceedings related thereto and given reasonable assistance and the opportunity to assume sole control over defense and settlement; Company will not be responsible for any settlement it does not approve in writing. The foregoing obligations do not apply with respect to portions or components of the Service (i) not supplied by Company, (ii) made in whole or in part in accordance with Customer specifications, (iii) that are modified after delivery by Company, (iv) combined with other products, processes or materials where the alleged infringement relates to such combination, (v) where Customer continues allegedly infringing activity after being notified thereof or after being informed of modifications that would have avoided the alleged infringement, or (vi) where Customer's use of the Service is not strictly in accordance with this Agreement. If, due to a claim of infringement, the Services are held by a court of competent jurisdiction to be or are believed by Company to be infringing, Company may, at its option and expense (a) replace or modify the Service to be non-infringing provided that such modification or replacement contains substantially similar features and functionality, (b) obtain for Customer a license to continue using the Service, or (c) if neither of the foregoing is commercially practicable, terminate this Agreement and Customer's rights hereunder and provide Customer a refund of any prepaid, unused fees for the Service.

#### 8. LIMITATION OF LIABILITY

NOTWITHSTANDING ANYTHING TO THE CONTRARY, EXCEPT FOR BODILY INJURY TO A PERSON, COMPANY AND ITS SUPPLIERS (INCLUDING BUT NOT LIMITED TO ALL EQUIPMENT AND TECHNOLOGY SUPPLIERS), OFFICERS, AFFILIATES, REPRESENTATIVES, CONTRACTORS AND EMPLOYEES

SHALL NOT BE RESPONSIBLE OR LIABLE WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT OR TERMS AND CONDITIONS RELATED THERETO UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER THEORY; (A) FOR ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY OR CORRUPTION OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY OR LOSS OF BUSINESS; (B) FOR ANY INDIRECT, EXEMPLARY, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES; (C) FOR ANY MATTER BEYOND COMPANY'S REASONABLE CONTROL; OR (D) FOR ANY AMOUNTS THAT, TOGETHER WITH AMOUNTS ASSOCIATED WITH ALL OTHER CLAIMS, EXCEED THE FEES PAID BY CUSTOMER TO COMPANY FOR THE SERVICES UNDER THIS AGREEMENT IN THE 12 MONTHS PRIOR TO THE ACT THAT GAVE RISE TO THE LIABILITY, IN EACH CASE, WHETHER OR NOT COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

## 9. MISCELLANEOUS

If any provision of this Agreement is found to be unenforceable or invalid, that provision will be limited or eliminated to the minimum extent necessary so that this Agreement will otherwise remain in full force and effect and enforceable. This Agreement is not assignable, transferable or sublicenseable by Customer except with Company's prior written consent. Company may transfer and assign any of its rights and obligations under this Agreement without consent. This Agreement is the complete and exclusive statement of the mutual understanding of the parties and supersedes and cancels all previous written and oral agreements, communications and other understandings relating to the subject matter of this Agreement, and all waivers and modifications must be in a writing signed by both parties, except as otherwise provided herein. No agency, partnership, joint venture, or employment is created as a result of this Agreement and Customer does not have any authority of any kind to bind Company in any respect whatsoever. In any action or proceeding to enforce rights under this Agreement, the prevailing party will be entitled to recover costs and attorneys' fees. All notices under this Agreement will be in writing and will be deemed to have been duly given when received, if personally delivered; when receipt is electronically confirmed, if transmitted by facsimile or e-mail; the day after it is sent, if sent for next day delivery by recognized overnight delivery service; and upon receipt, if sent by certified or registered mail, return receipt requested. This Agreement shall be governed by the laws of the State of Nevada without regard to its conflict of laws provisions.

EXHIBIT 4

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EXHIBIT 4

From: FlashVote <surveys@flashvote.com>

Date: July 28, 2016 at 3:24:24 PM PDT

To: mistybray33@yahoo.com

Subject: New FlashSurvey for IVGID - Recent Changes to Your Garbage and Recycling Service



**THIS IS NOT FROM ANY GOVERNMENT AGENCY.**

This survey was sent on behalf of the Incline Village  
General Improvement District community members.

You have received a new FlashSurvey for Incline Village General Improvement District!

### **Recent Changes to Your Garbage and Recycling Service**

<image001.png> **VOTE NOW**

Note: This link will log you into your account one time only.

This survey is scheduled to end in about 24 hours at Jul 29, 2016 3:08pm PDT.

FlashSurveys help provide your community leaders with the input they need to make the best decisions possible.  
Make your voice heard! Make your opinion count! Vote now!

Incline Village General Improvement District and FlashVote thank you for your input!

To opt-out of receiving any further contact from FlashVote, click [here](#).

**VOTE NOW**

EXHIBIT 5

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EXHIBIT 5

On Nov 30, 2016, at 3:10 PM, Kevin Lyons <[kevin@flashvote.com](mailto:kevin@flashvote.com)> wrote:

Hi Jason et. al.-

I'm afraid we've already been through this recently with you guys so you know how our quality control works. If IVGID wants to send crappy surveys (or worse), including previously rejected questions like they did recently with surveygizmo, that's up to IVGID. But we can't and don't do that -- its the core of our value proposition to citizens and governments. We keep citizens involved better than any other approach by ensuring high-quality surveys that meet 23 points of quality control. No other government has ever had the slightest problem or hiccup with this process. In fact they all deeply desire and appreciate it. IVGID management has now generated a problem for us twice in the last 6 months as the lone problem child.

So I'm sorry to have to do this, but we just had our dally company meeting and unanimously decided we can no longer continue working with IVGID after the present intransigence and the perceived risks and hassles of continuing in this way. We would be happy to consider other workable alternatives in the future, but we will be promptly and happily refunding the remainder of the contract value at this point.

Thanks again for the opportunity to work with everyone that wants to make IVGID better and sorry we have to move on, but it is what it is.

Best,  
-Kevin

PS: I've very much enjoyed working directly with you Misty. If you do want us to send out the latest quality controlled version of the survey from last night, we will be happy to do so at no charge. And don't hesitate to call or email if we can be helpful in any other way.

PPS: And for the record, I chuckled involuntarily when I read Jason's commentary on my "lay" opinions. We all know that IVGID "legal" opinions are dictated by IVGID management without the best interests of the public in mind or quality control by counsel, just as in this instance. That was the first amusing thing. The second was that my "not competent" opinions happen to be those of a disinterested law and governance expert who 1) once trained to be a law professor at a top university with a full fellowship, 2) has earned the respect of the finest corporate, constitutional, academic and municipal lawyers in the country, 3) has used his contract reading skills to piece together several successful fraud cases up to 9 digits, 4) has used his ordinance reading skills to convince several top state officials to change Nevada law, 5) has used his litigation skills to win a Motion for Reconsideration as a pro per litigant, and even 6) just taught a Continuing Legal Education class to the leading municipal law firm in California. You would not have known most of these highlights, but I imagine you can see why I'm quite happy to put my reputation and opinions up against anything that comes out of IVGID given the circumstances. Anytime, anywhere and on any topic. In fact this just gave me another interesting idea... but now its back to work after too much (more) time wasted.

EXHIBIT 6

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EXHIBIT 6

**From:** Jason Guinasso [<mailto:JGuinasso@rkglawyers.com>]  
**Sent:** Thursday, December 1, 2016 9:55 AM  
**To:** Kevin Lyons  
**Cc:** Moga, Misty A.; Steve J. Pinkerton  
**Subject:** Re: Flashvote Ordinance 1

Kevin -

I have received and acknowledge your notice to terminate Governance Sciences Group, Inc.'s ("GSGI") Contract with IVGID. As you admit in your e-mail correspondence, GSGI is required to refund fees advanced for remainder of the Contract service term within thirty (30) days of notice of termination.

Please be advised that, in accordance with Section 3.2 of the Contract, IVGID owns the rights to "Customer Data," including but not limited to the data base used for FlashVote Surveys. Please deliver both an electronic and paper copy of the data base along with all other Customer Data in the possession and control of GSGI within thirty (30) days.

Please be further advised that GSGI is prohibited from using IVGID's logo or data base for any purpose. Any unauthorized use of IVGID's logo or data base will result in immediate legal action.

Finally, IVGID will advise the Board of Trustees of GSGI's decision at its next regularly scheduled meeting and will take all necessary steps to make sure the public understands that IVGID will no longer be using GSGI's services and the "FlashVote" product.

Jason D. Guinasso, Esq.  
Shareholder  
Reese Kintz Guinasso, L.L.C.     [jguinasso@rkglawyers.com](mailto:jguinasso@rkglawyers.com)  
[www.rkglawyers.com](http://www.rkglawyers.com)

Sent from Jason Guinasso's iPhone

936 Southwood Blvd., Suite 301  
Incline Village, Nevada 89451  
p. 775.832.6800

190 W. Huffaker Lane, Suite 402  
Reno, Nevada 89511  
p. 775.853.8746

2300 W. Sahara Ave., Suite 800  
Las Vegas, NV 89102  
p. 702-856-4333

EXHIBIT 7

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EXHIBIT 7

From: FlashVote <[admin@flashvote.com](mailto:admin@flashvote.com)>

Subject: You have been added to the Truckee Meadows Regional Planning Agency community at FlashVote

Date: February 8, 2017 at 4:06:53 PM PST

To: [gulnasso@mac.com](mailto:gulnasso@mac.com)



## You have been added to the Truckee Meadows Regional Planning Agency, NV Community

A FlashVote community has been established for Truckee Meadows Regional Planning Agency, NV, or the existing community modified its geographic limits. Because you have an address registered inside this community's geographic boundary, you have been automatically added as a member.

If you don't want to participate in the Truckee Meadows Regional Planning Agency, NV community, you can remove your subscription at any time by visiting your [My Communities](#) page and removing the community.

You can also [visit the FlashVote site](#), log in, and start completing available Civic Tasks for this new community whenever you like.

**VISIT FLASHVOTE**

**VISIT FLASHVOTE**

Thanks again for participating and welcome aboard!  
The FlashVote Team

To opt-out of receiving any further contact from FlashVote, [click here](#).

EXHIBIT 8

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EXHIBIT 8

From: FlashVote (IVGID, NV) <[surveys@flashvote.com](mailto:surveys@flashvote.com)>  
Date: Mon, Apr 10, 2017 at 2:54 PM  
Subject: New FlashSurvey for IVGID, NV - IVGID Priorities  
To: [kendrawong@gmail.com](mailto:kendrawong@gmail.com)



DENT



This survey was sent on behalf of IVGID Trustee  
Matthew Dent to the FlashVote community for  
IVGID, NV.



You have received a new FlashSurvey for the Incline Village General Improvement District community!

### IVGID Priorities

#### **VOTE NOW**

Note: This link will log you into your account one time only.

This survey is scheduled to end in 2 days at Apr 12, 2017 2:51pm PDT.

FlashSurveys help provide your community leaders with the input they need to make the best decisions possible.

Make your voice heard! Make your opinion count! Vote now!

Incline Village General Improvement District and FlashVote thank you for your input!

To opt-out of receiving any further contact from FlashVote, click [here](#).

EXHIBIT B

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EXHIBIT B

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE

\*\*\*

INCLINE VILLAGE GENERAL  
IMPROVEMENT DISTRICT, a General  
Improvement District,

Plaintiff,

Case No. CV17-00922

Dept. No. 1

vs.

GOVERNANCE SCIENCES GROUP, INC., a  
Delaware Corporation,

Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND  
DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S REQUEST FOR  
SUBMISSION OF MOTION TO DISMISS**

On June 23, 2017, Defendant, GOVERNANCE SCIENCES GROUP, INC., by and through counsel, Richard McGuffin, Esq., filed its Motion to Dismiss. Plaintiff, INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, by and through counsel, Jason Guinasso, Esq. and Ryan Herrick, Esq., filed an Opposition to the Motion to Dismiss on July 18, 2017, subsequently Defendant replied and submitted the matter for the Court's consideration on July 21, 2017. The matter came before the Court for hearing on August 9, 2017.

1 Having considered the papers and pleadings on file, arguments by counsel and the  
2 record in its entirety, the Court DENIES Defendant's Motion to Dismiss. Further, in  
3 consideration of the ruling on the Motion to Dismiss, this Court renders Plaintiff's Motion to  
4 Strike Defendant's Request for Submission of Motion to Dismiss as moot and therefore  
5 DENIES Plaintiff's Motion to Strike Defendant's Request for Submission of Motion to  
6 Dismiss.  
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8 IT IS SO ORDERED.

9 DATED this 10<sup>th</sup> day of August, 2017.  
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12 A. WILLIAM MAUPIN  
13 Senior Justice  
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 10 day of August, 2017, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to the individuals listed herein and/or electronically filed the foregoing document with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

VIA ECF

RICHARD MCGUFFIN, ESQ.

JASON GUINASSO, ESQ./RYAN HERRICK, ESQ.

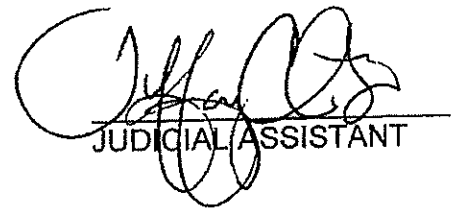
  
JUDICIAL ASSISTANT

EXHIBIT C

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EXHIBIT C

IN THE SECOND JUDICIAL DISTRICT COURT OF  
THE STATE OF NEVADA IN AND FOR THE  
COUNTY OF WASHOE

INCLINE VILLAGE GENERAL  
IMPROVEMENT DISTRICT, a General  
Improvement District,

Plaintiff/Counter-Defendant,

v.

GOVERNANCE SCIENCES GROUP,  
INC., a Delaware Corporation; and DOES  
1-50 inclusive,

Defendant/Counter-Claimant.

Case No.: CV17-00922

Dept. No.: 1

**ORDER AFTER HEARING RE: PLAINTIFF'S MOTION FOR PRELIMINARY  
INJUNCTIVE RELIEF**

Currently before this Court is Incline Village General Improvement District's ("Plaintiff" or "IVGID") *Motion for Preliminary Injunctive Relief* ("Motion") filed May 12, 2017. Governance Sciences Group, Inc. ("Defendant" or "GSGI") filed the *Opposition* to the Motion on June 23, 2017. IVGID filed the *Reply* on July 5, 2017. The matter was submitted to the Court for consideration on July 5, 2017. On July 6, 2017, this Court issued an *Order to Set* the matter for oral arguments.

On December 6, 2017, the parties appeared before this Court for a hearing on the Motion. Plaintiff IVGID was represented by Devon Reese, Esq. and Defendant GSGI was represented by Richard McGuffin, Esq. This Court took the Motion under advisement, which is now before this

1 Court for a decision. Having considered the pleadings, parties' arguments and relevant law, this  
2 Court grants IVGID's request for a preliminary injunction.

3 **I. Relevant Factual and Procedural History**

4 This matter arises out a *Complaint* filed on May 12, 2017 by Plaintiff against GSGI, alleging  
5 claims for declaratory and injunctive relief. IVGID is a special purpose district under Chapter 18.  
6 GSGI is a Delaware Corporation and its place of business is Incline Village, Nevada. *Mot.* at Ex. 1,  
7 *Aff. of Steven Pinkerton, General Manager IVGID.*

9 GSGI owns the FlashVote survey service. *Decl. of Kevin Lyons*, Jun. 23, 2017 at 2.  
10 FlashVote sends surveys to registered FlashVote users who sign up to take short surveys on issues  
11 relevant to their communities. *Opp.* at 2:8. People sign up to join FlashVote by going to  
12 [www.flashvote.com](http://www.flashvote.com) and submitting personal information to the FlashVote database. *Opp.* at 2:12-13.  
13 When people sign up to join FlashVote, they voluntarily provide personal data such as their name,  
14 age, gender, as well as contact data such as their email address, a phone number for texts, and a  
15 phone number for voice calls. *Opp.* at 2:15-16. This data is submitted to and stored in the FlashVote  
16 database. *Opp.* at 2:17-18.

18 In 2013, GSGI approached IVGID to beta test its survey platform services, whereby GSGI  
19 would provide services to allow IVGID to send surveys to its customers and GSGI would provide an  
20 analysis of those surveys so IVGID could better serve its customers. *Mot.* at Ex. 1:15-20.

22 On March 27, 2015, a "Memorandum of Understanding between Kevin Lyons and IVGID"  
23 was executed by the parties, in which they agreed that, among other things, FlashVote would  
24 continue to waive its fee for surveys if IVGID aggressively promoted FlashVote to its known parcel  
25 owners/residents ("IVGID customers" or "customers") and sent letters at IVGID's expense asking  
26 the customers to sign up with FlashVote. *Opp.* at Ex. 2.  
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1 On April 6, 2015 and April 17, 2015, in accordance with the Memorandum of  
2 Understanding, IVGID sent correspondence to its customers, which was draft by GSGI's Mr. Lyons,  
3 announcing that it had "partnered with FlashVote" to collect customer information, inviting  
4 customers to sign up and participate in the program, and stating that "FlashVote ensures that all  
5 questions are concise, unbiased and meaningful to its citizens." *Mot.* at Ex. 1, 1:22-24, 2:1-2, Ex. 2;  
6 *Opp.* at Ex 2 at 3. Certain recipients of the April 2015 IVGID letters signed up with FlashVote and  
7 provided personal data including email addresses and telephone numbers for texts and voice calls.  
8 *Decl. of Kevin Lyons* at 2:13-14. Between March 27, 2015 and May 10, 2016, the database of  
9 registered FlashVote users increased from 400 to 1000 users. *Decl. of Kevin Lyons* at 2:18-19.

10  
11 Thereafter, on May 10, 2016, GSGI entered into a Services Agreement ("Agreement") with  
12 IVGID, "wherein GSGI agreed to provide continuing standard tier 'FlashVote' services and surveys  
13 to IVGID." *Mot.* at 3:4-6; Ex. 3. The surveys that were issued to IVGID residents pursuant to the  
14 Agreement included questions related to beach parking (June 1, 2016) and recent changes to garbage  
15 and recycling service (July 28, 2016). *Supp. Decl. of Kevin Lyons*, Dec. 18, 2017, Ex. 5 and 6.  
16  
17 Thereafter, in late 2016, the relationship between the parties deteriorated and GSGI terminated the  
18 Agreement. *Mot.* at Ex. 1, 2:7-24; see also, *Decl. of Kevin Lyons* at 2:22-24.

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20 GSGI sent FlashVote surveys on behalf of third parties using IVGID's customers' FlashVote  
21 data, stating, "This survey was sent on behalf of the Incline Village General Improvement District"  
22 even though they were not. *Mot.* at 4:7-10. GSGI, using IVGID's customers' FlashVote data, has  
23 also sent surveys on behalf of other entities such as the Truckee Meadows Regional Planning  
24 Agency and on behalf of private individuals. *Mot.* at Ex. 1:17-21; Ex. 4, 7. GSGI has been  
25 compensated for doing so. *Hearing Transcript* at 62, Dec. 6, 2017.  
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1 As recently as November 13, 2017, GSGI issued a survey entitled "Accountability for IVGID  
2 Misconduct," that included a narrative which stated, among other things, that the IVGID General  
3 Manager and District Counsel "conspired with certain board members to inappropriately delay,  
4 remove and block the agenda item across all subsequent meeting opportunities (to date), in violation  
5 of board policy and open meeting law." *Supp. Decl. of Kevin Lyons*, Ex. 12. The survey that  
6 followed the narrative, which was distributed to the IVGID members, read as follows:  
7

8 If IVGID's General Manager committed or directed the commission of a crime  
9 such as concealment of public records (felony), making a false or misleading  
10 public statement (gross misdemeanor) or unauthorized expenditure of public  
11 money (misdemeanor), what do you think would be the most appropriate  
12 response by the IVGID Board of Trustees?

- 13 • Terminate the GM and notify law enforcement
- 14 • Suspend the GM without pay and launch an investigation
- 15 • Suspend the GM with pay and launch an investigation
- 16 • Do nothing
- 17 • Give the GM a raise
- 18 • Not Sure

19 *Supp. Decl. of Kevin Lyons*, Ex. 12.

20 In response to this and other similar survey questions, IVGID customers' comments included  
21 the following:

- 22 • "This needs to be investigated and prosecuted."
- 23 • "I can't believe there hasn't been an investigation and arrest already, its  
24 [sic] been 3 months. Lock those scumbags up."
- 25 • "Fire them."
- 26 • "Throw the Thugs out of there."

27 *Supp. Decl. of Kevin Lyons*, Ex. 12.

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## II. Applicable Legal Authority

NRS 33.010 provides that an injunction may be granted in the following cases:

1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.
3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

NRCP 65 recognizes three kinds of injunctive orders: (1) temporary restraining orders, (2) preliminary injunctions, and (3) permanent injunctions. Generally a preliminary injunction grants injunctive relief for a limited time until there is a decision on the merits. See NRCP 65. A preliminary injunction is available if an applicant can show a likelihood of success on the merits and a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy. Dep't of Conservation & Nat. Res., Div. of Water Res. v. Foley, 121 Nev. 77, 80, 109 P.3d 760, 762 (2005). Injunctive relief is extraordinary relief, and the irreparable harm must be articulated in specific terms by the issuing order or be sufficiently apparent elsewhere in the record. Dangberg Holdings v. Douglas Co., 115 Nev. 129, 142, 978 P.2d 311, 319 (1999). The purpose of such an order is to preserve the status quo until the case can be decided on its merits. Dixon v. Thatcher, 103 Nev. 414, 415, 742 P.2d 1029, 1030 (1987). The Court's decision to grant a preliminary injunction is within the sound discretion of the court, whose decision will not be disturbed on appeal absent an abuse of discretion. Labor Comm'r of State of Nev. v. Littlefield, 123 Nev. 35, 38, 153 P.3d 26, 28 (2007).

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1           **III. Discussion**

2           A. Plaintiff IVGID's Argument

3           In the *Motion*, IVGID argues that pursuant to subsection 3.1 of the Agreement, it owns the  
4 Customer Data which was developed by IVGID using the April 2015 letters which were sent to its  
5 customers. *Mot.* at 3:1-3, 12-17; 7:9-10. IVGID states that GSGI was only able to develop the  
6 customer database, i.e., the Customer Data, as a result of IVGID's letters. *Mot.* at 3:1-3. IVGID  
7 further relies on the provisions of Section 3.2 of the Agreement to support its ownership of the  
8 Customer Data. *Mot.* at 4:1-2.

9           Section 3 of the Agreement, "Confidentiality; Proprietary Rights" defines "Proprietary  
10 Information" at subsection 3.1 as "non-public data *provided* by Customer [IVGID] to Company  
11 [GSGI] to enable the provision of the Services ("Customer Data") such as non-public citizen email  
12 addresses or other non-public data." *Mot.* at Ex. 2. *Emphasis added.* Subsection 3.2 of the  
13 Agreement then states that IVGID "shall own all right title and interest in and to the Customer  
14 Data." *Mot.* at Ex. 2.

15           IVGID argues that subsequent to the termination of the Agreement, GSGI continued to use  
16 IVGID's customer data without IVGID's permission by sending surveys not only to IVGID  
17 customers, alleging they were being sent by IVGID, but to IVGID customers on behalf of third party  
18 entities such as the Truckee Meadows Regional Planning Agency. *Mot.* at 4:7-10; 5:4-12; 6:19-21.  
19 Furthermore, IVGID argues it has an obligation to protect the personal information of its customers,  
20 and to stop others from distributing such information in IVGID's name. *Mot.* at 7:3-9. IVGID asserts  
21 that it is at risk of irreparable injury, as it is opened up to potential liabilities because GSGI is using  
22 IVGID's customer information without IVGID's permission, and distributing information to  
23 IVGID's customers. *Mot.* at 7:3-9.

1 As to irreparable harm, IVGID contends that as a result of the false accusations alleging  
2 criminal behavior on behalf of IVGID management and personnel contained in the recent surveys  
3 issued by GSGI, IVGID management and personnel are being personally approached and accused by  
4 members of the community of committing crimes against the citizens and IVGID, they have become  
5 fearful for their safety and there is a resulting loss of confidence in IVGID on behalf of its citizenry,  
6 an ongoing level of harassment and fomenting of injury. *Hearing Transcript* at 62-63. IVGID  
7 contends that but for the existence of the IVGID customer list, i.e. the Customer Data, GSGI would  
8 not be able to circulate its opinions or the opinions of other third parties, which IVGID believes are  
9 untrue and are creating safety risks for IVGID personnel and generally ruining its reputation.  
10 *Hearing Transcript* at 71.

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12  
13 B. GSGI's Argument

14 In the *Opposition*, GSGI contends that that Memorandum of Understanding states that, "The  
15 database of registered users belongs to GSG as does the software product."<sup>1</sup> *Opp.* at 3:21-23.  
16 Therefore, GSGI argues that the Memorandum of Understanding clearly assigns ownership of the  
17 "database of registered users" to GSGI. *Opp.* at 3:21-23. GSGI further states that subsection 3.1 of  
18 the Agreement defines "Customer Data" as "non-public data *provided by Customer to Company.*"  
19 *Opp.* 7:18-25. *Emphasis added.* GSGI states that if IVGID had provided any Customer Data to  
20 GSGI, then IVGID would have ownership of it; however, GSGI argues that IVGID has not  
21 "provided" any Customer Data. *Opp.* at 8:8-11. GSGI contends that the Customer Data was provided  
22 directly to GSGI by the customers voluntarily using the FlashVote link. *Opp.* at 8:8-11. Further,  
23 GSGI argues that pursuant to subsection 3.2 of the Agreement, GSGI owns all data associated with  
24 the FlashVote product. *Opp.* at 4:18-25.

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<sup>1</sup> In the Memorandum of Understanding, GSGI is referred to as GSG.

1 As to irreparable harm, GSGI contends that IVGID cannot establish a single element of NRS  
2 33.010 in support of a preliminary injunction as its demands are based on a wholesale  
3 misrepresentation of the Agreement. *Opp.* at 7:11-12. GSGI contends that it has done nothing  
4 wrong, that IVGID has no rights, owns nothing, provided nothing to its customers and that  
5 "Customer Data" as defined in the Agreement does not exist. *Opp.* at 7:11-18. GSGI contends  
6 further that the only party that would be harmed by granting an injunction would be GSGI. *Opp.* at  
7 7:14-15. GSGI contends that the injury IVGID is complaining of is nothing more than the citizenry  
8 speaking out against its government and this does not qualify as injury that will support a finding of  
9 irreparable harm. *Hearing Transcript* at 73.  
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11 C. Court's Findings  
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13 1. *Likelihood of Success on the Merits*

14 This Court must first determine the likelihood of Plaintiff's success on the merits.

15 First, this Court takes issue with GSGI's assertion that the Memorandum of Understanding  
16 clearly assigns ownership of the "database of registered users" to GSGI. The Memorandum of  
17 Understanding (executed March 27, 2015) appears to be superseded by the May 10, 2016  
18 Agreement. Section 9 of the Agreement, "Miscellaneous" clearly states, "This Agreement is the  
19 complete and exclusive statement of the mutual understanding of the parties and supersedes and  
20 cancels all previous written and oral agreements, communications and other understandings relating  
21 to the subject matter of this Agreement, and all waivers and modifications must be in writing signed  
22 by both parties, except as otherwise provided herein." *Mot.* at Ex. 3:4. *Emphasis added.* Therefore,  
23 there is a reasonable probability that the Agreement entered into between the parties is controlling  
24 despite the March 25, 2015 Memorandum of Understanding.  
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1 Next, this Court addresses the Customer Data as defined in subsections 3.1 and 3.2 of the  
2 Agreement.

3 Subsection 3.1 of the Agreement provides in relevant part:

4 Each party (the "Receiving-Party") understands that the other party (the  
5 "Disclosing Party") has disclosed or may disclose business, technical or  
6 financial information relating to the Disclosing Party's business (hereinafter  
7 referred to as "Proprietary Information" of the Disclosing Party), Proprietary  
8 Information of Company includes non-public information regarding features,  
9 functionality and performance of the Service. *Proprietary Information of  
customer includes non-public data provided by Customer to Company to enable  
the provision of the Services ("Customer Data") such as non-public citizen  
email addresses or other non-public citizen data. Emphasis added.*

10 Subsection 3.1 of the Agreement also states that GSGI was "(i) to take reasonable  
11 precautions to protect such Proprietary Information, and (ii) not to use (except in performance of the  
12 Services or as otherwise permitted herein) or divulge to any third person any such Proprietary  
13 Information."

14 Subsection 3.2 of the Agreement states that IVGID "shall own all right title and interest in  
15 and to the Customer Data." Subsection 3.2 further provides that GSGI "shall own and retain all  
16 right, title and interest in and to (a) the Services and Software, all improvements, enhancements or  
17 modifications thereto, (b) any software, applications, inventions or other technology developed in  
18 connection with Implementation Services or support, and (c) all intellectual property rights  
19 pertaining to the foregoing."  
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22 It has been held that "[a] court should not interpret a contract so as to make meaningless its  
23 provisions" and "[e]very word must be given effect if at all possible." Bielar v. Washoe Health Sys.,  
24 Inc. 129 Nev. Adv. Op. 49, 306 P.3d 360, 364 (2013). If this Court were to accept GSGI's  
25 interpretation of subsection 3.1 of the Agreement, the provisions that define Customer Data would  
26 arguably be rendered meaningless. In spite of the fact that the parties contemplated that IVGID  
27 would "provide" the Customer Data as evidenced by the Agreement, GSGI contends that under the  
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1 scheme developed by the parties, this could not and did not occur.

2       Importantly, the process for gathering and providing customer data to GSGI was arguably  
3 established when the Agreement was signed, i.e., IVGID, who alone possessed the customer's  
4 physical addresses, would inform customers that it had partnered with GSGI and solicit their  
5 participation in the program, which required that the customers submit their personal contact  
6 information to GSGI. It appears that GSGI did not have access to customer contact information and  
7 needed to rely solely on IVGID to reach out to customers. Arguably, but for IVGID's April 2015  
8 letters sent to IVGID customers asking them to participate in the program, GSGI would not have had  
9 the customer information and been able to administer its FlashVote surveys as contemplated by the  
10 Agreement. *Mot.* at Ex. 1, 2. Subsection 3.1 of the Agreement appears to validate this process as the  
11 process by which IVGID would provide Customer Data to GSGI. Accordingly, this Court finds that  
12 IVGID has demonstrated a reasonable probability of success that it "provided" the Customer Data to  
13 GSGI pursuant to subsection 3.1 of the Agreement.  
14

15       Subsection 3.2 of the Agreement, states that IVGID "shall own all right title and interest in  
16 and to the Customer Data." While this subsection also addresses GSGI's ownership rights, these  
17 rights pertain to the Services, Software and Implementation Services. The Agreement defines  
18 Services as "the Standard Tier of FlashVote services...a program of up to 12 monthly Stock  
19 FlashVote Surveys and up to 6 Custom FlashVote Surveys...." The Agreement defines Software as  
20 "the source code, object code, underlying structure, ideas, know-how or algorithms relevant to the  
21 Services or any software, documentation or data related to the Services." Finally, Implementation  
22 Services are defined as GSGI's obligation to use "commercially reasonable efforts to provide  
23 Customer [IVGID] the services described in the Statement of Work. None of these appear to pertain  
24 to or confirm an ownership in the Customer Data. Accordingly, this Court finds that IVGID has  
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1 demonstrated a reasonable probability of success that it owns the Customer Data.

2       The Agreement at subsection 3.1 provides that GSGI "shall not use" the Proprietary  
3 Information, which includes the Customer Data, "(except in the performance of the Services, or as  
4 otherwise permitted herein) or divulge to any third person any such Proprietary Information." GSGI  
5 does not dispute that it has used the Customer Data outside the bounds of the Services defined in the  
6 Agreement and that this use has included surveys that have been distributed to IVGID customers  
7 claiming the survey was sent on behalf of IVGID when it was not and surveys sent on behalf of  
8 parties other than IVGID, including the Truckee Meadows Regional Planning Agency. And while  
9 the Agreement has been terminated, Section 5 "Term and Termination" at subsection 5.2 provides  
10 that "[a]ll sections of this Agreement which by their nature should survive termination will survive  
11 termination, including, without limitation...confidentiality obligations...." Again, Section 3 of the  
12 Agreement, which defines Proprietary Information to include Customer Data is entitled,  
13 "Confidentiality; Proprietary Rights." Accordingly, GSGI's duties and obligations regarding use of  
14 the Customer Data have likely survived the termination of the Agreement. Therefore, this Court  
15 finds that IVGID has demonstrated a reasonable probability of success that GSGI's continued use of  
16 the Customer Data violates the Agreement.

17  
18       According to the above analysis, this Court finds that IVGID has proven a likelihood of  
19 success on the merits on its claims for declaratory and injunctive relief.

## 20                   2.       *Irreparable Harm*

21  
22       Next, this Court must determine whether Plaintiff will be irreparably harmed if GSGI is  
23 allowed to continue using the Customer Data in violation of the Agreement. In the *Motion*, IVGID  
24 claims that irreparable injury has resulted and will continue because IVGID has an obligation to  
25 protect the personal information of its customers and to prevent others from distributing such  
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1 information in IVGID's name. IVGID contends that allowing GSGI to continue to use the Customer  
2 Data in violation of the Agreement, puts Plaintiff at risk of irreparable injury, opening Plaintiff up to  
3 potential liabilities because GSGI continues to use IVGID's customer information without IVGID's  
4 permission. IVGID also claims that irreparable injury will be suffered by IVGID because Incline  
5 Village is a very small community and its management and personnel, who have become fearful for  
6 their safety, are being personally approached and accused by members of the community of  
7 committing crimes against the customers and IVGID, and there is a resulting loss of confidence in  
8 IVGID on behalf of its citizenry, an ongoing level of harassment and fomenting of injury. This  
9 appears to be confirmed by the comments of the IVGID customers to the surveys that GSGI has  
10 issued since the termination of the Agreement.  
11

12  
13 GSGI contends that IVGID has suffered no harm and that the injury IVGID is complaining  
14 of is nothing more than the citizenry speaking out against its government and this does not qualify as  
15 injury that will support a finding of irreparable harm.

16  
17 Having reviewed the record and having heard the parties' arguments, this Court rejects  
18 GSGI's contention that this is just a case of the citizenry speaking out against its government since  
19 this is not the focus of the inquiry that this Court must make. This Court must focus on whether  
20 IVGID has made the requisite showing of irreparable harm and inadequacy of legal remedies.

21  
22 This Court finds that IVGID has made the requisite showing of irreparable harm and  
23 inadequacy of legal remedies permitting this Court to grant injunctive relief pursuant to NRS  
24 33.010(1). As evidenced by the actions of IVGID's citizenry both with respect to personally  
25 approaching IVGID management and personnel alleging criminal behavior and with respect to  
26 IVGID citizenry's response to the surveys issued by GSGI following termination of the Agreement,  
27 IVGID has made the requisite showing that its reputation has been and will continue to be damaged  
28

1 by GSGI's use of the Customer Data. Moreover, when IVGID solicited its customers to participate  
2 in the FlashVote surveys with IVGID's April 2015 letters, the content of which was known to GSGI,  
3 IVGID ensured its customers that FlashVote's surveys would be "unbiased," that IVGID was  
4 GSGI's partner in the survey process and that the customers' "personal data stays private." GSGI's  
5 current use of the Customer Data arguably violates each of these assurances and may subject IVGID  
6 to legal action from its customers for which legal remedies may be inadequate.  
7


8 Accordingly, and good cause appearing,

9 IT IS HEREBY ORDERED that IVGID's *Motion for Preliminary Injunctive Relief* is  
10 GRANTED. "

11 IT IS HEREBY FURTHER ORDERED that GSGI is prohibited from any further use of  
12 IVGID's Customer Data until the Court has ruled on the merits of this case.  
13

14 IT IS HEREBY FURTHER ORDERED that IVGID is exempt from posting a security bond  
15 as an agency under NRCP 65(c).

16 DATED this 10<sup>th</sup> day of January, 2018.

17  
18   
19 KATHLEEN M. DRAKULICH  
20 District Judge  
21  
22  
23  
24  
25  
26  
27  
28

CERTIFICATE OF MAILING

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 10<sup>th</sup> day of January, 2018, I did the following:

☒ Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement:

RICHARD J. MCGUFFIN, ESQ.

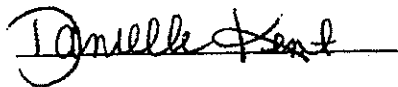
RYAN W. HERRICK, ESQ.

JASON D. GUINASSO, ESQ.

DEVON T. REESE, ESQ.

Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada:

NONE



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EXHIBIT D

EXHIBIT D



## **Conduct Meetings of the Board of Trustees**

### **Policy 3.1.0**

- f. Contracts. Contracts entered into by the District that are required to be advertised under Nevada Revised Statutes 332 and/or 338 must be approved by the Board of Trustees. All documents approved or awarded by the Board shall be signed in the name of the District by the Chair and countersigned by the Secretary, unless authorization to sign is given to another person(s) by the Board.

Contracts, other than those covered by Nevada Revised Statutes 332.115 and which are not subject to the advertising thresholds of Nevada Revised Statutes 332 and/or 338, may be authorized, approved and executed by the General Manager of the District or designee, unless otherwise ordered by the Board of Trustees.

Contracts covered by Nevada Revised Statutes 332.115 may be authorized, approved and executed by the General Manager or his designee of the District, if it is for an amount less than the advertising threshold of Nevada Revised Statute 332. Contracts over the threshold of NRS 322.115 must be approved by the Board of Trustees.

- g. Claims. The General Manager and General Counsel, and their designees, are authorized to negotiate on behalf of IVGID, the settlement of all property damage, personal injury, or liability claims, unless otherwise ordered by the Board of Trustees. Final settlement of such claims may be authorized by the General Manager, provided the amount attributed to IVGID is less than the amount that must be approved by the Board for amounts per occurrence, including all sources of payment (insurance, risk reserve, operating funds, or working capital). For claims that exceed the amount, those must be approved by the Board, the General Manager may authorize and accept a tentative settlement, which shall not be final and binding upon IVGID, unless and until approved by the Board of Trustees.

RESOLUTION NO. 1480

A RESOLUTION ADOPTING A  
PERSONNEL MANAGEMENT POLICY

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT

WHEREAS, the Board of Trustees of the Incline Village  
General Improvement District desires to establish a framework for  
the Board and General Manager to use in addressing personnel  
matters within IVGID;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

The Policy Statement titled "Personnel Management" attached  
hereto as Exhibit A, is adopted as Policy and Procedure Resolution  
No. 105.

\* \* \* \* \*

I hereby certify that the foregoing is a full, true and  
correct copy of a resolution duly passed and adopted at a regular-  
ly held meeting of the Board of Trustees of the Incline Village  
General Improvement District on the 29th day of November  
1984, by the following vote:

AYES, and in favor thereof, Trustees:

Jane Maxfield, Bob Wolf, Bob Jones, Syd Brosten

NOES, Trustees: None

ABSENT, Trustees: None

ABSTENTION, Trustee: Tom Duggan

  
Secretary

Resolution Number 1480  
Adopted November 29, 1984

Policy Statement  
**PERSONNEL MANAGEMENT**  
Incline Village General Improvement District

**I. PURPOSE**

The Incline Village General Improvement District (IVGID) is committed to maintaining a dedicated and motivated work force, while developing its Staff's technical and professional standards to meeting changing demands for services with the Village. This policy statement establishes a framework which the Board of Trustees and the General Manager will use in addressing personnel matters within IVGID.

**II. ROLES**

The District operates under a Board-Manager form of government which places the Board of Trustees in the role of establishing overall IVGID policy direction. IVGID Staff is appointed to administer and execute day-to-day operations. The Manager is responsible for supervising these operations and providing general administrative direction.

With regarding to IVGID personnel, it is the Board's responsibility to establish overall guidelines governing IVGID's approach to personnel matters. The Manager's role is to put these guidelines into the day-to-day practice of hiring, firing, motivating, promoting, demoting, compensating, and training individual employees.

**III. GENERAL OBJECTIVES**

The Board hereby establishes the following general personnel objectives for IVGID.

- o Employee Development. IVGID will motivate and train existing employees to become more productive and proficient in their current jobs. Where appropriate, IVGID will encourage employees to develop new skills which might lead to job advancement. Where appropriate, IVGID will cross-train employees to cover temporary vacancies on related jobs.

**EXHIBIT A**

*Policy and Procedure Resolution No. 105*

Resolution Number 1480  
Adopted November 29, 1984

Policy Statement  
PERSONNEL MANAGEMENT  
Incline Village General Improvement District

- Attrition Management. IVGID will evaluate alternatives to filling positions which become vacant, as a means to reduce costs. These alternatives may include changes in work routines, job descriptions, work hours, or scope of services. They may include combining positions or reassigning work or personnel from one department to another.
- Recruitment. When vacancies must be filled from outside the ranks of the existing work force, IVGID will recruit and hire the most qualified candidates for the job, based strictly upon merit. Merit selection implies that anyone may apply, and that candidates are evaluated fairly by the appointing authority, based upon job-related criteria established in advance. In general, local recruitment is sufficient for clerical positions, semiskilled laborer positions, lower level technical positions, and all part-time or temporary positions. A larger recruitment area may be required for more highly skilled positions. Where local and non-local candidate are being considered which have equal or nearly equivalent qualifications, the local candidate will be preferred.
- Performance Standards and Evaluations. IVGID will establish clear standards for employee performance, and encourage employees to maintain these standards through ongoing communication with supervisors, performance evaluations, and where necessary, disciplinary procedures, demotion or termination.
- Longevity. IVGID will ensure the longevity of loyal and hard-working employees which have provided many years of faithful service to the community.
- Management. IVGID will develop senior department heads as a management team which can work with the General Manager in addressing overall IVGID administrative needs and assist the Board of Trustees in policy development.

**EXHIBIT A**

Resolution Number 1480  
Adopted November 29, 1984

Policy Statement  
**PERSONNEL MANAGEMENT**  
Incline Village General Improvement District

- Guidelines. IVGID will develop a uniform set of guidelines to direct the administration of the District's personnel matters.
- Planning. IVGID will develop a strategic approach to personnel administration which will diagnose long-term problems, anticipate future needs, and develop a stable framework for addressing these problems and needs in an orderly fashion.
- Unions. IVGID will maintain a cooperative relationship with collective bargaining units and their representatives, which establishes a clear understanding of the proper roles for both unions and management.

**IV. PROCEDURES**

The General Manager is accountable to the Board of Trustees for the fair and efficient execution of these guidelines, as well as the overall performance of IVGID. In order to maintain this accountability, the General Manager must be given the authority to administer personnel matters without direct Trustee intervention or influence.

The following procedures shall govern the personnel practices of IVGID:

- The General Manager shall maintain direct, day-to-day supervision over all District employees, with the exception of the Attorney. Supervision includes the power to hire, fire, motivate, discipline, evaluate, promote, demote, transfer, and train employees, subject to established personnel guidelines, union contracts, Board policy, and generally accepted personnel practices.
- The General Manager will keep the Trustees informed about the status of all major personnel actions relating to department head positions. Department head appointments and terminations shall be discussed with the Trustees in advance. Information on personnel actions relating to non-department head positions will be provided on an as-requested basis.

**EXHIBIT A**

Resolution Number 1480  
Adopted November 29, 1984

Policy Statement  
PERSONNEL MANAGEMENT  
Incline Village General Improvement District

- Trustees are encouraged to express their opinion and/or concerns on any personnel matter to the General Manager in private. Trustees, individually or as a body, will refrain from directly intervening in or publicly influencing any personnel matter within the jurisdiction of the General Manager.
- Trustees will exercise their authority to direct Staff, collectively, through the General Manager, at Board meetings. Individual Trustees shall refrain from directing or attempting to directly supervise Staff. This policy statement is not intended to prevent individual Trustees from occasionally making suggestions to supervisor Staff, when such suggestions do not imply supervisory direction.
- All union matters, other than overall negotiation strategy, will be handled by the General Manager. The Board will maintain responsibility for establishing overall negotiation strategy and approving final union contracts.
- The General Manager shall be responsible for coordinating the work of the Attorney with the activities of IVGID Staff, and the Board of Trustees.
- The General Manager shall recommend, and the Board of Trustees shall establish, salary ranges for all non-contract, full-time permanent employment classifications. Salary ranges shall be based upon objective criteria not specific to individual employees, relating to union contracts, market conditions, cost of living, budgetary guidelines, legal considerations, and job descriptions.
- The General Manager shall set a specific salary for each employee within the salary range established by the Board of Trustees. Specific salaries shall be based upon employee-specific information, including qualifications, experience, longevity, and performance evaluations.

**EXHIBIT A**

*Policy and Procedure Resolution No. 105*

Resolution Number 1480  
Adopted November 29, 1984

Policy Statement  
PERSONNEL MANAGEMENT  
Incline Village General Improvement District

- The Board of Trustees shall exercise its exclusive power to create full-time permanent employment positions, considering the recommendations, if any, of the General Manager. The General Manager shall establish, and as deemed necessary, amend detailed job descriptions for positions of employment. The General Manager may create temporary, seasonal and part-time positions of employment, and the wages and terms of employment thereof, subject to general personnel and budgetary guidelines, Board policies, and union contracts.
- The General Manager shall have the authority to establish and revise chains of command, reporting relationships among personnel, organization charts, and other structural matters pertaining to the organization of the District, provided that the Board of Trustees shall exercise the exclusive power to create or abolish operating departments of the District. The Board's power shall be exercised by resolution.
- The General Manager may eliminate positions, combine positions, lay off personnel, or reduce work hours, as deemed necessary to maintain a balanced budget, improve efficiency, or accomplish other administrative objectives, subject to general personnel guidelines, union contracts, legal considerations, or Board policy. Where such actions pertain to full-time permanent personnel, the General Manager shall notify the Board of Trustees of the actions in advance, and the Board may, by majority vote, override such proposals.

**EXHIBIT A**

**RETAINER AGREEMENT**

**By and Between**

**INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT**

**And**

**THE LAW OFFICES OF REESE KINTZ GUINASSO, L.L.C.**

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THIS RETAINER AGREEMENT (the "Retainer Agreement") is entered into by and between the INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT ("IVGID") and the law firm of REESE KINTZ GUINASSO, L.L.C. ("Firm") and is effective as of the 1st day of January 2017.

### **RECITALS**

WHEREAS, IVGID and Firm desire to engage in a stable and flexible long term contractual relationship whereby IVGID can recognize pricing efficiencies for legal services and the Firm is available to provide service as IVGID Attorney, as well as additional legal services on an as needed basis, in a thoughtful and cost effective manner; and

WHEREAS, IVGID and Firm desire to respectively receive and provide legal services specifically described herein pursuant to this Retainer Agreement;

WHEREAS, IVGID and Firm specifically acknowledge that this Agreement is not an employment agreement and does not establish a relationship of employer and employee between Firm and IVGID, between IVGID Attorney and IVGID, or between IVGID and any Firm Attorney, but defines a relationship between the parties wherein the Firm, its officers and employees, including those designated IVGID Attorney or Assistant IVGID Attorney are in fact independent contactors of IVGID and remain solely the employees of the Firm; and

WHEREAS, Firm reserves its independence to act within the limits imposed by law and professional obligations such that IVGID's policy objectives during the representation will be furthered through means the Firm considers appropriate under its professional obligations after consultation with IVGID and as may otherwise be required by the rules regulating the Nevada Bar.

NOW, THEREFORE, it is agreed as follows:

1. **RETAINER AGREEMENT.** This Retainer Agreement restates, supersedes, and replaces all prior agreements between the parties concerning the provision of legal services in the manner and under the terms described in this Agreement.
2. **TERM.** The term of the Agreement shall be for a period of two (2) years, commencing on January 1, 2017, subject to termination, as set forth in Section 10.3 below.
3. **IVGID ATTORNEY SERVICES.**
  - 3.1. Firm will provide legal services as IVGID Attorney to IVGID relative to the direction of the IVGID General Manager as prescribed under Resolution 1480, the District's personnel management policy, which states, "the General Manager shall be responsible for coordinating the work of the Attorney with the activities of IVGID Staff, and the Board of Trustees."
  - 3.2. IVGID Attorney shall serve as chief legal advisor to IVGID Board of Trustees, IVGID General Manager, and all IVGID departments and offices. IVGID attorney shall represent IVGID in all legal proceedings, except as set forth in Section 3.6.6 below.
  - 3.3. For purposes of this Retainer Agreement Devon T. Reese, Esq. and Jason D. Guinasso, Esq., of Firm shall be designated as IVGID Attorney ("Designated Lawyer"). The Designated Lawyer of the Firm serving as IVGID Attorney for IVGID may be substituted following notice to IVGID General Manager.
  - 3.4. Firm shall also designate one or more attorneys, who along with the Designated Lawyer shall serve accompanied by other members of the Firm, and IVGID shall have access to the complete complement of practice groups and breadth of experience of Firm attorneys along with the full statewide resources of the Firm.

3.5. The contemplated services described in this Agreement are to be provided in conjunction with efforts of designated officials and staff of IVGID to achieve the goals of IVGID as determined by the IVGID Board and the IVGID General Manager. The Agreement contemplates that the work will be assigned to IVGID Attorney by IVGID General Manager. Such legal services, as enumerated below, are to be provided as IVGID Attorney Legal Services on a monthly retainer basis, and supplemented by additional IVGID Attorney Legal Services, as enumerated below, on an hourly basis as approved by work order. Additional Special Counsel Legal Services will also be provided separately by the Firm or other firms on an hourly basis by separate work orders for special services or as otherwise approved by IVGID General Manager as provided in Sections 4 and 5 hereof.

3.6. IVGID Attorney Legal Services encompass the following:

3.6.1. Attend one IVGID Board meeting per month.

3.6.2. Attend one IVGID workshop per month;

3.6.3. Review and approve meeting agendas to ensure that they are in compliance with the Nevada Open Meeting Law.

3.6.3.a. Open Meeting Law complaints resulting out of reviewed and approved meeting agendas by Counsel shall fall under the services covered by the monthly retainer fee. Open Meeting Law complaints resulting from unreviewed or unapproved meeting agendas or actions taken during the meeting that the Board elects to do without seeking advice from Counsel shall fall under 4. Additional IVGID Attorney Legal Services and/or 5. Special Counsel Services as defined in this agreement. Rates for these

two services are included in 6.3 and 6.4 respectively in this agreement.

- 3.6.4. Provide up to four training sessions for IVGID Board and staff each year that will help to reduce questions by IVGID Board and staff about legal issues and reduce IVGID's risk in its operations or, in the alternative, attend up to four additional workshops, retreats or other meetings at the request of the General Manager.
- 3.6.5. Participate in up to one weekly conference either in person or via teleconference (as required by IVGID General Manager) at a regular time to be mutually determined by IVGID General Manager and IVGID Attorney that will include IVGID Manager and Department Heads (also referred to commonly as the "Senior Team") to identify and discuss outstanding legal issues, discuss projects both proposed and in development, share information associated with services to be provided by the Firm, and address the means to serve IVGID's legal needs;
- 3.6.6. Participate in up to one bi-weekly conference with the Director of Human Resources, the Director of Public Works, and other Department Heads and Directors as requested, either in person or via teleconference, at a regular time to be mutually determined by IVGID Attorney and Department Head or Director to identify and discuss outstanding legal issues, discuss projects both proposed and in development, share information associated with services to be provided by the Firm, and answer questions.
- 3.6.7. Assist IVGID Clerk or other designee with responses to public records requests.

- 3.6.8. Develop and implement a procedure to provide prompt responses to IVGID General Manager with date stamping (or other tracking for accountability purposes) of all internal requests for legal services and to coordinate that work with IVGID General Manager's work-plans and develop appropriate quality control and establish with the IVGID General Manager benchmarks to measure performance under this Agreement;
- 3.6.9. Develop and submit a budget for providing legal services (including additional IVGID Attorney Legal Services) for each fiscal year as requested and in the format required by IVGID General Manager and develop and submit to IVGID General Manager a budget for any additional IVGID Attorney Legal Services not included in the budget and any Special Counsel Services when authorized either upon request in advance of receiving a work order or within 10 days of receiving a work order for those services and thereafter to update the budget regularly and seek approval from IVGID General Manager for increases in the budget and before performing work that will exceed the budget for that work (except in an emergency and upon approval by IVGID General Manager);
- 3.6.10. Provide administration and periodic oversight and review of all special counsel engagements (including those involving other law firms or attorneys), or use of consultants necessary to support all special counsel engagements, including review, analysis and recommendation regarding payment of all billings by special counsel, including consultants;
- 3.6.11. Provide legal advice to IVGID Board and participate in individual calls with IVGID Board

members in order to provide advice to the Board regarding upcoming IVGID Board agenda items or ethics inquiries and participate in the preparation of agendas for IVGID Board and be prepared to offer legal advice on all agenda items at meetings of the Board or other committees and public bodies the Board shall appoint;

3.6.12. Provide to IVGID General Manager a monthly report that describes the status of all outstanding matters and provides such other information regarding the matters being handled by the Firm under this Agreement;

3.6.13. Facilitate the adherence to provisions of IVGID Ordinances, Resolutions and Policies, and contracts and drafting appropriate ordinances, resolutions, legislation, service agreements, inter-local agreements, and other contracts, documents and instruments to collaboratively and cooperatively achieve IVGID's objectives in the most cost effective and time efficient manner;

3.6.14. Provide review and input for vendor contractors or contemplated purchases to assist venue or accounting staff.

3.6.15. Clearly distinguish between legal advice and business advice when providing services to the Board, General Manager and staff;

3.6.16. Provide the Board and IVGID General Manager timely updates regarding changes in the law (legislation or cases) that may affect IVGID operations, policies or activities; and

3.6.17. Provide the IVGID General Manager with options to cost effectively handle all legal matters incorporated in this Agreement while retaining

the high quality of legal services through the use of forms, the use of lower priced staff, various alternate billing methods including using special counsel, temporary employees, task based billing, or other methods of charging for services or service delivery.

3.6.18. IVGID Attorney Legal Services do not encompass or include Additional IVGID Attorney Legal Services or Special Counsel Legal Services described herein, nor bond counsel, disclosure counsel or other legal services not specifically included in this subsection.

#### **4. ADDITIONAL IVGID ATTORNEY LEGAL SERVICES.**

4.1. Additional IVGID Attorney Legal Services encompass the following:

- 4.1.1. Attend, as reasonably required or requested, all meetings of IVGID Board not described in the foregoing subsection as IVGID Attorney Legal Services, and attend meetings with third parties or IVGID staff and/or IVGID Department Heads, as reasonably required or requested by IVGID General Manager.
- 4.1.2. Represent IVGID in the acquisition and disposition of real property rights and interests in the normal course of business, including the issuance of title insurance commitments and policies;
- 4.1.3. Coordinate, in concert with IVGID General Manager, with legal counsel and other professionals representing governmental agencies or third parties on routine legal matters affecting IVGID in the normal course of business;
- 4.1.4. Attend Ordinance and/or code enforcement hearings and defend decisions of IVGID General Manager and Senior Staff in court of law and/or

- before administrative agencies;
- 4.1.5. Perform other legal services which IVGID and Firm mutually agree are outside the normal and regular scope of day-to-day general counsel services, including special legal projects of a significant nature outside the normal day-to-day representation of IVGID;
  - 4.1.6. Prosecute or defend litigation as directed by the IVGID General Manager, including mediation, validation proceedings, and arbitrations before administrative boards, arbitrators, mediators, courts of all levels of the county, state or federal governments and report to the IVGID General Manager on that litigation regularly; and
  - 4.1.7. Prosecute or defend appeals in the courts of this state and the federal government and administrative boards having jurisdiction over matters affecting IVGID as directed by the IVGID General Manager.
  - 4.1.8. Special Counsel Legal Services described in Section 4 hereof,
  - 4.1.9. Bond counsel and disclosure counsel services.
  - 4.1.10. The provision of Additional IVGID Attorney Legal Services shall be conditioned upon a scope of services as directed or authorized by IVGID General Manager and shall be set forth in a written work order in substantially the form attached hereto as Exhibit "A";

## **5. SPECIAL COUNSEL SERVICES.**

- 5.1. Firm shall also be available to provide Special Counsel Legal Services to IVGID. Special Counsel Legal Services are to be provided on an hourly basis or by task based billing or other billing arrangements as agreed upon by the parties in advance and commenced by separate work orders as described in this Agreement and as agreed by the parties. Such services are of a nature that require recognized expertise, experience, or specialized subject

matter knowledge and focus above and beyond routine or normal day-to-day IVGID Attorney Legal Services or Additional IVGID Attorney Legal Services, and shall generally include the following:

- 5.1.1. Providing advice, research, and assistance on extraordinary IVGID administration or operational matters and negotiations;
- 5.1.2. Rendering written memoranda or opinions outside the scope of IVGID Attorney Legal Services or Additional IVGID Attorney Legal Services and which expose the Firm to significant liability;
- 5.1.3. Providing advice and research on the feasibility and legal sufficiency of statutory and alternative revenue sources, including the development or implementation of special assessment, impact fee, user fee, extraordinary revenue, utility fee or rate programs;
- 5.1.4. Negotiating, preparing, obtaining, delivering, and filing all documents in connection with the closing on any acquisition, contribution, sale, exchange, or disposition of any significant IVGID assets or systems requiring the financing thereof, including real and personal property associated with such IVGID assets or systems;
- 5.1.5. Nominally acting as a lobbyist before any legislative, administrative, or executive branch of government (such services, if extensive, may require a separate engagement);
- 5.1.6. Legal formulation, negotiation, drafting, and implementation of special or significant IVGID programs or initiatives;

5.1.7. The provision of Special Counsel Legal Services shall be conditioned upon a scope of services as directed or authorized by IVGID General Manager and shall be set forth in a written work order in substantially the form attached hereto as Exhibit "A";

5.1.8. Special Counsel Legal Services described in this section do not include bond counsel, disclosure counsel, underwriter's counsel, or other legal services which are already or will be the subject of other separate agreements with IVGID, or are premised upon negotiated fees; or other legal services otherwise subsequently agreed to between the parties or third parties.

## **6. COMPENSATION FOR PROFESSIONAL SERVICES.**

6.1. Firm will be compensated for IVGID Attorney Legal Services at the monthly retainer rate as authorized herein. Firm will be compensated for Additional IVGID Attorney Legal Services and Special Counsel Legal Services at hourly rates as authorized herein. Unless otherwise agreed to by the parties in separate writing, Firm will be compensated for legal services at negotiated and hourly rates as authorized herein.

6.2. The Firm will be compensated for IVGID Attorney Legal Services at the Firm's following monthly retainer rate:

6.2.1. **Ten Thousand Dollars (\$10,000) per month** to be billed at the beginning of each calendar month for work to be performed and paid within thirty (30) days.

6.2.2. An IVGID recreational pass will be made available to requesting Designated Lawyer on an as needed basis to conduct IVGID Business.

6.3. The Firm will be compensated for Additional IVGID Attorney Legal Services for hourly work at the following hourly rates:

6.3.1. **A blended rate of \$150 per hour** of attorney time (recorded and billed in increments no greater than 0.10 hour segments);

6.3.2. Firm paralegals or law clerks at the **rate of \$75.00 per hour** (recorded and billed in increments no greater than 0.10 hour segments), dependent upon experience and expertise. Firm agrees to assign matters to paralegals and law clerks to achieve the most cost effective service in IVGID's best interest.

6.3.3. Firm agrees not to bill for the services of more than one attorney (or paralegal/law clerk or combination of attorney, paralegal/law clerk) who attends the same meeting, conference or event unless approved in advance. Firm agrees to assign work to attorneys, paralegals and law clerks in a manner to achieve the most cost effective benefit to IVGID as is in IVGID's best interest.

6.4. The Firm will be compensated for Special Counsel Legal Services for hourly work at the following discounted and blended hourly rates:

6.4.1. **A blended rate of \$250 per hour** of attorney time (recorded and billed in increments no greater than 0.10 hour segments);

6.4.2. Firm paralegals or law clerks at the **rate of \$90.00 per hour** (recorded and billed in increments no greater than 0.10 hour segments), dependent upon experience and expertise; and

- 6.4.3. (c) Firm agrees to assign work to attorneys, paralegals and law clerks in a manner to achieve the most cost effective benefit to IVGID as is in IVGID's best interest and Firm agrees not to bill for the services of more than one attorney (or paralegal/law clerk) who attends the same meeting, conference or event unless approved in advance.
- 6.5. No attorney time shall be charged for any travel to IVGID or for travel to any meetings of IVGID Board if held within Washoe County, Douglas County or Carson City.
- 6.6. The Firm shall also be entitled to receive reimbursement for actual costs incurred such as, long distance telephone charges, overnight delivery charges, and travel expenses when such travel is necessary and requested from outside of Washoe County, Douglas County or Carson City; however, no other overhead charges will be reimbursed for copying, secretarial services or other overhead as those costs are considered a part of the fees paid under this Agreement. No travel expenses will be charged for daily travel within IVGID or for any travel for the purpose of attending and staffing any regularly scheduled meeting of IVGID Board in the Firm's role in providing IVGID Attorney Legal Services.
- 6.7. The Firm shall bill IVGID periodically for monthly retainer and hourly work, but not more often than monthly, and provide an itemized statement of fees for services provided and costs incurred to date. Invoices must be submitted within 60 days of the first billing date in the cycle and all bills for the fiscal year must be submitted within 30 days after the conclusion of that fiscal year with an estimate of that bill's total submitted before the end of the fiscal year as reasonably required by IVGID General Manager. All invoices shall include documentation for costs and be submitted to, approved, and promptly processed for payment by IVGID General

Manager.

**7. USE OF NECESSARY CONSULTANTS OR OTHER SPECIAL COUNSEL; APPROVAL PROCEDURE.**

7.1. IVGID may necessarily require legal expertise beyond the scope of IVGID Attorney, Additional IVGID Attorney, or Special Counsel legal service roles contemplated herein. Subject to the concurrence or recommendation of IVGID General Manager and, if required, the approval of IVGID Board, the Firm shall have the authority to use or retain on behalf of IVGID such additional consultants, experts, or counsel that it deems necessary to implement the objectives and programs of IVGID. Such approval shall be first requested in writing and shall include a scope of services and method of compensation for each additional consultant, expert, or counsel requested.

7.2. IVGID Attorney shall maintain oversight and request and provide to IVGID periodic status reports from either litigation or local counsel in the event of any representation pursuant to this section.

7.3. Statements for fees and costs incurred by any approved consultant, expert, or counsel, shall first be reviewed by the Firm for accuracy and completeness and, upon approval, be submitted to IVGID General Manager for payment.

**8. DISCLOSURE.**

8.1. IVGID recognizes that the Firm represents other clients in or near Incline Village as General Counsel, including but not limited to the North Lake Tahoe Fire Protection District, the Incline Village Crystal Bay Visitors Bureau and the Tahoe Douglas Fire Protection District.

8.2. The Firm as IVGID Attorney will not represent any client, including but not limited to a municipality, county, local

or state government agency or other person or entity in matters which the Firm determines to be directly adverse to IVGID nor will the Firm represent IVGID in matters which the Firm determines to be directly adverse to the interests of any other client of the Firm.

8.3. The rules regulating the Nevada Bar provide that common representation of multiple parties is permissible where the clients are generally aligned in interest, even though there is some difference in interest among them.

8.3.1. It is also possible that during the course of the Firm's representation of IVGID's interests IVGID may become involved in transactions or disputes with other clients of the Firm in which IVGID's interests are or become adverse to the interests of one or more of the Firm's other clients, whether present or future. If such a conflict between IVGID interests and those of another of the Firm's clients, whether present or future, were to arise, the Firm will promptly notify IVGID of that circumstance.

8.3.2. The Firm reserves the right, on account of any such conflicts of interest, to withdraw from the matter in question and will assist IVGID in securing interim or alternative counsel for the matter in conflict if a conflict waiver is not otherwise permissible under the rules regulating the Nevada Bar.

8.3.3. The Firm represents local governments and private sector clients throughout Nevada and California, and wishes to be able to consider the representation of other local governments or public sector clients who may have interests that are potentially adverse to IVGID's, but with respect to matters that are unrelated in any way to our representation of IVGID. The ethics rules

that govern the Firm permit it to accept such multiple representations, assuming certain requirements are met. Accordingly, during the term of this engagement, the Firm agrees that it will not accept representation of another client to pursue interests that are directly adverse to IVGID's interests unless and until the Firm makes full disclosure to IVGID of all the relevant facts, circumstances, and implications of the Firm's undertaking the two representations, and confirm to IVGID in good faith that the Firm has done so and that the following criteria are met:

8.3.3.1. there is no substantial relationship between any matter in which the Firm is representing or has represented IVGID and the matter for the other client;

8.3.3.2. any confidential information that the Firm has received from IVGID will not be available to the attorneys and other Firm personnel involved in the representation of the other client;

8.3.3.3. our effective representation of IVGID and the discharge of the Firm's professional responsibilities to IVGID will not be prejudiced by representation of the other client; and

8.3.3.4. the other client has also consented in writing based on our full disclosure of the relevant facts, circumstances, and implications of the Firm's undertaking the two representations. If the foregoing conditions are satisfied, IVGID agrees that the Firm may undertake the potentially adverse representation and that all conflict issues will be deemed to have been resolved or waived by IVGID.

## **9. CONTRACT ADMINISTRATION.**

- 9.1. In accordance with IVGID Resolution 1480, Policy and Procedure 105, the IVGID Board has designated its General Manager to provide policy direction and instructions to the Firm in the administration of its duties hereunder, approving and authorizing work orders, the provision of Additional Legal Services and all other matters necessary to administer this Retainer Agreement on behalf of IVGID.
- 9.2. The Firm shall be entitled to reasonably rely upon such direction received from IVGID General Manager.
- 9.3. The Firm will alert IVGID General Manager if any project or service it is working on or which it is asked to work on may exceed the budget for the year, or for that project or service and will not proceed to provide services for which it seeks compensation until sufficient funding to pay the Firm for its services for the project or service is approved; unless specifically directed by IVGID General Manager to proceed.

## **10. GENERAL.**

- 10.1. This Retainer Agreement shall be governed by and construed in accordance with the laws of the State of Nevada. In the event of any dispute arising out of or relating to this Retainer Agreement, the parties agree to waive trial by jury and agree that venue shall lie in Washoe County, Nevada. In the case of litigation of such disputes, the prevailing party shall be entitled to recover attorney fees and costs from the other party. This Retainer Agreement may be amended only by a written agreement entered into by the parties.

- 10.2. IVGID General Manager will evaluate the performance of the legal services of the Firm on at least an annual basis

and shall review such evaluation with the Firm. The evaluation shall include input from each member of the Board of Trustees as solicited by the IVGID General Manager, Senior Staff and the General Manager, and shall be completed by June 30 of each year. More frequent and informal performance evaluations and feedback may be undertaken by IVGID at any time.

10.3. This Retainer Agreement or the appointment of Firm as IVGID Attorney to IVGID may be terminated with or without cause by IVGID General Manager or upon the hiring of a full-time attorney directly employed by IVGID as IVGID Attorney or by Firm at any time upon one hundred and eighty (180) days written notice.

10.3.1. In the event that IVGID desires to terminate Firm's services with notice of a lesser period, IVGID will provide Firm with a severance payment, equal to the agreed upon monthly retainer, for each month of said specified one hundred and eighty (180) day notice period for which notice is shortened and is not given.

10.3.2. Additionally, even if IVGID does elect to seek and obtain either IVGID Attorney Legal Services or Additional IVGID Attorney Legal Services, or both, from an attorney or firm other than Firm, this contract may stay in force and effect so that the Firm is available to provide to IVGID, on an as needed and agreed to basis, supplemental legal services as provided for herein.

10.3.3. In the event of termination, the Firm shall assume responsibility for completion of and shall be compensated for all representation requested prior to the notice of termination and through any prompt transition to termination agreed upon by the parties at the hourly rates agreed upon for Additional IVGID Attorney Legal

Services for any remaining IVGID Attorney Legal Services or Additional IVGID Attorney Legal Services and at the rates agreed upon for Special Counsel Legal Services for those services. Provided however, IVGID may terminate this Retainer Agreement for breach by the Firm with such notice as may be reasonable under the circumstances.

10.3.4. In the event of termination, with or without cause, the Firm shall be compensated in accordance herewith for approved time and expenses expended prior to the date of termination. This Retainer Agreement may be executed in multiple counterparts.

10.3.5. All original files (their contents), records and documents are the property of IVGID and not of the Firm or its Attorneys and upon termination shall be returned to or delivered to IVGID as IVGID General Manager reasonably directs at the expense of the Firm. The Firm may retain copies as necessary to comply with the Rules of the Nevada Bar.

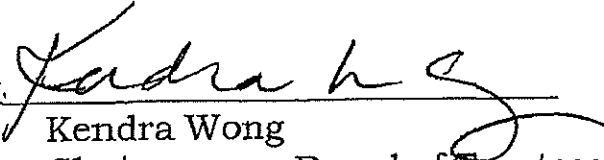
10.4. This Retainer Agreement shall be effective as of the date first written above and is the entire agreement between the parties concerning the subject matter hereof.

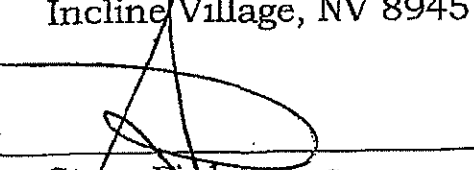
## **11. APPOINTMENT.**

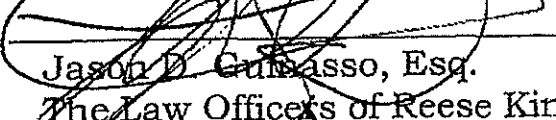
11.1. The IVGID General Manager hereby recommends appointment of Firm as IVGID Attorney for IVGID with confirmation of said recommendation by IVGID Board; this Retainer Agreement shall hereafter provide the terms and conditions for such engagement. Such appointment may be changed or altered from time-to-time by recommendation of IVGID General Manager and confirmation of said recommendation by IVGID Board. As

required, IVGID General Manager is directed and authorized to use and consult with Firm for IVGID Attorney Legal Services and Additional IVGID Attorney Legal Services as described herein. Additionally, and as required, IVGID General Manager is directed and authorized to use and consult with Firm for Special Counsel Legal Services at a cost not to exceed the delegated purchasing limit of IVGID Manager on any single project or matter. For projects or matters above the then current delegated purchasing limit of IVGID General Manager, Special Counsel Legal Services shall be provided by work order or as otherwise authorized and approved by action of IVGID Board.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

By   
Kendra Wong  
Chairwoman, Board of Trustees  
Incline Village General Improvement  
893 Southwood Blvd.  
Incline Village, NV 89451-9425

By   
Steve Pinkerton  
General Manager  
Incline Village General Improvement District  
893 Southwood Blvd.  
Incline Village, NV 89451-9425

By   
Jason D. Guinasso, Esq.  
The Law Offices of Reese Kintz Guinasso, L.L.C.  
936 Southwood Blvd., Suite 301  
Incline Village, Nevada 89451-9425

**EXHIBIT A**  
**EXEMPLARY FORM OF LEGAL SERVICES WORK ORDER No.**

[insert an identifying work order number here]

TO:

FROM: IVGID General Manager

1. Scope of Services: [describe whether Additional IVGID Attorney services (general counsel) or Special Counsel Services] are to be performed based upon the description attached hereto (A-1) in a proposal by IVGID Attorney that describes the scope of services, the time for performance, the hourly rates if not as described in the Retainer and which estimates the cost of performance.
2. Compensation: Hourly rates and reimbursement for actual costs as provided in IVGID Attorney Retainer Agreement between the parties, or this Work Order. If different rates from those included in the Retainer agreement are not included in the Scope of Services, then the Retainer rates apply.
3. Work Order Budget: The initial funding authorization or budget appropriation for this Work Order shall not exceed the amount of [amount] or the estimate incorporated in the Scope of Services attached to this Work Order whichever is lower. However, it is understood that the direction of IVGID will control the work effort and additional budget appropriations may be required and authorized.
4. Use of Necessary Consultants: Pursuant to the Retainer Agreement, IVGID confirms, directs, and authorizes the use of (1) [name of consultant] and (2) [name of consultant] and the scope of services and method(s) of compensation necessary to support the provision of legal services and continued assistance to IVGID with the [describe work effort and provide attachment].]

Authorized by: \_\_\_\_\_

Accepted by: \_\_\_\_\_

Title: IVGID General Manager

Date: \_\_\_\_\_

[Attach Scope of Service A-1]

A-1 Attachment to Work Order No. [insert work order number here]

ADAM PAUL LAXALT  
*Attorney General*



NICHOLAS A. TRUTANICH  
*Chief of Staff*

KETAN D. BHIRUD  
*General Counsel*

STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

555 E. Washington Ave. Suite 3900  
Las Vegas, Nevada 89101

November 30, 2017

**via Certified Mail 7009 2250 0001 8859 8693**

Incline Village General Improvement District – Board of Trustees  
Kendra Wong, Chair  
895 Southwood Boulevard  
Incline Village, NV 89451

Dear Chair Wong:

The Office of the Attorney General (OAG) has the authority to investigate and prosecute alleged violations of the Open Meeting Law (OML). NRS 241.039. The OAG is in receipt of a Complaint alleging OML violations by the Incline Village General Improvement District Board of Trustees (Board).

The OAG requests that the Board prepare a response and/or defense to the allegations contained in the attached Complaint. Please include any records or documentation that support the Board's response including, but not limited to, audio and/or video recordings of the Board's November 15, 2017 meeting in question. Please also provide a copy of the agenda and support materials from the September 20, 2017 meeting.

Due to the time limitations set forth in NRS 241, the OAG asks that you respond on or before December 15, 2017.

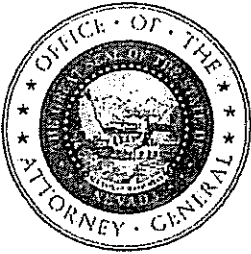
Should you have any questions, please contact Althea Zayas at (702) 486-3224 or via email at [azayas@ag.nv.gov](mailto:azayas@ag.nv.gov).

Sincerely,

ADAM PAUL LAXALT  
Attorney General

By: /s/ Caroline Bateman  
Chief Deputy Attorney General  
Boards and Open Government Division

CB:arz  
Enclosure



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 N. Carson St.  
Carson City, NV 89701  
Phone: 775-684-1100  
Fax: 775-684-1108

www.ag.nv.gov

*For official use only*

Received by: \_\_\_\_\_

Date Received: \_\_\_\_\_

Complaint Type: \_\_\_\_\_

Referred to: ☐ BCP ☐ GI  
☐ IFU ☐ OML ☐ MFU  
☐ MFCU ☐ PIU ☐ WCFU  
(Stamp here)

## OPEN MEETING LAW COMPLAINT FORM

The information you report on this form may be used to help us investigate alleged violations of Nevada's Open Meeting Law – NRS chapter 241. When completed, mail or fax your form and supporting documents (if any) to the office location listed above. Upon receipt, your complaint will be reviewed by a member of our staff. The length of this process can vary depending on the circumstances and information you provide with your complaint. The Attorney General's Office may contact you if additional information is needed. If you have a claim against the State of Nevada, complete the Tort Claim Form found on our website.

INSTRUCTIONS: Please TYPE/PRINT your complaint in dark ink. You must write LEGIBLY. All fields MUST be completed.

### SECTION 1.

#### COMPLAINANT INFORMATION

Salutation: ☒ Mr. ☐ Mrs. ☐ Ms. ☐ Miss

Your Name: Wright Frank

Your Address: P.O. Box 186 Crystal Bay NV 89402

Your Phone Number: 775-253-4919 818-601-1996

Email: alpineport55@gmail.com

Call me between 8am-5pm at: ☒ Home ☒ Cell ☒ Work

Age: ☐ Under 18 ☐ 18-29 ☐ 30-39 ☐ 40-49 ☐ 50-59 ☒ 60 or older

#### ALLEGED OPEN MEETING LAW VIOLATION IS AGAINST

Name of Public Body: Incline Village General Improvement Dist  
(i.e., specific board, commission, agency, or person(s) etc.)

Date of meeting where alleged violation occurred (mm/dd/yyyy): \_\_\_\_\_

Over  
✓  
P. 2 on Back

## SECTION 2.

Please detail the specific violations against the board, commission, or agency or person listed in Section 1. Include the who, what, where, when, and why of your complaint. You may use additional sheets if necessary. Remember the Open Meeting Law applies only to public bodies (see NRS 241.015 for definition) and only to members of public bodies.

My complaint is:

Incline Village General Improvement District held  
An unannounced, closed, secret meeting of 5 board members  
Outside the view of the public.

See attached page

## SECTION 3.

Sign and date this form. The Attorney General's Office cannot process any unsigned, incomplete, or illegible complaints.

I understand that the Attorney General is not my private attorney, but rather represents the public. I am filing this complaint to notify the Attorney General's Office of alleged violations of the Open Meeting law by public bodies or individual members of a public body. I understand that the information contained in this complaint may be used by the Attorney General to investigate the public body named in my complaint. I understand that the Attorney General has statutory authority to require public bodies to comply with the Open Meeting Law. In order to resolve your complaint, we may send a copy of this form to the public body about whom you are complaining. I authorize the Attorney General's Office to send my complaint and supporting documents to the public body identified in this complaint.

Signature

Print Name

11-27-17  
Date (mm/dd/yyyy)

#### SECTION 4. (Optional)

The following section is optional and is intended to help our office better serve Nevada consumers. Please check the categories that apply to you.

Gender: ☒ Male ☐ Female

Have you previously filed a complaint with our office?: ☐ Yes ☐ No

If yes, enter in the approximate filing date (mm/dd/yyyy) of your original complaint: \_\_\_\_\_

**I am (mark all that apply):**

- ☐ Income below federal poverty guideline
- ☐ Disaster victim
- ☐ Person with disability
- ☐ Medicaid recipient
- ☐ Military service member
- ☐ Veteran
- ☐ Immediate family of service member/veteran

**Ethnic Identification:**

- ☒ White/Caucasian
- ☐ Black/African American
- ☐ Hispanic/Latino
- ☐ Native American/Alaskan Native
- ☐ Asian/Pacific Islander
- ☐ Other: Senior Citizen

**Primary Language:**

- ☐ English
- ☐ Spanish
- ☐ Other: \_\_\_\_\_

May we provide your name and telephone number to the media in the event of an inquiry about this matter?

☒ Yes ☐ No

How did you hear about our complaint form (please choose only one):

- ☐ Called/visited Las Vegas AG Office ☐ Called/visited Carson City Office ☐ Called/visited Reno Office
- ☐ Attended AG Presentation/Event ☐ Another Nevada State Agency/Elected Official ☐ Search Engine ☒ AG Website
- ☐ AG Social Media Sites ☐ Media: Newspaper/Radio/TV ☐ Other

Return original form to:

Office of the Attorney General – ATTN: OML Coordinator  
100 N. Carson St.  
Carson City, NV 89701  
Fax: 775-684-1108

(Faxed copies will be accepted followed by original)

Office of the Attorney General  
State of Nevada  
OML Division

November 27, 2017

Dear MS Bateman,

I am again filing an open meeting law violation against Incline Village General Improvement district for holding a secret meeting after the November 15, 2017 regular board meeting.

Five Trustees were present, along with the General Manager, and legal counsel.

The regular meeting was adjourned, then the Trustees were told they had a closed session. But an interesting event took place, there was a power outage. The room went totally dark. But the Chairman continued with the unannounced and not publicly posted meeting. Because of the dark room, one resident who attended the regular board meeting was still present but unnoticed and sitting in the room. She was able to witness two Trustees reject the special meeting as a violation of the OML and proceeded to walk out of the room. (Matt Dent and Tim Calicrate) The resident sitting in the room was approached and ask to leave the room by the Finance Director Gerry Eick, and he escorted her to the door, and closed the door after she left the room.

This meeting had something to do with voting on litigation against a firm conducting surveys, and opinion polls. This vote should have been open to the public and discussed in an open meeting. Regardless of the content, the meeting under Nevada Law should have been posted. It is ironic that during the regular board meeting the board agenized and discussed the previous OML violations committed by the board. But not surprisingly the Legal Counsel Jason Guinasso and board Chair Kendra Wong both stated that the Attorney Generals opinions were contrite and just her opinions. Chairman Wong Stated: "it all depends on who is in the AG's office making the decisions, as to the validity of the opinions". These Statements can be viewed on the livestream. My initial opinion is that the legal Counsel and Board chair didn't view the OML opinions as a valid assessment of the behavior of the IVGID board. It sounded to me as if Chairman Wong, and Jason Guinasso , could give a "whoopy" as to what the AG has to say, or that the AG's opinions are baseless.

Resident who was present and in room during meeting:

Margaret Martini 775-722-4152

Margaretmartini@liveintahoe.com

Thank You,

Frank Wright

775-253-4915

alpinesportss@gmail.com

# **CORRESPONDENCE REGARDING RESPONSE**

**Subject:** Re: OML Complaint 13897-257  
**Date:** Monday, December 18, 2017 at 6:43:15 PM Pacific Standard Time  
**From:** Jason D. Guinasso <jguinasso@hutchlegal.com>  
**To:** Caroline Bateman <CBateman@ag.nv.gov>  
**CC:** wong\_trustee@ivgid.org <wong\_trustee@ivgid.org>, Pinkerton, Steve J. <steve\_pinkerton@ivgid.org>, Devon Reese <DReese@reeseekintz.com>  
**Attachments:** Cronin v Eighth Judicial Dist Court In and For County of Clark.pdf, Palmer v Pioneer Inn Associates Ltd.pdf, Rule 42 Communication With Person Represented by Counsel.pdf, Rule 113 Organization as Client.pdf, Log of Complaints including Ethics Commission.revised.pdf

Ms. Bateman -

Thank you for your thoughtful response. Again, let me be clear, I have no desire to obstruct your investigation. Additionally, my hope would be that we can engage in a constructive working relationship as you investigate and I respond to the Open Meeting Law (OML) Complaints that are filed against IVGID from time to time.

My clients and I have nothing to hide and have done nothing wrong. The OML complaint you are investigating is meritless on its face because it alleges that attempting to conduct a litigation non-meeting was somehow a violation of the OML. However, NRS 241.015(3)(b)(2) is clear when it excludes from the definition of "Meeting," for purposes of the OML, a meeting of a quorum of a public body "[t]o receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both." As the OAG Open Meeting Law Manual points out in Section 3.05, "A meeting held for the purpose of having an attorney-client discussion of potential and existing litigation pursuant to NRS 241.015(3)(b)(2) is not a meeting for purposes of the Open Meeting Law and does not have to be open to the public. In fact, no agenda is required to be posted and no notice is required to be provided to any member of the public."

I trust your interview of the Trustees will confirm that the subject matter of the complaint filed by Mr. Wright, who was not even at the meeting at the time he alleges there was a "closed session," is a litigation non-meeting that occurred on November 15, 2017, where ongoing litigation with the District was going to be discussed, not a closed session or secret meeting.

However, I again strongly object to you directly communicating with my clients. Please note that I also spoke with Nevada Bar Counsel this afternoon. Bar Counsel agreed that section 4.2 of the Nevada Rules of Professional Conduct apply and also noted that Rule 1.13 may also apply. Bar Counsel also directed my attention to a few Nevada cases that you may want to consider, including:

Cronin v. Eighth Judicial Dist. Court, In and For County of Clark, 105 Nev. 635 (1989)(in a case disqualifying an attorney, the court cited with approval Nevada SCR 182 and the comment to Model Rule 4.2 from which the Nevada Rule was adopted, stating in pertinent part, "*In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, 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.*")

Palmer v. Pioneer Inn Associates, Ltd., 118 Nev. 943 (2002)(explaining that SCR 182's protections, "undisputedly extend to organizational parties, who must act through their directors and employees" and the elaborating on the purpose of the rule, stating, "*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.*")

Importantly, the Court in Palmer adopted the managing-speaking test which prohibits the interviewing of corporate employees who have the authority to bind the corporation. In this regard, under the test, a person considered a "party" covered by this rule when that person has managing authority sufficient to give them the right to speak for, and bind, the corporation. Trustees of the Incline General Improvement District both speak for and can bind the District. Certainly, some of that authority has been delegated to professional staff and no one Board member can act alone to bind the District; however, Trustees are elected to manage and supervise the operations of the District and they are expected to conduct their meetings in accordance with the Nevada Open Meeting Law.

It appears clear from the Rules and the cases interpreting the rules that your office is prohibited from communicating with and/or interviewing Trustees of the District without directing such communication through me as legal counsel for the District and/or obtaining my consent, after consultation with my clients, to conduct an interview.

Attached hereto are the referenced Nevada Rules of Professional Conduct as well as the cases that I just cited for your review and consideration.

Please note that I was specifically retained by the Board to represent the Board in all matters pertaining to OML Complaints. This portion of the scope of my representation is specifically outlined in my retainer agreement. I was hired by and serve the District at the pleasure of the Board and my day to day duties are directed by the General Manager.

The fact that you sent the notice of the OML complaint to me, and not to each individual Trustee, for an appropriate response is specific acknowledgement of the fact that I represent the Board, the District and the individual Trustees with respect to OML complaints filed against the District.

I am confident that you can appreciate the position I am taking on this issue because the OAG has taken a similar position with respect to the Boards and Board members it represents. In this regard, I sit on a State Board where I have benefited from the advice and counsel of attorneys from your office who represent me and the Board I sit on as a member. I would respectfully submit to you that the position you have outlined in your email to me contradicts the position your attorneys have taken when attorneys adverse to the Board attempt to communicate with Board members. Specifically, the OAG has taken the position that opposing counsel could not communicate directly with Members. Accordingly, all communication are directed through the DAG assigned to represent our Board. Thereafter, the DAG forwards the communication to the Board members.

I will close with two final points.

First, I am willing and able to set up a day and time for you to interview each of the Trustees. The point in my last two communications with you is to ask that you cease and desist from communicating directly with my clients. Such communication is prohibited under our Nevada Rules of Professional Conduct.

If you would have asked me to set up the telephone interviews when I reached out to you for an extension of time to prepare my response last Thursday afternoon instead of writing to my clients directly, I could have made sure that all the interviews were completed by the end of business today. Instead, we have both wasted time speaking with Bar Counsel and writing long emails to address a problem that could have been resolved with a phone call from you to me and/or a short email asking me to set up the interviews. Now, as you know, Trustee Morris is now out of the country for the holidays and will not return until the first of the year. I am told that the rest of the Trustees can make themselves available this week. Please advise if you would like me to schedule days and times for you to interview the Trustees who remain in town this week.

In my formal response to the OML Complaint later this week, I will also provide written statements from at least three of the five Trustees.

Finally, I am very concerned that you are unwittingly being used to further the political agenda of a few vocal and hostile members of the Incline Village and Crystal Bay Community. These people now see you, rightly or wrongly, as

an ally to their attacks on the District, individual Trustees and me. The attacks of these disgruntled community members take many forms, including but not limited to abusive and disruptive conduct during public comment, frivolous litigation in District Court (in one case the Court awarded the District nearly a quarter of a million dollars in fees and costs), the filing of OML complaints, complaints to the County Commission, complaints to the State Board of Taxation, complaints to Legislature and the Governor, etc.

To illustrate this point, I have attached for your review a log of the OML complaints filed against the District since 2011. Please note that I did not start representing the District until January of 2015. Nevertheless, whether it was my predecessor, my law partner or me, Frank Wright and Aaron Katz have been relentless in their attacks having filed 17 (Wright 10, Katz 7) of the 22 OML complaints against the District during that time period.

Additionally, please click into this drop box link:

[https://www.dropbox.com/s/b6rshzk663mtjvf/Wright\\_Frank\\_Highlights.mp4?dl=0](https://www.dropbox.com/s/b6rshzk663mtjvf/Wright_Frank_Highlights.mp4?dl=0)

This link will open up a video depicting excerpts of what Frank Wright has said and how he has acted at meetings over the last eighteen months. You will see a person who engages in slander, personal attacks and every form of insult and vitriol. Please pay particularly attention to the last several minutes where he cites out of context conversations he has allegedly had with the OAG and/or the written decision you wrote finding no violation of the OML, but admonishing legal counsel regarding compliance with the spirit of the OML. Clearly, Mr. Wright is using OML complaints as a means to advance his political objectives and to harass the District.

Again, rather than trade emails, perhaps we can speak by phone and work out what you need to complete your investigation, including interviews with Trustees or Staff of IVGID. In any event, IVGID's formal response to the OML complaint filed by Mr. Wright will be submitted to you by the agreed upon deadline at the end of the week.

Very truly yours -

Jason

On Dec 18, 2017, at 11:26 AM, Caroline Bateman <[CBateman@ag.nv.gov](mailto:CBateman@ag.nv.gov)> wrote:

Mr. Guinasso:

Unless the IVGID Trustees have retained you individually, you are counsel to the District, not to its individual members. Rule 1.13 of the Nevada Rules of Professional Conduct (NRPC) clarifies that an attorney employed or retained by an organization represents *the organization*, not the individual members of the organization. I copied you on the emails to the trustees in the event that you also represent one or more of the trustees in their individual capacities. At least one of the Trustees have requested to speak to me without your attendance. Moreover, your representation of IVGID does not include the potential penalties outlined in NRS 241.040 against the trustees in their individual capacities. Therefore, Rule 4.2 does not apply to my communications to the trustees. However, moving forward, I will direct all communications to you, until advised otherwise.

Please note that if you are representing each of the trustees as individual clients, in addition to the District as a body, that based on the allegations in the Complaint under File No. 13897-257, there may be a conflict of interest between clients pursuant to NRPC Rule 1.7. Notably, your representation of trustees Callicrate and Dent may be directly adverse to your representation of the other trustees. Additionally, there may be a conflict to your own interests as you are a

subject to the present investigation.

I have consulted with the State Bar's Office of Bar Counsel regarding Rules 1.13, 4.2, and 1.7 for clarification.

Regarding any attorney-client communications that you may have had with the IVGID trustees, I can assure you that I will not violate the confidentiality of such communications or seek information related to those communications unless they pertain to any stated purposed behind the November 15, 2017 meeting.

In terms of the investigation timeline, although I was willing to accommodate your request for an extension of time to file the Board's response, I could not postpone my internal deadlines based on the extension of time. As you are aware, the OML provides a very limited time period in which the Attorney General's Office (OAG) can take action on a potential violation. As such, I will be proceeding with my investigation, including issuing subpoenas, pending the receipt of your response. However, please rest assure that I will not issue my final opinion until I receive, review, and fully investigate your response.

Thank you for your cooperation as the OAG completes its investigation.

Sincerely,

Caroline

**Caroline Bateman**  
Chief Deputy Attorney General  
Boards and Open Government Division  
Nevada Office of the Attorney General  
T: 702.486.0621  
F: 702.486.3773  
[CBateman@ag.nv.gov](mailto:CBateman@ag.nv.gov)

<image001.png>

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**From:** Jason D. Guinasso [<mailto:jguinasso@hutchlegal.com>]  
**Sent:** Friday, December 15, 2017 11:12 AM  
**To:** Caroline Bateman <[CBateman@ag.nv.gov](mailto:CBateman@ag.nv.gov)>  
**Cc:** [wong\\_trustee@ivgid.org](mailto:wong_trustee@ivgid.org); Pinkerton, Steve J. <[steve\\_pinkerton@ivgid.org](mailto:steve_pinkerton@ivgid.org)>; Devon Reese <[DReese@reesekintz.com](mailto:DReese@reesekintz.com)>  
**Subject:** Re: OML Complaint 13897-257

Ms. Bateman -

I have reviewed the emails you sent after regular business hours at 5:42 p.m. on December 15, 2017, to each of the Incline Village General Improvement District's (IVGID) Trustees

regarding your investigation into the Open Meeting Law complaint under File No. 13897-257.

First, I object to you directly communicating with my clients regarding your investigation. Our Nevada Rules of Professional Conduct specifically prohibit such communication. In this regard, Rule 4.2 provides:

*Communication With Person Represented By Counsel.*

*In representing a client, a lawyer shall not communicate about the subject of the representation with a 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 court order.*

You know I am legal counsel for IVGID. In your emails, you seek an opportunity to further communicate with my clients concerning an investigation that would lead to legal findings and conclusions. Under these circumstances, you should not have communicated with any of them directly without my express permission.

Please be advised that IVGID will cooperate fully with your investigation. Nothing in this communication should be construed as inhibiting or impeding your investigation. In this regard, I am willing and able to set up times for you to interview the Trustees.

If you would like to communicate with my clients about your investigation, please be sure any further communication comes through me.

Second, the subject matter of the complaint filed by Mr. Wright is a litigation non-meeting that occurred on November 15, 2017, not a closed meeting, where ongoing litigation with the District was going to be discussed. As you know, communication between an attorney and the attorney's client in a litigation non-meeting is privileged and confidential.

Therefore, I respectfully submit that any questions you may have about what was discussed between me and my clients is prohibited and protected by the attorney client privilege.

However, that being said, please be advised that, after we began the non-meeting, we were not able to proceed with the non-meeting for three reasons: (1) We could not communicate effectively in the wake of a power outage; (2) a dispute about whether one Trustee could participate in the non-meeting could not be resolved; and (3) tensions between a few of the Trustees resulted in uncivil discourse. Therefore, I concluded the non-meeting and offered to meet with each Trustee individually. My recollection is that the litigation non-meeting did not last more than ten minutes. Subsequent to this meeting, I did meet with four of the five Trustees individually by phone or in person.

Finally, the fact that you are attempting to schedule a meeting with my clients to conduct an interview regarding your investigation before I have completed the District response is highly unusual. Based on my experience with your office when we have responded to OML complaints, the OAG has always requested additional information and/or an opportunity to interview my clients after a response has been filed to the OML complaint. I am not sure why you believe interviews are necessary before our response to the complaint has been submitted. If you will recall, I asked for an extension of time to file my response to this complaint. Part of the reason for the request, was so that I could obtain statements

from Trustees and District Staff who were present at the litigation non-meeting to confirm that it was in fact a non-meeting and not a meeting or a closed session.

In closing, I respectfully request that any further communications with my clients come through me. Further, I request that you and I schedule a telephone conference to discuss your investigation and how you would like to proceed.

I look forward to working with you to as you commence your investigation. I am confident you will find that there has not been a violation of the Open Meeting Law.

On Dec 14, 2017, at 5:42 PM, Caroline Bateman <[CBateman@ag.nv.gov](mailto:CBateman@ag.nv.gov)> wrote:

Good evening, Chairwoman Wong:

The Office of the Attorney General (OAG) is currently investigating an Open Meeting Law complaint under File No. 13897-257. A copy of the complaint is attached for your review.

As a part of my investigation, I would like to conduct a telephonic interview with you regarding the Board's meeting on November 15, 2017. You are welcome to have counsel attend the interview with you. If possible, I would like the interview to take place before December 28th. If you could provide me with a convenient date and time, I would appreciate it.

Please let me know if you have any questions or concerns.

Thank you,

Caroline

**Caroline Bateman**  
Chief Deputy Attorney General  
Boards and Open Government Division  
Nevada Office of the Attorney General  
T: 702.486.0621  
F: 702.486.3773  
[CBateman@ag.nv.gov](mailto:CBateman@ag.nv.gov)

<image001.png>

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<OML (257) - Complaint.pdf>

Jason D. Guinasso  
Partner



HUTCHISON & STEFFEN, PLLC  
(775) 853-8746  
[hutchlegal.com](http://hutchlegal.com)

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 KeyCite Red Flag - Severe Negative Treatment  
Disapproved of by Nevada Yellow Cab Corp. v. Eighth Judicial Dist.  
Court ex rel. County of Clark, Nev., March 8, 2007

105 Nev. 635

Supreme Court of Nevada.

Joseph I. CRONIN, Esq., Petitioner,

v.

The EIGHTH JUDICIAL DISTRICT COURT of  
the State of Nevada, In and For the COUNTY  
OF CLARK, and The Honorable Joseph S.  
Pavlikowski, District Judge, Respondents,  
and

Ralph Engelstad, Betty A. Engelstad, individually  
and d/b/a Imperial Palace Hotel and Casino,  
Las Vegas, Nevada; The Imperial Palace, Inc.,  
a Nevada Corporation, Real Parties in Interest.

No. 19890.

|

Nov. 2, 1989.

Plaintiffs' attorney petitioned for writ of certiorari or mandamus to challenge order disqualifying him from representing plaintiffs. The Supreme Court, Rose, J., held that attorney's ex parte communications with management level employees of defendant permitted district court to disqualify him.

Petition denied.

Springer, J., filed dissenting opinion.

#### West Headnotes (8)

##### [1] Mandamus

###### ⇒ Specific Acts

Mandamus is properly used to challenge orders disqualifying attorneys from representing parties in actions that are pending in district courts.

2 Cases that cite this headnote

##### [2] Attorney and Client

##### ⇒ Disqualification in General

Attorney's ex parte communications with defendant's management level employees, director of corporate security, its director of human resources, and its chief of uniformed security about plaintiffs' case permitted district court to disqualify attorney from representing plaintiffs, even though attorney did not intentionally violate prohibition against ex parte communications and presented substantial, credible evidence that defendant was systematically destroying relevant evidence. Sup.Ct.Rules, Rule 182; ABA Rules of Prof.Conduct, Rules 4.2, 4.2 comment.

8 Cases that cite this headnote

##### [3] Attorney and Client

###### ⇒ Disqualification in General

##### Attorney and Client

###### ⇒ Power and Duty to Control

District courts have responsibility for controlling conduct of attorneys practicing before them and have broad discretion in determining whether disqualification is required in particular case.

6 Cases that cite this headnote

##### [4] Appeal and Error

###### ⇒ Allowance of Remedy and Matters of Procedure in General

District court's determination whether to disqualify attorney will not be disturbed absent showing of abuse of discretion.

2 Cases that cite this headnote

##### [5] Attorney and Client

###### ⇒ Disqualification in General

In situation involving disqualification of attorney, any doubt should be resolved in favor of disqualification.

7 Cases that cite this headnote

[6] Attorney and Client

⇌ Disqualification in General

District court deciding whether to disqualify attorney must balance prejudices that will inure to parties as result of its decision.

5 Cases that cite this headnote

[7] Attorney and Client

⇌ Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent

Neither attorney's negligence nor his ignorance of prohibition against ex parte communications with opposing party can justify violation of rule. Sup.Ct.Rules, Rule 182.

2 Cases that cite this headnote

[8] Attorney and Client

⇌ Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent

Neither client's interest nor opponent's conduct justify communication with adverse party that lawyer knows is represented by counsel. Sup.Ct.Rules, Rule 182.

4 Cases that cite this headnote

Attorneys and Law Firms

**\*\*1150 \*635** Joseph I. Cronin, Minden, for petitioner.

Bell & Young and Craig Hoppe, Barker, Gillock, Koning, Brown & Earley, Las Vegas, for real parties in interest.

**\*636** OPINION<sup>1</sup>

ROSE, Justice:

On December 14, 1984, James and Joan Scanlon were paying guests at the Imperial **\*\*1151** Palace Hotel in Las Vegas. While they were in their room on that date, a man dressed in a "hotel service type" uniform appeared in the room, robbed the couple and raped Joan

Scanlon. Consequently, in 1986, the Scanlons commenced an action against the Imperial Palace Hotel and its owners (collectively referred to as Imperial Palace). On August 9, 1988, the Scanlons, represented by petitioner (Cronin), filed in the district court an amended complaint seeking damages from the Imperial Palace for, among other things, negligently failing to provide adequate security for the guests of the hotel.

Prior to the filing of the amended complaint, on either July 19, 1988, or July 21, 1988, Mick Shindell, the director of corporate security at the Imperial Palace, received a call from the hotel PBX that attorney Cronin was waiting to see him and to serve some papers on him.<sup>2</sup> Cronin was escorted to Shindell's office and served the papers. It appeared to Shindell that Cronin knew he was the director of corporate security, and Shindell assumed that **\*637** his position in the hotel management structure was the reason that he was being served with the papers. Shindell conversed with Cronin for about 10 minutes, and then walked Cronin to the front of the hotel. Before Cronin left the premises, Shindell told him that "somebody may call him," regarding the *Scanlon* case.

Shindell called Cronin's office in Minden the following day. Shindell told Cronin that he wanted to meet with him personally to discuss the *Scanlon* case. Cronin was receptive to the idea, and a meeting was scheduled. Shindell then mentioned his plan to meet with Cronin to two other Imperial Palace employees, Shirley Albury and Ed Steffen.

Cronin met with Shindell the following Wednesday at a restaurant in Las Vegas. The meeting lasted about one and one-half hours at that location, and continued for an additional hour at Shindell's home. During the meeting, Shindell told Cronin that he was ordered to destroy any documents in his files which indicated that the security department at the Imperial Palace needed improvement. Shindell also gave Cronin several documents from the Imperial Palace during that meeting. Shortly afterwards, Shindell told Shirley Albury and Ed Steffen of his meeting with Cronin. Shindell telephoned Cronin the following day, and informed him that Shirley Albury wanted to talk to him.

Shirley Albury, the director of human resources at the Imperial Palace, first met Cronin at Shindell's house in mid or late July of 1988, within one week of her conversation

with Shindell. Albury informed Cronin of her job title and duties at the Imperial Palace, and specifically asked Cronin if she could talk to him. According to Albury, Cronin did nothing to discourage her from talking to him. During her initial three-hour meeting with Cronin, Albury told Cronin that she was ordered to purge, and did purge from several personnel files, information that might harm the Imperial Palace in the *Scanlon* case. According to Albury, the files were purged during the hotel's process of responding to a request for production of documents.<sup>3</sup>

Albury met with Cronin on four subsequent occasions to discuss various aspects of the *Scanlon* case. Albury gave Cronin a 4-5 inch stack of Imperial Palace documents during the course of those meetings. The final meeting occurred at her home on September 8, 1988, when Cronin stopped by her home, unannounced, while she, Shindell and others were present. During the two hours that Cronin was in Albury's house, Cronin showed Albury and Shindell the draft of a document that he intended to file in court.

**\*\*1152 \*638** Ed Steffen, the chief of uniformed security at the Imperial Palace, met with Cronin on two occasions. The first meeting was arranged by Shindell at Steffen's request. Although Steffen met with Cronin at Shindell's home for about three hours, the two talked about the *Scanlon* case for only about fifteen minutes. The second meeting with Cronin was not scheduled; Steffen was simply present at Shindell's house when Cronin stopped by. They discussed the *Scanlon* case, and Cronin questioned Steffen regarding certain Imperial Palace documents. Steffen admitted giving documents to Shindell, and assumed that the documents were forwarded to Cronin.

On September 18, 1988, the Scanlons filed in the district court a motion to strike the answer of the Imperial Palace to the amended complaint, and for the entry of judgment in favor of the Scanlons due to the alleged willful destruction of evidence by the Imperial Palace. That motion alleged that the Imperial Palace had ordered hotel employees to purge embarrassing material from the hotel's files. In particular, the motion alleged that all security incident reports and crime reports predating January 1, 1983, were destroyed. The motion also alleged that personnel files concerning security employees were purged of negative evaluations and other material that might reflect negatively on the security in the hotel.

The Imperial Palace opposed the motion to strike, and categorically denied destroying any documents. Further, it labelled as untrue deposition testimony which indicated that documents were destroyed, and stated that other deposition testimony indicated that copies of the allegedly destroyed documents were still in existence.

In September of 1988, during the pendency of the motion to strike, the Imperial Palace filed in the district court a motion for a temporary restraining order and for a preliminary injunction. In that motion, the Imperial Palace asserted that Cronin acted improperly when he communicated with its employees without the consent of its attorneys. *See* SCR 182 (a lawyer is prohibited from communicating with an adverse party who is represented by an attorney without the consent of the attorney). Accordingly, the Imperial Palace asked that Cronin be enjoined from engaging in any further *ex parte* communications with its employees. The district court issued a restraining order on September 20, 1988. Cronin opposed the motion for a preliminary injunction.

On January 9, 1989, during the pendency of the request for an injunction, the Imperial Palace filed in the district court a motion to disqualify Cronin from representing the Scanlons in the action below. The Imperial Palace asserted that, prior to his meetings **\*639** with Cronin, Shindell had been present in meetings where settlement strategies in the *Scanlon* case were discussed. Therefore, the Imperial Palace argued that it was irreparably harmed by Cronin's unauthorized interviews because of the "actual and the potential disclosure of attorney-client and work product disclosures" that occurred during those interviews.

[1] Cronin opposed the motion to disqualify arguing, among other things, that considerations of public policy excused his actions. On March 14, 1989, after a hearing, the district court entered an order granting the motion to disqualify. This proceeding followed.<sup>4</sup>

[2] Cronin contends in his petition that the district court incorrectly determined that he communicated with an adverse party when he spoke with the employees of the Imperial Palace regarding the *Scanlon* case. Cronin asserts that the employees contacted him initially, and that he did not speak with employees of the Imperial Palace who had managing authority for the hotel. Further, he states that none of the employees he interviewed had any authority to

control the litigation below. Therefore, Cronin contends that the district court erred in determining that he violated SCR 182 when he interviewed the employees of the Imperial Palace. See \*\*1153 *Wright by Wright v. Group Health Hosp.*, 103 Wash.2d 192, 691 P.2d 564, 570 (1984) (the provisions of DR 7-104(A)(1), the predecessor to SCR 182, did not prohibit a lawyer representing the plaintiff in a medical malpractice action from interviewing, *ex parte*, "nonspeaking/managing agent employees" of the defendant).

The Imperial Palace correctly notes, however, that the *Wright* case interpreted DR 7-104(A)(1). That rule was superseded in Nevada by SCR 182, which 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.

The Nevada Rules of Professional Conduct are taken from the ABA Model Rules of Professional Conduct. See SCR 150(1). Although the preamble and comments to the Model Rules were \*640 not adopted by this court, those materials "may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the preamble or comments." SCR 150(2). SCR 182 was taken verbatim from Model Rule 4.2. Comment 2 to the Model Rule 4.2 provides in pertinent part:

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, 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. If an agent or employee 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....

[3] [4] [5] Initially, we note that the district courts have the responsibility for controlling the conduct of attorneys practicing before them. See *Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85 (9th Cir.1983); *Boyd v. Second Judicial District Court*, 51 Nev. 264, 274 P. 7 (1929) (district court has inherent power to enjoin an attorney from representing conflicting interests). Further, the district courts have broad discretion in determining whether disqualification is required in a particular case, and that determination will not be disturbed by this court absent a showing of abuse of that discretion. See *Schloetter v. Railco of Indiana, Inc.*, 546 F.2d 706 (7th Cir.1976). See also *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982) (disqualification of prosecutor's office rests in the discretion of the district court); *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981) (mandamus will issue to control an arbitrary or capricious exercise of discretion by a district court). Finally, in a situation involving the disqualification of an attorney, any doubt should be resolved in favor of disqualification. See *Hull v. Celanese Corporation*, 513 F.2d 568 (2nd Cir.1975).

[6] Although the district court has wide latitude in determining whether to disqualify counsel from participating in a given case, its discretion in such cases is not unlimited. The district court must balance the prejudices that will inure to the parties as a result of its decision. See \*641 *Shelton v. Hess*, 599 F.Supp. 905 (S.D. Tex.1984). Therefore, to prevail on a motion to disqualify opposing counsel for an alleged ethical violation, the moving party must first establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." *Id.* at 909. Moving counsel must also establish that "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.*

[7] In the present case, it is undisputed that Cronin had repeated and pervasive *ex parte* communications with management level employees of the Imperial Palace to discuss the *Scanlon* case. He met with Mick Shindell twice, Shirley Albury five times and Ed Steffen twice. He

received \*\*1154 extensive records from the three. Cronin admitted in a deposition that he knew that Mick Shindell was the executive in charge of the security department at the Imperial Palace prior to his first meeting with Shindell. Cronin also admitted in an affidavit filed below that he had interviewed three current *management level employees* of the Imperial Palace. Those documents belie Cronin's statement in this proceeding that he communicated only with "non-speaking/managing" employees of the Imperial Palace. It is clear that Cronin knew that each of the persons he interviewed was a high-ranking employee of the Imperial Palace. Although we do not believe that Cronin intentionally violated SCR 182 when he met with the employees of the Imperial Palace, neither Cronin's negligence nor his ignorance of the rule can justify his conduct. See *In re Lewelling*, 296 Or. 702, 678 P.2d 1229, 1230 (1984). Thus, the district court was clearly confronted with "at least a reasonable possibility" that a specifically identifiable impropriety did occur.

[8] The second determination, whether the likelihood of public suspicion or obloquy outweighs the social interests that would be served by Cronin's continued participation in the *Scanlon* case, is not as easy as the first. This court has previously characterized as reprehensible the conduct of an attorney who engages in *ex parte* communications with an opposing party who is represented by counsel. See *Holiday Inn v. Barnett*, 103 Nev. 60, 732 P.2d 1376 (1987). As outlined at the beginning of this opinion, however, Cronin was presented with substantial amounts of credible evidence that the Imperial Palace was systematically destroying evidence relevant to the *Scanlon* case. Indeed, if the allegations of wrongdoing by the Imperial Palace contain even a scintilla of truth, public suspicion and obloquy could be fostered by Cronin's \*642 disqualification. We note, however, that by failing to disclose evidence of the Imperial Palace's alleged fraud to the district court at the earliest opportunity, Cronin may have become an unwitting participant in that alleged fraud. In this regard, we note that upon receiving evidence of the alleged fraud, Cronin apparently increased his demand for settlement from \$750,000 to \$5,000,000. Although this increased settlement demand was undoubtedly prompted by the allegedly improper acts of the Imperial Palace, and was almost certainly in the best interests of the Scanlons, neither a client's interests nor an opponent's conduct justify communication with an adverse party that a lawyer

knows is represented by counsel. See *Lewelling*, 678 P.2d at 1230; *In re Schwabe*, 242 Or. 169, 408 P.2d 922 (1965).

The disqualification of Cronin may impose a substantial economic penalty on him as the dissent in this case points out. And the real parties in interest may have committed acts more serious than those of Cronin. However, it is our obligation to review and act upon Cronin's conduct, a member of the Nevada Bar. We are not now called upon to determine the violations of the real parties in interest or the penalties that should be imposed upon them. That is initially left to other public officials and courts. Although Cronin was faced with a difficult situation and conflicting loyalties, we cannot overlook conduct that clearly violates the letter and spirit of SCR 182.

Finally, we note that Cronin does not dispute the allegation of the Imperial Palace that prior to meeting Cronin, Mick Shindell was present at meetings with attorneys for the Imperial Palace at which the *Scanlon* case was discussed. This circumstance created a great potential for disclosure of privileged material during Shindell's meetings with Cronin, and thus constitutes another factor that the district court could have used in determining that the nature and extent of Cronin's conduct outweighed the Scanlons' interest in being represented by counsel of their choice. See *Shelton*, 599 F.Supp. at 909.

In light of the above, we conclude that the district court properly balanced the interests of the parties below when it resolved the motion to disqualify Cronin from representing the Scanlons. The circumstances of this case reveal no abuse of \*\*1155 discretion by the district court; therefore, we are constrained to deny this petition.<sup>5</sup>

YOUNG, C.J., and STEFFEN and MOWBRAY, JJ., concur.

SPRINGER, Justice, dissenting:

It is alarming to me that Imperial Palace, guilty of the kinds of wrongdoing attributed to its management, should be successful in having Mr. Cronin eliminated as counsel in this case. Imperial Palace claims no prejudice that might result from Mr. Cronin's continuing as counsel in this case and paradoxically must rest its case on the collateral claim of Mr. Cronin's wickedness in violating our rule, SCR 182.

The severance of the attorney-client relationship, the denial to Mr. Cronin's clients of the right to counsel of their choosing, does not seem to me to bear any relationship to what, by all accounts, was at worst an unintentional violation of our rule. Aside from the interests of the clients in this case, it does not seem to me that summary removal of counsel for the plaintiffs in this case is an appropriate penalty to be imposed upon the attorney given even the worst possible interpretation of his conduct in this case.<sup>1</sup>

Rather than sever the attorney-client relationship in this case, thereby punishing both client and attorney, I would simply refer the matter to the Bar. If Mr. Cronin is claimed to be guilty of an unintentional rule violation, it should be dealt with in the same manner as other ethical and disciplinary matters are dealt with. To allow the trial court's order to stand is, to my mind, to permit a great and regrettable injustice to both Mr. Cronin and his clients.

#### All Citations

105 Nev. 635, 781 P.2d 1150, 58 USLW 2326

#### Footnotes

- 1 Although the petition names both Joseph Cronin and Louis Wiener, Jr., as petitioners, the petition is signed only by Cronin. Further, only Cronin submitted an affidavit supporting the petition, and the petition contains arguments that are relevant only to Cronin. Therefore, it does not appear that Louis Wiener is challenging the order of disqualification in this case.
- 2 The facts regarding the employees of the Imperial Palace are taken from the depositions of those employees.
- 3 There is no indication in the record that the attorneys representing the Imperial Palace had any knowledge of the alleged destruction of documents.
- 4 Mandamus is used properly to challenge orders disqualifying attorneys from representing parties in actions that are pending in the district courts. *See Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982).
- 5 Cause appearing, we deny the parties' respective request for sanctions.
- 1 We cannot be blind to the fact that removal of Mr. Cronin as counsel in this case will very probably result in a loss to him of fees in the hundreds of thousands of dollars. Such a "fine" is painful indeed as a consequence for Mr. Cronin's receiving information about Imperial Palace's attempt to corrupt the judicial system. Also, it does not seem fair to me that Mr. Cronin should be punished at the behest of Imperial Palace. The wrongdoer goes unpunished; the discoverer of the wrongdoing is punished by being removed from the case. This is not right.

KeyCite Yellow Flag - Negative Treatment

Declined to Follow by William D. and Barbara S. Totherow, v. Rivier COLLEGE, William J. Farrell and Therese Larochelle., N.H.Super., February 20, 2007

118 Nev. 943

Supreme Court of Nevada.

Dena PALMER, Appellant,

v.

PIONEER INN ASSOCIATES, LTD.,

a Limited Partnership, Respondent.

No. 38213.

Dec. 27, 2002.

The United States Court of Appeals for the Ninth Circuit certified questions concerning application of Nevada Supreme Court rule governing lawyer's ex parte contacts. The Supreme Court held that: (1) managing-speaking agent test applies to rule providing that in representing a client, a lawyer shall not communicate about subject of representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has consent of other lawyer or is authorized by law to do so, and under that test, a party is an employee who has legal authority to bind the corporation in a legal evidentiary sense, and (2) Nevada does not follow portion of ABA Model Rule's former comment providing that contact is barred with an organization's employee whose admission may constitute an admission on part of organization, nor does it follow the 2002 version of the comment which provides that in representing a client, a lawyer shall not communicate about subject of representation with a person lawyer knows to be represented by another lawyer in the matter, unless lawyer has consent of other lawyer or is authorized to do so by law or a court order.

Questions answered.

West Headnotes (2)

[1] Attorney and Client

↔ Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent

Managing-speaking agent test applies to rule providing that in representing a client, a lawyer shall not communicate about subject of representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has consent of other lawyer or is authorized by law to do so, and under that test, a party is an employee who has legal authority to bind the corporation in a legal evidentiary sense. Sup.Ct. Rules, Rule 182.

6 Cases that cite this headnote

[2] Attorney and Client

↔ Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent

Nevada does not follow portion of ABA Model Rule's former comment providing that contact is barred with an organization's employee whose admission may constitute an admission on part of organization, nor does it follow the 2002 version of the comment which provides that in representing a client, a lawyer shall not communicate about subject of representation with a person lawyer knows to be represented by another lawyer in the matter, unless lawyer has consent of other lawyer or is authorized to do so by law or a court order. ABA Rules of Prof.Conduct, Rules 4.2, 4.2 comment.

7 Cases that cite this headnote

Attorneys and Law Firms

**\*\*1238 \*944** Hardy & Associates and Ian E. Silverberg, Reno, for Appellant.

McDonald Carano Wilson LLP and Miranda Du and Pat Lundvall, Reno, for Respondent.

Bradley Drendel & Jeanney, Reno, for Amicus Curiae Nevada Trial Lawyers Association.

Rob W. Bare, Bar Counsel, and Felicia Galati, Assistant Bar Counsel, Las Vegas, for Amicus Curiae State Bar of Nevada.

BEFORE THE COURT EN BANC.

*OPINION*

PER CURIAM:

In this matter, we are asked by the United States Court of Appeals for the Ninth Circuit to 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"?

\*945 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?

These questions concern the interpretation of SCR 182, which is based on ABA Model Rule 4.2, as applied to employees of organizational clients. The rule is commonly referred to as the "no-contact" rule.

We note that while the matter has been pending, the comment language at issue was deleted in the 2002 amendments to the ABA Model Rules, and new language was adopted. As we never formally adopted the comments to the Model Rules, we may interpret SCR 182 according to the new version of the comment, the old version of the comment, or some other basis.

We also note that a literal reading of the Ninth Circuit's questions could yield a result that offers no guidance: if we decide that the language at issue does not apply, then the answer to the first question is "no" and the second question need not be addressed, but the Ninth Circuit would still not know what test Nevada uses in applying SCR 182 to an employee of a represented organization. We therefore rephrase the first question as follows, and delete the second question:

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

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.<sup>1</sup> 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.

*FACTS*

Dena Palmer applied for work as a waitress at the Pioneer Inn Hotel and Casino in Reno, Nevada. She allegedly also discussed possible positions as a deli food server and a restaurant supervisor with Greg Zamora, Food and Beverage Director. According to Palmer, Zamora told her that she would be hired as a restaurant supervisor, but when she arrived for work, Zamora told her she had been rejected by one of Pioneer's general managers because she was pregnant. Palmer allegedly told him that she believed this was unlawful discrimination, but Zamora confirmed that she would not be hired.

\*\*1239 Pioneer asserted that Palmer was never hired because she did not complete Pioneer's standard hiring process. This process \*946 begins with an initial screening by Pioneer's human resources department, followed by an interview with the department for which the applicant wishes to work. At that interview, an offer of employment may be extended, conditional upon completion of the hiring process. Upon acceptance of a conditional offer, the applicant is required to attend an orientation, complete new hire forms, and obtain a police work card. Pioneer argued that since Palmer completed only the first two steps, initial screening and an interview with the appropriate department, she was never actually hired. Palmer essentially maintained that she attempted to complete the hiring process, but was prevented from doing so when Zamora revoked the offer of employment and told her she would not be hired because of her pregnancy.

Pioneer also asserted that only a deli food server position was available at the time Palmer applied, and that Palmer rejected this position because the required hours conflicted with her other job as a waitress at the Olive Garden. According to Pioneer, as no positions for a waitress or restaurant supervisor were available at the time, Palmer

could not have been offered these positions. In contrast, Palmer claimed that Zamora gave her the restaurant menus and a pamphlet on supervisor responsibilities to study, and told her the dress code requirements for the position. Palmer alleged that in reliance on the offer of this better position, she quit her job at the Olive Garden and purchased clothing suitable for a supervisor. Additionally, Palmer argued that she would never have quit her job at the Olive Garden if she did not believe that she had been hired.

When Palmer was not hired, she retained counsel almost immediately. Palmer's attorney informed Pioneer by letter dated February 27, 1997, that he intended to file an action on her behalf. In early March 1997, Palmer lodged a complaint with the Equal Employment Opportunity Commission.<sup>2</sup> Pioneer retained counsel to represent it in the matter, and counsel sent a letter to Palmer's attorney informing him of the representation.

In April 1997, George Kapetanakis, then an executive sous chef at Pioneer,<sup>3</sup> contacted Palmer's attorney. Following their discussion, Kapetanakis signed an affidavit, prepared by Palmer's attorney, which stated: "during the month of January, 1997, I witness[ed] Mr. Greg Zamora interviewing ... [Palmer] .... I inquired of Mr. Zamora whether he intended to hire [her] at \*947 which time Mr. Zamora told me that he had already hired her." Kapetanakis's job was a supervisory position that involved running Pioneer's main kitchen.

Palmer received a right-to-sue letter from the EEOC. On July 9, 1997, Palmer filed an action in federal court alleging pregnancy and gender discrimination under Title VII,<sup>4</sup> and pendent state law claims.

Pioneer moved to disqualify Palmer's counsel under SCR 182 based on his ex parte contact with Kapetanakis.<sup>5</sup> The federal magistrate judge found that Kapetanakis 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 Kapetanakis 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 \*\*1240 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 Kapetanakis constituted ex parte contact with a represented party under SCR 182, and sanctioned counsel by excluding the affidavit obtained by the contact, precluding Kapetanakis 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.

Before trial, the district court dismissed two of Palmer's claims on summary judgment. At trial, the jury found for Pioneer. Palmer appealed the summary judgment, certain rulings at trial, and the order imposing sanctions for her counsel's ex parte contact. The questions certified by the Ninth Circuit concern only the sanctions order.

## DISCUSSION

*SCR 182, Model Rule 4.2 and Comments*  
SCR 182 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the \*948 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.

This rule was adopted verbatim from the original version of ABA Model Rule 4.2,<sup>6</sup> which in turn was copied almost verbatim from Model Code of Professional Responsibility DR 7-104(A)(1). Before that, the same general concept was contained in Canon 9 of the ABA Canons of Professional Ethics.<sup>7</sup>

The primary purpose of the rule is to protect the attorney-client relationship from intrusion by opposing counsel.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

The rule's protections undisputedly extend to organizational parties, who must act through their directors and employees.<sup>11</sup> 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.<sup>12</sup> A conflict between policies arises, however. On one hand, \*949 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 \*\*1241 prompt and cost-effective resolution of disputes. Moreover, a narrower definition affords a reasonable opportunity for pre-litigation investigation under Rule 11.<sup>13</sup> The question then becomes how to apply the rule in a way that best balances the competing policies.

The ABA has attempted to provide some guidance in this area in its comments to the Model Rules. SCR 150(2) explains that the comments to the ABA Model Rules were not adopted by this court, but can be consulted for guidance. In our two published opinions on SCR 182, we have considered the comments, as they stood at the time of those decisions, in interpreting the rule. In *Cronin v. District Court*,<sup>14</sup> we followed a portion of the 1983 comments providing that communications with managerial-level employees of a corporate client are included within SCR 182's scope. In the other case, *In re Discipline of Schaefer*,<sup>15</sup> we rejected a portion of the 1995 comments that suggested that a lawyer representing himself in a matter was not included within the rule's scope.

The pertinent part of the 1995 comments to Model Rule 4.2, in effect at the time of the federal district court's decision and the Ninth Circuit's certification order,<sup>16</sup> is as follows, with emphasis added:

In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, 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*. If an agent or employee of the organization is represented in the matter by \*950 his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f) [concerning propriety of a lawyer's request that a person other than a client refrain from voluntarily giving information].<sup>17</sup>

As noted above, the emphasized portion of the comment is at issue in this case.

The comments to Model Rule 4.2 were substantially revised in the 2002 amendments to the Model Rules,<sup>18</sup> well after the conduct in this case took place, and after the certification order was entered. While they were available in draft form at the time of the certification order and when the parties filed their briefs with this court, they had not yet been approved. As amended, the pertinent comment reads:

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's \*\*1242 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. Compare Rule 3.4(f). 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 Rule 4.4.<sup>19</sup>

The amendment deletes the portion of the earlier comment at issue in this matter. According to the Ethics 2000 Commission's Report overview, the amendments to Rule 4.2 were part of the commission's effort to "[c]larify] existing rules and Comment to \*951 provide better guidance and explanation to lawyers," specifically, to "clarify] application of the Rule to organizational clients."<sup>20</sup> In particular, the Reporter's Explanation of

Changes states that the "admission" clause was deleted because it had been misapplied to situations when an employee's statement could be admissible against the organizational employer, when the clause was only ever intended to encompass those few jurisdictions with a law of evidence providing that statements by certain employees of an organization were not only admissible against the organization but could not thereafter be controverted by the organization.<sup>21</sup>

The recent amendments, and the reasons for them, are relevant to our consideration of the issue, particularly because the former comment was never binding on Nevada lawyers, and so retroactivity is not a concern.

*Various tests for determining which employees are included within the rule's scope*

Many competing policies must be considered when deciding how to interpret the no-contact rule as applied to organizational clients: protecting the attorney-client relationship from interference; protecting represented parties from overreaching by opposing lawyers; protecting against the inadvertent disclosure of privileged information; balancing on one hand an organization's need to act through agents and employees, and protecting those employees from overreaching and the organization from the inadvertent disclosure of privileged information, and on the other hand the lack of any such protection afforded an individual, whose friends, relatives, acquaintances and co-workers may generally all be contacted freely; permitting more equitable and affordable access to information pertinent to a legal dispute; promoting the court system's efficiency by allowing investigation before litigation and informal information-gathering during litigation; permitting a plaintiff's attorney sufficient opportunity to adequately investigate a claim before filing a complaint in accordance with Rule 11; and enhancing the court's truth-finding role by permitting contact with potential witnesses in a manner that allows them to speak freely.

Various courts have formulated several tests for determining who is encompassed within the no-contact rule. Most of the tests attempt to interpret the former comment to Model Rule 4.2. At one extreme is the "blanket" test, which prohibits contact with \*952 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.

*Blanket test*

The blanket test prohibits all contact, and appears to have been adopted in very few published decisions. A federal district court \*\*1243 has concluded that a blanket rule prohibiting all contact sets a bright-line rule that is easily followed and enforced.<sup>22</sup> That court also opined that depositions were more "reliable and ethically sound" than informal interviews.<sup>23</sup>

The primary advantage of this test is its clarity: no employees of a represented organization may be contacted by opposing counsel. It also offers the most protection for the organization. The cost of these advantages, however, is very high. A complete prohibition on informal ex parte contact greatly limits, if not eliminates, counsel's opportunity to properly investigate a potential claim before a complaint is filed, as required by Rule 11. Also, the rules of civil procedure, especially the discovery rules, are designed to afford parties broad access to information, and informal interviews are a cost-effective way of gathering facts, as opposed to more expensive depositions, which preserve facts.<sup>24</sup>

*Party-opponent admission test*

The test based on the hearsay rule appears to encompass almost as many employees as the blanket test, and is the test adopted by the federal district court in this matter. This test encompasses within the ethical rule any employee whose statement might be admissible as a party-opponent admission under FRE 801(d)(2)(D) \*953 and its state counterparts.<sup>25</sup> According to the evidence rule, an employee's statement is not hearsay, and thus is freely admissible against the employer, if it concerns a matter within the scope of the employee's employment, and is made during the employee's period of employment.

The courts adopting the party-opponent admission test have concluded that the former comment's reference to "admissions" was clearly meant to incorporate the rules

of evidence governing admissions. In *Brown v. St. Joseph County*,<sup>26</sup> an Indiana federal district court quoted a leading treatise in reasoning that the evidentiary test gave “a sound practical cast to the rule: those who can hurt or bind the organization *with respect to the matter at hand* are off limits except for formal discovery or except with the consent of the entity's lawyer.”

This test's primary advantage is that it protects the organization from potentially harmful admissions made by its employees to opposing counsel, without the organization's counsel's presence. The organization's interest in this regard is particularly strong because such admissions are generally recognized as a very persuasive form of evidence.<sup>27</sup>

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.<sup>28</sup> Thus, the party-opponent admission test can effectively serve as a blanket test, thus frustrating the \*\*1244 search for truth.<sup>29</sup> 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 persons 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 \*954 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.<sup>30</sup>

In addition, a party admission may be challenged through impeachment of the witness, by presenting contradictory evidence, or by explaining the admission.<sup>31</sup> Accordingly, it is not clear that this test properly balances the competing policies.

#### *Managing-speaking agent test*

The managing-speaking agent test appears to have evolved before the tests discussed above, in response to a United States Supreme Court case discussing the scope of the attorney-client privilege as applied to an organizational client. In *Upjohn Co. v. United States*,<sup>32</sup>

the Court held that the privilege was not restricted to an organization's “control group.” Rather, the Court held that mid- and even low-level employees could have information necessary to defend against a potential claim, and thus communications between such employees and counsel were protected by the privilege. While acknowledging that the *Upjohn* opinion did not expressly apply to the no-contact rule, the courts adopting the managing-speaking agent test in *Upjohn*'s wake reasoned that the protection afforded an organization under the no-contact rule should be commensurate with that afforded by the attorney-client privilege.<sup>33</sup> At the same time, relying on dicta in *Upjohn* stating that confidential communications, not facts, were entitled to protection, these courts determined that the rule should not be expanded so broadly that informal investigation through ex parte interviews was restricted too severely.

Some courts adopting this test have done so without reference to Model Rule 4.2's former comment, which includes three categories of employees: those with managerial responsibility, those whose acts or omissions could be imputed to the organization to establish liability, or those whose statements could constitute an admission by the organization.<sup>34</sup> Other courts applied the former \*955 comment in determining that the test best interpreted one or more categories of employees listed in the former comment.<sup>35</sup> No court appears to have adopted precisely the same statement of the test.<sup>36</sup>

In all of its formulations, the managing-speaking agent test restricts contact with \*\*1245 those employees who have “speaking” authority for the organization, that is, those with legal authority to bind the organization.<sup>37</sup> Which employees have “speaking” authority is determined on a case-by-case basis according to the particular employee's position and duties and the jurisdiction's agency and evidence law. This is the essence of the test as set forth in the most-cited case adopting it, the Washington Supreme Court's opinion in *Wright by Wright v. Group Health Hospital*.<sup>38</sup>

Beyond this common factor, the test has sometimes included other employees. For example, in jurisdictions with an evidence rule similar to FRE 801(d)(2)(D), courts have applied the evidence rule in determining which employees “speak” for the organization, thus yielding a

result similar to the party-opponent admission test.<sup>39</sup> Also, some courts have used this test to interpret one or another of the categories in Model Rule 4.2's former comment, but have also referred to the other categories, including those employees whose conduct could be imputed to the organization.<sup>40</sup>

Courts adopting this test have concluded that it best balances the competing policies of protecting the organizational client from overreaching by opposing counsel through direct contact with its employees and agents, and the adverse attorney's need for information in the organization's exclusive possession that \*956 may be too expensive or impractical to obtain through formal discovery.<sup>41</sup> They also note, relying on *Upjohn*'s dicta, that the rule's purpose is not to protect an organization from the revelation of prejudicial facts, thus disapproving of the party-opponent admission test.<sup>42</sup>

The test's primary drawback is its lack of predictability.<sup>43</sup> As noted above, several of the courts purporting to adopt the test have stated and applied it very differently. In addition, because the test relies on a particular jurisdiction's agency and evidence law, its application may yield divergent results.

#### *Control group test*

The final test that interprets the former comment to the rule is the "control group" test. This test encompasses only those top management level employees who have responsibility for making final decisions, and those employees whose advisory roles to top management indicate that a decision would not normally be made without those employees' advice or opinion.<sup>44</sup>

This test serves the policies of preserving the availability of witnesses, reducing discovery costs by permitting informal interviews of a broad range of employees, and affording the best opportunity for pre-litigation fact investigation.<sup>45</sup> The test has become disfavored following the *Upjohn* decision, because the control group test is narrower than the attorney-client privilege rule approved in that case.<sup>46</sup> Also, it lacks predictability because it is not always clear which employees fall within the "control group."<sup>47</sup>

#### *Case-by-case balancing test*

A few courts have adopted a case-by-case balancing approach.<sup>48</sup> Under this test, the \*\*1246 particular facts of the case must be examined to determine what informal contacts may be appropriate in light \*957 of the parties' specific needs. Factors to be considered are the claims asserted, the employee's position and duties, the employer's interests in protecting itself, and the alternatives available to the party seeking an informal interview.<sup>49</sup> Results under the test have varied.<sup>50</sup> The pertinent cases do not address counsel's difficulty in applying this test before an actual interview, to determine whether the interview might later be found to be a rule violation. Rather, it appears that this test has been applied only when a lawyer seeks prospective guidance from a court, and it has not been used in making an after-the-fact determination of whether an attorney has violated the ethical rule. While this approach offers a fact-specific application of the no-contact rule and has some practical appeal in those situations when counsel seeks court guidance before making an ex parte contact, it is not at all predictable and does not have a sound analytical basis. Also, ex parte contact is most useful and necessary in the pre-litigation stage, when counsel is complying with his or her Rule 11 obligation to investigate whether a valid claim exists. A test that requires court intervention before contact may be made does not further the purpose of permitting an adequate investigation under Rule 11. Accordingly, while the balancing approach may be useful in certain limited situations, it cannot feasibly be applied as a universal standard for interpreting SCR 182.

#### *New York test*

Finally, an additional test has been formulated by the New York Court of Appeals in *Niesig v. Team I*,<sup>51</sup> which explicitly rejects reliance on the former comment. The test is often referred to as the "alter ego" test.<sup>52</sup> The court rejected the blanket test as too broad, and the control group test as too narrow. It also expressed dissatisfaction with the existing intermediate tests, because they were too uncertain in application. Instead, while acknowledging that any non-blanket rule engendered some uncertainty, the court formulated its own test:

\*958 The test that best balances the competing interests, and incorporates the most desirable elements

of the other approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally.<sup>53</sup>

In particular, the court noted that its test "would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued."<sup>54</sup> This test has since been adopted by several courts.<sup>55</sup>

One advantage of the New York test is that it balances the protection afforded to the organization with the need for informal investigation, although it may go too far in protecting the organization by including \*\*1247 those employees whose conduct may be imputed to the organization. Its disadvantage, as admitted by the *Niesig* court, is that any non-blanket rule has an element of unpredictability, and so in close situations it may be difficult to determine whether a particular employee is within its scope. In particular, as with the managing-speaking agent test on which the New York test is based, it may be difficult to determine which employees have sufficient authority to "bind" the organization.

#### *The arguments of the parties and amici*

Palmer first argues that the "admission" clause of the former comment should not be followed.<sup>56</sup> She contends that it is difficult for an attorney who is attempting to comply with Rule 11 while not violating ethical rules. According to Palmer, the former comment thus chills proper representation of clients against an organizational opponent. Instead, Palmer advocates the New York test. In the event this court decides to apply the "admission" clause, Palmer argues that the party-opponent admission test relied upon by the district court is too broad, and that the managing-speaking agent test should be adopted.

\*959 Pioneer argues that this court should apply the "admission" clause, and relies on this court's citation to the comments generally in *Cronin* and *Schaefer*.<sup>57</sup> Pioneer further argues that the federal district court appropriately applied the party-opponent admission test, because any other test renders the "admission" clause superfluous.

Pioneer also relies on the *Restatement (Third) of the Law Governing Lawyers*, which provides that attorneys are prohibited from contacting employees whose statements "would have the effect of binding the organization with respect to proof of the matter."<sup>58</sup> Pioneer argues that this language is the same as applying the party-opponent admission test to interpret the "admission" clause.

The *Restatement* is considerably narrower, however, because the party-opponent admission test does not bind the organization to the admission—while the admission is admissible, the organization is free to offer evidence contradicting the admission and/or impeaching the party who made it.<sup>59</sup> The comments to the *Restatement* itself indicate that it in no way advocates a standard based on the party-opponent admission rule, but rather that its proposed rule follows the New York approach.<sup>60</sup>

In its amicus brief, the Nevada Trial Lawyers Association argues that the "admission" clause should not be followed, and cites heavily to the Ethics 2000 Commission's reports and drafts.<sup>61</sup> In the event this court decides to follow the "admission" clause, the NTLA essentially repeats Palmer's arguments that a managing-speaking agent test should be adopted rather than the party-opponent admission test.

Finally, in its amicus brief, the state bar recommends that the "admission" clause be rejected, and that we adopt the test crafted by the New York Court of Appeals. The state bar strongly argues that the policies behind the rule are best served by the New York test. In a final paragraph, the state bar recommends that in the event this court applies the "admission" clause, the managing-speaking agent test would be preferable.

#### \*960 Analysis

[1] We conclude that the managing-speaking agent test, as set forth below, best \*\*1248 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.

In addition, we conclude 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 SCR 182 is to protect the attorney-client relationship, not to protect an organization from the discovery of adverse facts.<sup>62</sup> 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.<sup>63</sup>

[2] In embracing the managing-speaking agent test, we do not adopt Model Rule 4.2's former comment. Also, we do not follow the 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*.<sup>64</sup>

[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.

\*961 ... [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.<sup>65</sup>

A lawyer must have a reasonable opportunity to conduct an investigation under Rule 11. This investigation would be unduly hampered by an over-inclusive test, such as the party-opponent admission test adopted by the federal district court in this case. Such a test essentially bars contact with all employees, because any employee could make a statement concerning a matter within the scope of his or her employment, which would then be admissible under FRE 801(d)(2)(D) \*\*1249 or a state equivalent. A lawyer contacting the employee could not know in advance whether the employee might make such a statement, and so would be forced to choose between foregoing information that could be useful and even necessary to a proper investigation, or risking sanctions for an SCR 182 violation. Without doubt, an organization is entitled to the protections afforded by SCR 182, but just as for individuals, this protection is not unlimited. The managing-speaking agent test most appropriately balances these competing interests, and so it is the test we adopt.

## CONCLUSION

Nevada does not follow the portion of the ABA Model Rule 4.2's former comment providing that contact is barred with an organization's employee whose admission may constitute an admission on the part of the organization, nor does it follow the 2002 version of the comment. Rather, in interpreting SCR 182 as \*962 applied to employees of an organization, we adopt the managing-speaking agent test. This test preserves the protection afforded by SCR 182 to an organization, while permitting sufficient flexibility to conduct an adequate pre-litigation investigation.

## All Citations

118 Nev. 943, 59 P.3d 1237, 90 Fair Empl.Prac.Cas.  
(BNA) 1042

## Footnotes

- 1 *Palmer v. Pioneer Hotel & Casino*, 19 F.Supp.2d 1157 (D.Nev.1998).
- 2 The record does not reflect that Palmer filed a complaint with the Nevada Equal Rights Commission—only the EEOC complaint is mentioned.
- 3 It appears from the record that Kapetanakis later left Pioneer's employ, under hostile circumstances apparently arising out of a workers' compensation dispute.
- 4 42 U.S.C. §§ 2000e to 2000e-17 (1994).
- 5 Palmer's counsel also contacted one other current employee and two former employees. Jennifer Walker, the current employee, was a telephone operator, a non-supervisory position. The two former employees were Sarah Favero, an "on-call" banquet worker, and Donna Lorenz, who was Food and Beverage Director before Zamora. The federal district court found that counsel's contact with these individuals was not a violation of SCR 182, and so they are not discussed in the Ninth Circuit's order or this opinion.
- 6 See SCR 150(1); Model Rules of Prof'l Conduct R. 4.2 (1983). Model Rule 4.2 was amended in 1995 to replace the word "party" with "person," to clarify that communications occurring before litigation but after a dispute had arisen were encompassed within the rule. See Model Rules of Prof'l Conduct R. 4.2 (1995); 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 38.2 (2001). Nevada has never adopted this amendment. Model Rule 4.2 and its comments were amended in early 2002, when the ABA House of Delegates approved proposed changes to the rules based on the Ethics 2000 Commission report. See *Ethics 2000 Commission*, at [http://abanet.org/cpr/e2k-report\\_home.html](http://abanet.org/cpr/e2k-report_home.html) (2002). The 2002 amendments are discussed *infra*.
- 7 Felicia Ruth Reid, Comment, *Ethical Limitations on Investigating Employment Discrimination Claims: The Prohibition on Ex Parte Contact with a Defendant's Employees*, 24 U.C. Davis L.Rev. 1243, 1249 (1991).
- 8 *Id.* at 1250; see also ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* 398 (4th ed.1999); Thomas W. Biggar, *Discovery and Ethics: Dilemma in Interviewing Corporate Employees*, 1 Nev. L.Rev. 1, 5 (1998).
- 9 Reid, *supra* note 7, at 1250-51.
- 10 Biggar, *supra* note 8, at 4-5.
- 11 *Id.* at 2.
- 12 *Id.* at 1-2.
- 13 Reid, *supra* note 7, at 1252-53; Biggar, *supra* note 8, at 6; see also NRCP 11; Fed.R.Civ.P. 11. Inasmuch as the duties imposed by the Nevada and federal versions of the rule are substantially the same, any reference in this opinion to "Rule 11" means both the federal and Nevada rules.
- 14 105 Nev. 635, 781 P.2d 1150 (1989).
- 15 117 Nev. 496, 25 P.3d 191, as modified 31 P.3d 365 (2001), cert. denied, 534 U.S. 1131, 122 S.Ct. 1072, 151 L.Ed.2d 974 (2002).
- 16 In the original 1983 version, this text was designated as Comment 2. In the 1995 revisions, it was renumbered Comment 4, but the text did not change. In the 2002 revisions, it was renumbered Comment 7, and the text was changed substantially, as discussed in this opinion.
- 17 Model Rules of Prof'l Conduct R. 4.2 cmt. 4 (1995).
- 18 Model Rule 4.2 received only a minor change, to clarify that a court may permit or prohibit contact in a particular case. The change reflects actual practice under the former version of the rule. As amended in 2002, Model Rule 4.2 reads as follows (the added language is emphasized):

In representing a client, a lawyer shall not communicate about the subject of the representation with a 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.

Model Rules of Prof'l Conduct R. 4.2 (2002).
- 19 *Id.* R. 4.2 cmt. 7.

- 20 Charlotte Stretch, *Overview of Ethics 2000 Commission and Report*, at [http://abanet.org/cpr/e2k-ov\\_mar02.doc](http://abanet.org/cpr/e2k-ov_mar02.doc) (2002).
- 21 See *Model Rule 4.2—Reporter's Explanation of Changes*, at <http://www.abanet.org/cpr/rule42memo.html> (Feb. 21, 2000).
- 22 *Public Serv. Elec. & Gas v. Associated Elec. & Gas*, 745 F.Supp. 1037 (D.N.J.1990), *superseded by rule amendment as recognized in Klier v. Sordoni Skanska Const. Co.*, 337 N.J.Super. 76, 766 A.2d 761 (2001) (incorporating control group test in text of rule as amended); see also Louis A. Stahl, *Ex Parte Interviews with Enterprise Employees: A Post-Upjohn Analysis*, 44 Wash. & Lee L.Rev. 1181, 1196 (1987) (concluding that a blanket rule best serves the purpose of the no-contact rule: to provide effective representation to the client).
- 23 *Public Serv. Elec.*, 745 F.Supp. at 1043.
- 24 Biggar, *supra* note 8, at 6 (stating that SCR 182 "is an ethical rule, not a rule through which corporate parties should gain the ability to control the flow of information to their adversaries").
- 25 See *Cole v. Appalachian Power Co.*, 903 F.Supp. 975 (S.D.W.Va.1995); *Brown v. St. Joseph County*, 148 F.R.D. 246 (N.D.Ind.1993); *University Patents, Inc. v. Kligman*, 737 F.Supp. 325 (E.D.Pa.1990); see also *Weeks v. Independent School Dist. No. 1-89*, 230 F.3d 1201 (10th Cir.2000) (purporting to adopt the managing-speaking test, but applying FRE 801(d)(2)(D) to determine which employees "speak" for the university), *cert. denied*, 532 U.S. 1020, 121 S.Ct. 1959, 149 L.Ed.2d 755 (2001); *id.* at 1214-15 (Briscoe, J., concurring) (identifying the inconsistency in the majority's analysis, and explicitly basing his concurrence on FRE 801(d)(2)(D)); see also NRS 51.035(3)(d) (mirroring FRE 801(d)(2)(D)).
- 26 148 F.R.D. at 254 (quoting 2 Hazard & Hodes, *supra* note 6, § 38.6, at 38-9).
- 27 Reid, *supra* note 7, at 1274.
- 28 *Id.* at 1277.
- 29 Biggar, *supra* note 8, at 15.
- 30 *Id.* at 3-4.
- 31 Reid, *supra* note 7, at 1278; see also *Chaffee v. Kraft General Foods, Inc.*, 886 F.Supp. 1164 (D.N.J.1995) (explaining the difference between a judicial admission, which is conclusively binding, and an evidentiary party admission, which may be challenged); *In re Applin*, 108 B.R. 253 (Bankr.E.D.Cal.1989) (same).
- 32 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).
- 33 See *Chancellor v. Boeing Co.*, 678 F.Supp. 250 (D.Kan.1988); *Wright by Wright v. Group Health Hosp.*, 103 Wash.2d 192, 691 P.2d 564 (1984).
- 34 See *Wright*, 103 Wash.2d 192, 691 P.2d 564; Model Rules of Prof'l Conduct R. 4.2 cmt. 4 (1995).
- 35 See *Chancellor v. Boeing Co.*, 678 F.Supp. 250 (D.Kan.1988) (applying test to "admission" category); *Palmer v. Pioneer Hotel & Casino*, 19 F.Supp.2d 1157 (D.Nev.1998) (applying test to more clearly define former comment's "managerial" category, but reasoning that other categories of former comment still apply).
- 36 Compare *Weeks v. Independent School Dist. No. 1-89*, 230 F.3d 1201 (10th Cir.2000) (purporting to adopt the managing-speaking test, but applying FRE 801(d)(2)(D) to determine which employees "speak" for the university), *cert. denied*, 532 U.S. 1020, 121 S.Ct. 1959, 149 L.Ed.2d 755 (2001), and *Chancellor*, 678 F.Supp. 250 (implying that evidentiary rules determine which employees have "speaking" authority), with *Wright*, 103 Wash.2d 192, 691 P.2d 564 (emphasizing that only employees who could "bind" the organization are covered), and *Porter v. Arco Metals, Div. of Atlantic Richfield*, 642 F.Supp. 1116 (D.Mont.1986) (relying on *Wright* but stating the test differently).
- 37 See *Chancellor*, 678 F.Supp. at 253; *Porter*, 642 F.Supp. at 1118; *Wright*, 691 P.2d at 569.
- 38 103 Wash.2d 192, 691 P.2d 564.
- 39 See *Weeks*, 230 F.3d 1201; *Chancellor*, 678 F.Supp. 250.
- 40 See *Chancellor*, 678 F.Supp. 250; *Palmer*, 19 F.Supp.2d 1157.
- 41 See *Wright*, 691 P.2d at 569; see also Reid, *supra* note 7, at 1289-90.
- 42 *Wright*, 691 P.2d at 569.
- 43 Reid, *supra* note 7, at 1291; Biggar, *supra* note 8, at 12.
- 44 See *Fair Automotive v. Car-X Service Systems*, 128 Ill.App.3d 763, 84 Ill.Dec. 25, 471 N.E.2d 554, 560 (1984).
- 45 Reid, *supra* note 7, at 1286.
- 46 *Id.* at 1286-87.
- 47 *Id.* at 1287.
- 48 See *Erickson v. Winthrop Laboratories*, 249 N.J.Super. 137, 592 A.2d 33 (1991), *superseded by rule amendment as recognized in Klier v. Sordoni Skanska Const. Co.*, 337 N.J.Super. 76, 766 A.2d 761 (2001) (incorporating control group

test in text of rule as amended); *Baisley v. Missisquoi Cemetery Ass'n*, 167 Vt. 473, 708 A.2d 924 (1998) (purporting not to choose between balancing test and New York test, but applying balancing test).

49 See *Baisley*, 708 A.2d at 933.

50 Compare *Morrison v. Brandeis University*, 125 F.R.D. 14 (D.Mass.1989) (permitting ex parte contact by counsel for the plaintiff professor, who was denied tenure, with professors sitting on the plaintiff's peer review panel; such contact would appear to be prohibited under every other test), with *Baisley*, 708 A.2d at 933 (prohibiting ex parte contact with a cemetery caretaker in a case seeking damages for injuries suffered by the plaintiffs' child when he fell upon a spiked fence surrounding the cemetery; such contact would appear to be permissible under most of the other tests).

51 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990).

52 Reid, *supra* note 7, at 1293.

53 *Id.* at 1035.

54 *Id.* at 1035-36.

55 See *Strawser v. Exxon Co., U.S.A.*, 843 P.2d 613 (Wyo.1992); *State v. CIBA-GEIGY Corp.*, 247 N.J.Super. 314, 589 A.2d 180 (1991); *Dent v. Kaufman*, 185 W.Va. 171, 406 S.E.2d 68, 72 (1991); *MR & W v. President and Fellows of Harvard*, 436 Mass. 347, 764 N.E.2d 825 (2002); *Bougé v. Smith's Management Corp.*, 132 F.R.D. 560 (D.Utah 1990).

56 Although the comment has since been amended, we could still conclude that it contains the best statement of which employees should be covered; accordingly, the issue is not moot.

57 Although Pioneer argues that our *Schaefer* opinion supports application of the former comment, and Palmer concedes that *Schaefer*, together with *Cronin*, may lead us to conclude that we have adopted the former comment, including the "admission" clause, we actually rejected the portion of the comment addressed in *Schaefer*. See 117 Nev. at 507-08, 25 P.3d at 199-200.

58 *Restatement (Third) of the Law Governing Lawyers* § 100 (2000).

59 See, e.g., *Chaffee*, 886 F.Supp. 1164; *Applin*, 108 B.R. 253.

60 *Restatement*, *supra* note 58, § 100 cmt. e.

61 The NTLA's brief was filed in September 2001, before the amendments were formally adopted.

62 See *Upjohn*, 449 U.S. at 395-96, 101 S.Ct. 677.

63 See Biggar, *supra* note 8, at 22 (noting that while ethical rules provide few bright lines, attorneys, who must have a certain level of education, training, and common sense, can survive without them by being aware of when to seek further guidance and what possible consequences may attach to questionable actions).

64 103 Wash.2d 192, 691 P.2d 564, 569 (1984) (citations omitted).

65 See *Upjohn*, 449 U.S. at 395-96, 101 S.Ct. 677. We note that an attorney who abuses the interview process by inquiring into privileged matters, or even by permitting an employee to refer to confidential communications without immediately warning the employee that such communications are protected and should not be disclosed, is subject to appropriate sanctions.

## Rule 4.2. Communication With Person Represented by Counsel

West's Nevada Revised Statutes Annotated | Nevada Rules of Court

### Search Details


Jurisdiction: Nevada

### Delivery Details

Date: December 18, 2017 at 5:21 PM

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Status Icons: 

West's Nevada Revised Statutes Annotated  
Nevada Rules of Court  
Nevada Rules of Professional Conduct  
[IV] Transactions with Persons Other than Clients

Rules of Prof. Conduct, Rule 4.2  
Formerly cited as NV SCR 182

Rule 4.2. Communication With Person Represented by Counsel

Currentness

In representing a client, a lawyer shall not communicate about the subject of the representation with a 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.

**Credits**

Added, eff. May 1, 2006.

**Editors' Notes**

**MODEL RULE COMPARISON--2006**

Rule 4.2 (formerly Supreme Court Rule 182) is the same as ABA Model Rule 4.2. While the text of the two rules is identical, the rules are applied differently in two respects. First, Nevada has adopted the managing-speaking agent test to determine which constituents of an organization are covered by the no-contact rule. *Palmer v. Pioneer Inn Assocs., Ltd.*, 118 Nev. 943, 59 P.3d 1237 (2002). The comments to the Model Rule adopt a different test. Model Rules of Prof'l Conduct R. 4.2 cmt. 7 (2004). Second, Nevada has interpreted the Rule to prohibit a lawyer who is representing himself from contacting a represented person in the matter. *In re Discipline of Schaefer*, 117 Nev. 496, 25 P.3d 191, as modified, 31 P.3d 365 (2001). The comments to the Model Rule suggest that it may not prohibit contact when the lawyer represents himself. See Model Rules of Prof'l Conduct R. 4.2 cmt. 4 (2004) ("Parties to a matter may communicate directly with each other ..."); *Pinsky v. Statewide Grievance Committee*, 578 A.2d 1075 (Conn. 1990) (holding that Connecticut rule based on Model Rule 4.2 does not prohibit contact when lawyer represents himself). But see *Runsvold v. Idaho State Bar*, 925 P.2d 1118 (Idaho 1996) (holding that Idaho rule based on Model Rule 4.2 applies when lawyer represents himself).

**Notes of Decisions (55)**

Rules of Prof. Conduct, Rule 4.2, NV ST RPC Rule 4.2

Current with amendments received through November 1, 2017.

## Rule 1.13. Organization as Client

West's Nevada Revised Statutes Annotated | Nevada Rules of Court

### Search Details

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Search Query: 1.13 (g)

Jurisdiction: Nevada


### Delivery Details

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Date: December 18, 2017 at 5:32 PM

Delivered By: Bernadette Francis

Client ID: 7747-000

Status Icons: 

West's Nevada Revised Statutes Annotated  
Nevada Rules of Court  
Nevada Rules of Professional Conduct  
[I] Client-Lawyer Relationship

Rules of Prof. Conduct, Rule 1.13  
Formerly cited as NV SCR 163

**Rule 1.13. Organization as Client**

Currentness

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) 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 that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information related to a lawyer's retention by an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c) or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent. In cases of multiple representation such as discussed in paragraph (g), the lawyer shall take reasonable steps to ensure that the constituent understands the fact of multiple representation.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

#### Credits

Added, eff. May 1, 2006. As amended, eff. Jan. 1, 2007.

#### Editors' Notes

##### MODEL RULE COMPARISON--2006

Rule 1.13 (formerly Supreme Court Rule 163) is the same as ABA Model Rule 1.13 with four exceptions. First, paragraph (b) of the Rule covers the same subject matter as paragraph (b) of the Model Rule but is substantively different from the Model Rule. The Rule includes factors that the lawyer should consider in determining how to proceed under the Rule, specifies that any "measures taken shall be designed to minimize disruption of the organization and the risk of revealing" confidential information "to persons outside the organization," and identifies some specific measures that may be taken. Second, paragraph (c) of the Rule addresses the same subject matter as paragraph (c) of the Model Rule--what the lawyer should do if the lawyer's efforts under paragraph (b) are unsuccessful--but the text is different from the Model Rule. Whereas the Model Rule permits the lawyer to then reveal confidential information in certain circumstances whether or not Rule 1.6 permits the disclosure, the Nevada Rule provides that the lawyer may resign in accordance with Rule 1.16. The Nevada lawyer would only be permitted to make disclosures allowed by Rule 1.6. Third, paragraph (d) of the Model Rule has not been included. The paragraph has been reserved to maintain consistency with the Model Rules format. Fourth, paragraph (e) of the Model Rule has not been included. The paragraph has been reserved to maintain consistency with the Model Rules format.

##### MODEL RULE COMPARISON--2007

Rule 1.13 is amended, effective January 1, 2007, to conform to ABA Model Rule 1.13 with only one exception. Paragraph (f) includes Nevada-specific language. The Model Rule provides that when dealing with an organization's directors, officers, employees, members, shareholders or other constituents, the lawyer has 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 lawyer is dealing." The former Nevada Rule was consistent with the Model Rule. The amended Nevada Rule, however, departs from the Model Rule on this point by deleting the above-quoted language and requiring that the lawyer explain the identity of the client to the constituent "and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent." The final sentence of the paragraph is also Nevada-specific language.

Relevant Additional Resources

Additional Resources listed below contain your search terms.

**HISTORICAL AND STATUTORY NOTES**

Nevada Rule of Professional Conduct 1.13 contains provisions analogous to former Supreme Court Rule 163.

Rules of Prof. Conduct, Rule 1.13, NV ST RPC Rule 1.13

Current with amendments received through November 1, 2017.

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End of Document

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# OPEN MEETING LAW COMPLAINTS

Date	Tracking Number	Who Filed	Current Status
06/19/2017	13897-224	Judith Miller	CLOSED – On 11/15/2017 agenda-Finding of no violation
04/04/2017	13897-226	Frank Wright	CLOSED – On 11/15/2017 agenda-Finding of no violation
06/15/2017	13897-233	Frank Wright	CLOSED – On 11/15/2017 agenda-Finding of no violation
02/27/2017	13897-234	Frank Wright	CLOSED – On 11/15/2017 agenda-Finding of no violation
01/29/2016	13897-180	Aaron Katz	CLOSED – On 04/27/2016 agenda-Finding of no violation
08/17/2016	13897-204	Linda Newman	CLOSED – On 10/11/2016 agenda-Finding of no violation
10/21/2015	13897-171	Aaron Katz	CLOSED – On 04/27/2016 agenda-Finding of no violation
10/15/2015	13897-159	Frank Wright	CLOSED – On 01/27/2016 agenda-Finding of no violation
09/11/2015	13897-164	Frank Wright	CLOSED – On 2/24/2016 agenda (AG warned the board to ensure that its agenda topics are clearly and completely stated-IVGID took corrective action by including the OAG Opinion in the next meeting agenda and included the Opinion in the supporting material of the next meeting)
07/01/2015	13897-155	Frank Wright	CLOSED – On 01/27/2016 agenda- Finding of no violation
08/05/2011	11-024	Frank Wright	CLOSED – Finding of no violation- Finding of no violation
08/05/2011	11-025	Paul Olsen	CLOSED – Finding of no violation- Finding of no violation
08/05/2011	11-026	Aaron Katz	CLOSED – Finding of no violation- Finding of no violation
08/05/2011	11-030	Aaron Katz	CLOSED – Finding of no violation- Finding of no violation
12/22/2011	11-037	Frank Wright	CLOSED – Finding of no violation- Finding of no violation
09/28/2012	12-030	Frank Wright	CLOSED – AG provided some guidance; no corrective action required- Finding of no violation
03/18/2013	13-005	Judith Miller	CLOSED- Finding of no violation
04/02/2013	13-008	Aaron Katz	CLOSED- Finding of no violation
04/03/2013	13-010	Frank Wright	CLOSED- Finding of no violation
06/06/2013	13-017	Aaron Katz	CLOSED – IVGID took corrective action- Finding of no violation
08/29/2013	13-031	Aaron Katz	CLOSED – IVGID took corrective action- Finding of no violation
09/24/2013	13-032	Aaron Katz	CLOSED - IVGID took corrective action – Finding of no violation

# ETHIC COMMISSION COMPLAINTS

Date	Tracking Number	Who Filed	Current Status
2006	06-82	Steven Kroll	CLOSED – determined no hearing by Commission needed
2006	06-83	Steven Kroll	CLOSED – determined no hearing by Commission needed
2011	11-27A, -28A, -29A, -30A, -36A		CLOSED
2011	11-24C, -22C, -19C, -21C	Larry Pesetski, Paul Olson, Chris Crow, Howard Amundsen (via Katz)	CLOSED
2012	11-19C, -21C, -22C, -23C	Aaron Katz	CLOSED
2012	13-39C	Frank Wright	CLOSED - Not referred to Commission, dismissed RFO in its entirety
2013	13-07C, 08C, -11C	Aaron Katz	CLOSED - Not referred to Commission, dismissed RFO in its entirety

2013	12-72C, -73C, -74C	Frank Wright	CLOSED
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11/28/2017

# RESPONSE

December 22, 2017

*Via Electronic Mail- CBateman@ag.nv.gov  
& Hand Delivery to:*

Ms. Caroline Bateman, Chief Deputy Attorney General  
State of Nevada Office of The Attorney General  
Boards and Open Government Division  
555 E. Washington Ave., Suite 3900  
Las Vegas, NV 89101

**Re: RESPONSE OF INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT BOARD OF  
TRUSTEES- OPEN MEETING LAW COMPLAINT, WRIGHT, FRANK O.A.G. FILE NO.  
13897-257**

Dear Ms. Bateman:

We received your November 30, 2017, correspondence notifying the Incline Village General Improvement District (herein referenced as "IVGID" or "District") of the above referenced complaint by Frank Wright alleging that IVGID has violated the Nevada Open Meeting Law ("OML"). Please accept this correspondence and the referenced enclosures as IVGID's response.

**Issue Presented**

1. Whether IVGID General Counsel's attempt to conduct a litigation non-meeting after the conclusion of the November 15, 2017, meeting of the IVGID Board of Trustees was a violation of the Nevada OML.

**IVGID's Position**

Before addressing the substance of Mr. Wright's complaint, Mr. Wright was not present at the conclusion of the November 15, 2017 Board of Trustees meeting, so his assertions that there was a "closed" or "secret meeting" are not credible or reliable and are otherwise false assertions.<sup>1</sup> Indeed, whether Mr. Wright has standing to bring this OML complaint without firsthand knowledge of the alleged facts that he asserts support his charge that there was a violation of the OML, is an open question that has not been addressed in the OML, by the OAG in any published opinion, or within the OAG's Open Meeting Law Manual.

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<sup>1</sup> Mr. Wright's complaint is a hearsay narrative of "one resident who attended the regular board meeting but was still present and unnoticed and sitting in the room." Mr. Wright alleges based off the information provided by his "witness" that "Chairman [sic] continued with the unannounced and not publicly posted meeting." Mr. Wright restates the events in a way that is both false and misleading, by stating his "witness" saw two Trustees reject the special meeting as a violation of the OML and proceeded to walk out (Matt Dent and Tim Callicrate). It was also at this time that Mr. Wright's "witness" was approached by Finance Director Gerry Eick, whom escorted her to the door, and closed the door after she left the room. Mr. Wright appears to argue that the litigation non-meeting should have been noticed as a meeting under the OML.

That said, Mr. Wright's complaint is meritless. IVGID did not conduct a "closed, secret meeting" of the Board of Trustees.

NRS 241.015(3)(b)(2) is clear when it excludes from the definition of "Meeting," for purposes of the OML, a meeting of a quorum of a public body:

"[t]o receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both."

Section 3.05 of the OAG's Open Meeting Law Manual further explains:

A meeting held for the purpose of having an attorney-client discussion of potential and existing litigation pursuant to NRS 241.015(3)(b)(2) is not a meeting for purposes of the Open Meeting Law and does not have to be open to the public. In fact, no agenda is required to be posted and no notice is required to be provided to any member of the public. See OMLO 2002-21 (May 20, 2002) ...

It is important to note that a public body may deliberate "collectively to examine, weigh and reflect upon the reasons for or against the action," which connotes collective discussion in an attorney-client conference. See NRS 241.015(2); Dewey v. Redevelopment Agency, 119 Nev. 87, 97, 64 P.3d 1070, 1077 (2003), OMLO 2001-09 (March 28, 2001) and OMLO 2002-13 (March 22, 2003). However, NRS 241.015(3)(b)(2) does not permit a public body to take action in an attorney-client conference.

On November 15, 2017, at approximately 9:55p.m. Chairwoman Wong called for a five-minute break and stated the board would resume session at 10:00p.m. The livestream video of November 15, 2017 can be viewed at the following link: <https://livestream.com/accounts/3411104> identified as **Exhibit "A"**. Before the Board resumed its meeting, the power went out. At that time, Chairwoman Wong removed items G through K from the Agenda and moved them to the Agenda for the next meeting. The Agenda from the November 15, 2017 has been included for your review as **Exhibit "B"**. Chairwoman Wong allowed for the final public comment period, even though the power had gone out, and once everyone had an opportunity to speak, Chairwoman Wong adjourned the regular meeting.

Immediately thereafter, Chairwoman Wong asked the Trustees to stay to participate in a litigation non-meeting. As she attempted to commence the meeting, a member of the public would not leave the room after multiple requests, so Chairwoman Wong asked Gerry Eick, IVGID Director of Finance, to escort the person out of the room. Once the litigation non-meeting commenced, District Legal Counsel asked Trustee Matthew Dent to excuse himself because of a conflict-of-interest regarding the subject of the litigation non-meeting. Trustee Callicrate objected to Trustee Dent being asked to leave and became belligerent. In response, Trustee Horan expressed his frustration with Trustee Callicrate, which then escalated into uncivil discourse between the Trustees.

Consequently, District Legal Counsel concluded the litigation non-meeting and offered to meet with each Trustee individually. The litigation non-meeting did not last more than ten minutes. Subsequently, District Legal Counsel did follow up with each Trustee and was able to meet with four of the five Trustees individually by phone or in person.

Along with the foregoing response, please review the following affidavits of individuals who were present at the conclusion of the IVGID Board meeting November 15, 2017, and during the litigation non-meeting:<sup>2</sup>

- **Exhibit "C"**- Affidavit of Chairwoman Kendra Wong
- **Exhibit "D"**- Affidavit of Trustee Phillip Horan
- **Exhibit "E"**- Statement of Trustee Peter Morris<sup>3</sup>
- **Exhibit "F"**- Affidavit of Steven J. Pinkerton, IVGID General Manager
- **Exhibit "G"**- Affidavit of Misty Moga, IVGID Communication Coordinator
- **Exhibit "H"**- Affidavit of Jason D. Guinasso, Esq., IVGID Legal Counsel

In addition to the foregoing affidavits, District Counsel is willing and able to schedule a day and time for the OAG to conduct phone interviews of each Trustee and/or any witness, District Legal Counsel is currently working to schedule dates and times for interviews with the IVGID Trustees as requested by the OAG. IVGID is confident that your interview of the Trustees and the witnesses will confirm that the subject matter of the complaint filed by Mr. Wright was in fact an attempt to conduct a litigation non-meeting on November 15, 2017, where, "potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power . . ." and not a "closed, secret meeting," as he falsely alleges.

**Mr. Wright Brought This Open Meeting Law Complaint in Bad Faith.**

Mr. Wright has a long history of bringing complaints against IVGID that have no merit. To illustrate this point, I have enclosed for your review as **Exhibit "I"** a log of the OML complaints filed against the District since 2011. Please note that I did not start representing the District until January of 2015. Nevertheless, whether it was my predecessor, my law partner or me, Mr. Wright has been relentless in his attacks against the District, having filed nearly half of the complaints against the District during that time period.

Additionally, please view the video contained in the following drop box link identified as **Exhibit "J"**:

[https://www.dropbox.com/s/b6rshzk663mtjvf/Wright Frank Highlights.mp4?dl=0](https://www.dropbox.com/s/b6rshzk663mtjvf/Wright%20Frank%20Highlights.mp4?dl=0)

This video shows excerpts of what Mr. Wright has said and how he has acted at meetings over the last eighteen months. You will see a person who engages in slander, personal attacks and every form of insult and vitriol. Please particularly pay attention to the last several minutes where he cites out of context conversations he has allegedly had with the OAG and/or the written decision the OAG wrote finding no violation of the OML, but admonishing legal counsel regarding compliance with the spirit of the OML. Clearly, Mr. Wright is using every tool at his disposal, including but not limited to filing OML complaints, abusive and disruptive conduct during

<sup>2</sup> Trustee Dent and Trustee Callicrate were invited in writing by District Legal Counsel to provide written statements to include with this response; however, the Trustees did not respond to Counsel's invitation.

<sup>3</sup> Trustee Morris provided a written statement prior to leaving the country for vacation. District Legal Counsel was unable to convert this statement into an Affidavit for his signature before he was scheduled to leave.

Ms. Caroline Bateman, Chief Deputy Attorney General  
State of Nevada Office of The Attorney General  
December 22, 2017

public comment, frivolous litigation in District Court, complaints to the County Commission, complaints to the State Board of Taxation, complaints to Legislature and the Governor, etc., as a means to advance his political objectives, smear the professional reputations of staff and independent contractors who serve the District, and to otherwise harass the District.

Mr. Wright's current complaint is yet another example of him asserting some alleged misconduct has occurred that has absolutely no basis whatsoever in law or in fact.

### **Scope of Response**

IVGID has not responded to each and every assertion submitted in Mr. Wright's narrative. IVGID's response has focused on whether there was a violation of the Nevada Open Meeting Law.

### **IVGID Did Not Violate the Open Meeting Law**

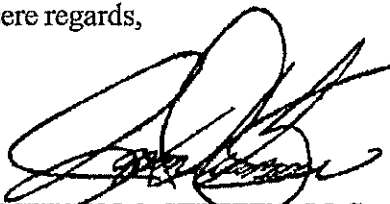
In the event that this memorandum has failed to address an alleged violation of the Nevada Open Meeting Law due to the vagueness and ambiguity of Mr. Wright's Complaint, IVGID denies that any such violation has occurred. IVGID has a stellar record of abiding by the provisions of NRS Chapter 241 and has worked diligently over the years to make sure that District business is conducted with openness and transparency.

### **Concluding Remarks**

In accordance with the foregoing, IVGID respectfully requests that the Attorney General conclude that there has been no violation of the Nevada Open Meeting Law.

Thank you for the opportunity to respond to the Open Meeting Law Complaint of Frank Wright, A.G.  
File No. 13897-257.

Sincere regards,



HUTCHISON & STEFFEN, LLC  
Jason D. Guinasso, Esq.

Encl.

cc: Chairwoman Kendra Wong  
General Manager Steve Pinkerton  
District Clerk Susan Herron

JDG:bf

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EXHIBIT A

EXHIBIT A

The livestream video of November 15, 2017 can be viewed at the following link:

<https://livestream.com/accounts/3411104>

EXHIBIT B

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EXHIBIT B



# NOTICE OF MEETING

The regular meeting of the Incline Village General Improvement District will be held starting at **6 p.m.** on **Wednesday, November 15, 2017** in the Chateau, 955 Fairway Boulevard, Incline Village, Nevada.

- A. PLEDGE OF ALLEGIANCE\*
- B. ROLL CALL OF THE IVGID BOARD OF TRUSTEES\*
- C. PUBLIC COMMENTS\* - Conducted in accordance with Nevada Revised Statutes Chapter 241.020 and limited to a maximum of three (3) minutes in duration.

**Public Comment Advisory Statement** – A public body has a legitimate interest in conducting orderly meetings. IVGID may adopt and enforce reasonable restrictions on public comment to ensure the orderly conduct of a public meeting and orderly behavior on the part of persons attending the meeting. Public comment, as required by the Nevada Open Meeting Law, is an opportunity for people to publicly speak to the assembled Board of Trustees. Generally, it can be on any topic, whether or not it is included on the meeting agenda. In other cases, it may be limited to the topic at hand before the Board of Trustees. Public comment cannot be limited by point of view. That is, the public has the right to make negative comments as well as positive ones. However, public comment can be limited in duration and place of presentation. While content generally cannot be a limitation, all parties are asked to be polite and respectful in their comments and refrain from personal attacks. Willful disruption of the meeting is not allowed. Equally important is the understanding that this is the time for the public to express their respective views, and is not necessarily a question and answer period. This generally is not a time where the Board of Trustees responds or directs Staff to respond. If the Chair feels there is a question that needs to be responded to, the Chair may direct the General Manager to coordinate any such response at a subsequent time. Finally, please remember that just because something is stated in public comment that does not make the statement accurate, valid, or even appropriate. The law mitigates toward allowing comments, thus even nonsensical and outrageous statements can be made. However, the Chair may cut off public comment deemed in their judgment to be slanderous, offensive, inflammatory and/or willfully disruptive. Counsel has advised the Staff and the Board of Trustees not to respond to even the most ridiculous statements. Their non-response should not be seen as acquiescence or agreement just professional behavior on their part. IVGID appreciates the public taking the time to make public comment and will do its best to keep the lines of communication open.

- D. APPROVAL OF AGENDA (for possible action)

The Board of Trustees may make a motion for a flexible agenda which is defined as taking items on the agenda out of order; combining agenda items with other agenda items; removing items from the agenda; moving agenda items to an agenda of another meeting, or voting on items in a block.

**-OR-**

The Board of Trustees may make a motion to accept and follow the agenda as submitted/posted.

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#### Incline Village General Improvement District

Incline Village General Improvement District is a fiscally responsible community partner which provides superior utility services and community oriented recreation programs and facilities with passion for the quality of life and our environment while investing in the Tahoe basin.

893 Southwood Boulevard, Incline Village, Nevada 89451 • (775) 832-1100 • FAX (775) 832-1122

[www.yourtahoeplace.com](http://www.yourtahoeplace.com)



# NOTICE OF MEETING

Agenda for the Board Meeting of November 15, 2017 - Page 2

## E. DISTRICT STAFF UPDATES\*

1. Solid Waste Services Update (Presenting Staff Member: Director of Public Works Joe Pomroy)

## F. GENERAL BUSINESS (*for possible action*)

1. Open Meeting Law Results – Acknowledgement of the Findings of Fact and Conclusions of Law as the result of the State of Nevada Office of the Attorney General investigation in the matter of Attorney General File No. 13897-224, Open Meeting Law Complaint – Placed on this agenda in accordance with Nevada Revised Statutes 241.0395 (Chairwoman Kendra Wong)
2. Open Meeting Law Results – Acknowledgement of the Findings of Fact and Conclusions of Law as the result of the State of Nevada Office of the Attorney General investigation in the matter of Attorney General File No. 13897-226, Open Meeting Law Complaint – Placed on this agenda in accordance with Nevada Revised Statutes 241.0395 (Chairwoman Kendra Wong)
3. Open Meeting Law Results – Acknowledgement of the Findings of Fact and Conclusions of Law as the result of the State of Nevada Office of the Attorney General investigation in the matter of Attorney General File No. 13897-233, Open Meeting Law Complaint – Placed on this agenda in accordance with Nevada Revised Statutes 241.0395 (Chairwoman Kendra Wong)
4. Open Meeting Law Results – Acknowledgement of the Findings of Fact and Conclusions of Law as the result of the State of Nevada Office of the Attorney General investigation in the matter of Attorney General File No. 13897-234, Open Meeting Law Complaint – Placed on this agenda in accordance with Nevada Revised Statutes 241.0395 (Chairwoman Kendra Wong)
5. Receive, review and discuss supplement from Megan Fogarty of Holland and Hart LLC regarding modification to the lease between Parasol Tahoe Community Foundation and IVGID, responses to Board of Trustees questions related thereto, as well as related covenants, conditions, restrictions and encumbrances of record relating to the leased property and the proposed lease modification (Requesting Trustee: Chairwoman Kendra Wong)
6. Review, discuss and possibly vote on each of the following questions regarding the Parasol Tahoe Community Foundation request for modification to their 30-year ground lease: (Requesting Trustee: Chairwoman Kendra Wong)
  - A. Is there a justifiable need for additional recreation space? Is there a justifiable need for different administration space?
  - B. Are there other spaces in IV/CB, either for rent or purchase, that meet the needs of IVGID?



# NOTICE OF MEETING

Agenda for the Board Meeting of November 15, 2017 - Page 3

- C. Would it be advantageous for IVGID to design and build space that meets our specific needs?
- D. Is the Parasol proposal an economically viable option?
- E. Are the terms and conditions of the Parasol proposal the most advantageous for IVGID?
- 7. Receive, discuss, and possibly provide direction on the history of Resolution 1760 (Policy and Procedure Number 135), Temporary Dog Park at Village Green, and how this amenity fits into the Community Services Master Plan (Requesting Staff Member: Parks and Recreation Director Indra Winquest)
- 8. Review, discuss, and possibly take action to authorize to continue contract for legal services for the Incline Village General Improvement District with the law firm of Reese, Kintz, Guinasso, LLC and their successor in interest law firms of Reese, Kintz, LLC and Hutchison & Steffen, PLLC, for remainder of the current contract term set to expire at the end of 2018 (Requesting Staff Member: General Manager Steve Pinkerton)
- 9. Review, discuss, and possibly adopt a revised Audit Committee Policy 15.1.0 (Requesting Trustee: Vice Chairman Phil Horan)
- G. DISTRICT STAFF UPDATE
  - 1. General Manager Steve Pinkerton
    - ❖ Financial Transparency
    - ❖ Capital Projects Update
    - ❖ Board Retreat
    - ❖ Quarterly Dashboards
- H. APPROVAL OF MINUTES (*for possible action*)
  - 1. Regular Meeting of August 22, 2017 – *resubmittal, minutes only*
- I. REPORTS TO THE IVGID BOARD OF TRUSTEES\*
  - 1. District General Counsel Jason Guinasso
- J. BOARD OF TRUSTEES UPDATE (**NO DISCUSSION OR ACTION**) ON ANY MATTER REGARDING THE DISTRICT AND/OR COMMUNITIES OF CRYSTAL BAY AND INCLINE VILLAGE, NEVADA\*
- K. CORRESPONDENCE RECEIVED BY THE DISTRICT\*
- L. PUBLIC COMMENTS\* - Conducted in accordance with Nevada Revised Statutes Chapter 241.020 and limited to a maximum of three (3) minutes in duration; see **Public Comment Advisory Statement** above.



# NOTICE OF MEETING

Agenda for the Board Meeting of November 15, 2017 - Page 4

- M. REVIEW WITH BOARD OF TRUSTEES, BY THE DISTRICT GENERAL MANAGER, THE LONG RANGE CALENDAR (*for possible action*)
- N. ADJOURNMENT (*for possible action*)

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## CERTIFICATION OF POSTING OF THIS AGENDA

I hereby certify that on or before Thursday, November 9, 2017 at 9:00 a.m., a copy of this agenda (IVGID Board of Trustees Session of November 15, 2017) was delivered to the post office addressed to the people who have requested to receive copies of IVGID's agendas; copies were either faxed or e-mailed to those people who have requested; and a copy was posted at the following seven locations within Incline Village/Crystal Bay in accordance with NRS 241.020:

1. IVGID Anne Vorderbruggen Building (Administrative Offices)
2. Incline Village Post Office
3. Crystal Bay Post Office
4. Raley's Shopping Center
5. Incline Village Branch of Washoe County Library
6. IVGID's Recreation Center
7. The Chateau at Incline Village

/s/ Susan A. Herron, CMC

Susan A. Herron, CMC

District Clerk (e-mail: [sah@ivgid.org](mailto:sah@ivgid.org)/phone # 775-832-1207)

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**Board of Trustees:** Kendra Wong, Chairwoman, Tim Callicrate, Peter Morris, Phil Horan, and Matthew Dent.

**Notes:** Items on the agenda may be taken out of order; combined with other items; removed from the agenda; moved to the agenda of another meeting; moved to or from the Consent Calendar section; or may be voted on in a block. Items with a specific time designation will not be heard prior to the stated time, but may be heard later. Those items followed by an asterisk (\*) are items on the agenda upon which the Board of Trustees will take no action. Members of the public who are disabled and require special accommodations or assistance at the meeting are requested to call IVGID at 832-1100 at least 24 hours prior to the meeting. Copies of the packets containing background information on agenda items are available for public inspection at the Incline Village Library.

**IVGID'S agenda packets are now available at IVGID's web site, [www.yourtahoeplace.com](http://www.yourtahoeplace.com); go to "Board Meetings and Agendas". A hard copy of the complete agenda packet is also available at IVGID's Administrative Offices located at 893 Southwood Boulevard, Incline Village, Nevada, 89451.**

*\*NRS 241.020(2) and (10): 2.Except in an emergency, written notice of all meetings must be given at least 3 working days before the meeting ...10. As used in this section, "emergency" means an unforeseen circumstance which requires immediate action and includes, but is not limited to: (a) Disasters caused by fire, flood, earthquake or other natural causes; or (b) Any impairment of the health and safety of the public.*

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EXHIBIT C

EXHIBIT C

1 **AFFIDAVIT OF KENDRA WONG**

2 **STATE OF NEVADA** )  
 ) ss.  
3 **COUNTY OF WASHOE** )

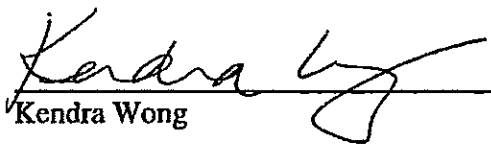
4 Under penalty of perjury, I, Kendra Wong, hereby swear that the information contained in  
5 this Affidavit is true and accurate:

- 6 1. My name is Kendra Wong.
- 7 2. I am a resident of the State of Nevada.
- 8 3. I am over 18 years of age.
- 9 4. I serve as the Chairwoman of the Board of Trustees for Incline Village General  
10 Improvement District ("IVGID").
- 11 5. The IVGID Board of Trustees attempted to have a litigation non-meeting on November  
12 15, 2017 after the regular board meeting.
- 13 6. The power had gone out in the building during the end of the regular board meeting.
- 14 7. After I adjourned the regular meeting, I asked the trustees to stay for a litigation non-  
15 meeting.
- 16 8. Trustee Tim Callicrate said that he didn't know that there was a litigation non-meeting  
17 that evening.
- 18 9. As I tried to commence the meeting, a member of the public would not leave the room  
19 after multiple requests, so I asked Mr. Gerry Eick, Director of Finance, to escort her out  
20 of the room.
- 21 10. Once the litigation non-meeting commenced, Mr. Jason Guinasso, District Legal  
22 Counsel, asked Trustee Matthew Dent to leave because of a conflict-of-interest  
23 regarding the subject of the litigation non-meeting.
- 24 11. Trustee Callicrate objected to Trustee Dent leaving.
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- 12. I explained that Trustee Dent not being present in the litigation non-meeting was consistent with the original litigation non-meeting we had when staff and counsel communicated the initiation of the lawsuit with Governance Sciences Group, Inc.
- 13. Trustee Callicrate claimed that he was not at the initial meeting, which I do not recall.
- 14. Trustee Callicrate made inappropriate accusations that Trustee Phil Horan responded to.
- 15. After that, Mr. Guinasso decided to communicate with each of the trustees individually and we concluded the litigation non-meeting.

DATED: This 19<sup>th</sup> day of December 2017.

  
Kendra Wong

SUBSCRIBED and SWORN to before me  
This 19<sup>th</sup> day of December 2017.

  
NOTARY PUBLIC

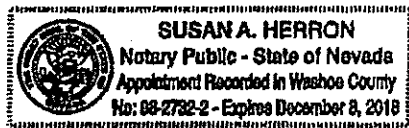


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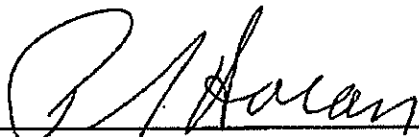
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- 1 14. There was some back and forth between Tim and Steve.
- 2 15. Jason Guinasso then said that Matthew Dent was not to be part of the litigation non-
- 3 meeting because it was about Flash Vote and he had a business relationship with the
- 4 company.
- 5 16. Matthew Dent said that he would not be part of the discussion or vote but he should be
- 6 able to attend.
- 7 17. Tim Callicrate supported Matthew Dent's idea.
- 8 18. I do not recall if there was any comment by Tim Callicrate or Matthew Dent that the
- 9 litigation non-meeting was an OML violation.
- 10 19. Jason Guinasso said there was confidential information involved, and he would not
- 11 discuss the matter if Matthew Dent was present.
- 12 20. Jason Guinasso said that if Matthew Dent would not leave, he would speak to the other
- 13 Trustee's one on one.
- 14 21. Tim Callicrate and Matthew Dent left.
- 15 22. The litigation non-meeting was never opened and there was no discussion about the
- 16 litigation.

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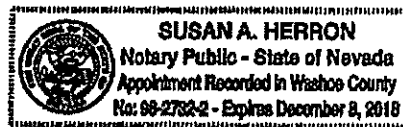
18 DATED: This 17<sup>th</sup> day of December 2017.

  
Philip Horan

19 SUBSCRIBED and SWORN to before me

20 This 17<sup>th</sup> day of December 2017.

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EXHIBIT E

EXHIBIT E

I am a duly elected Trustee serving on the board of the Incline Village General Improvement District (IVGID). During the evening of November 15<sup>th</sup> I attended an appropriately noticed IVGID Board Meeting. During the meeting a power cut necessitated the early adjournment of that meeting.

Following that board meeting a Litigation Non Meeting was to be convened. It was my belief the room had been cleared of the public prior to the start of this Litigation Non Meeting. At the start of the Litigation Non Meeting IVGID's General Counsel, Jason Guinasso, requested Trustee Matthew Dent to leave because the subject of the meeting was in regard to active litigation involving a company with whom Trustee Dent had a current and active individual contract for services.

Trustee Dent objected to being asked to leave. A brief debate between Trustee Dent and – primarily – Counsel Jason Guinasso ensued where Trustee Dent refused to be excluded from the Litigation Non Meeting and Counsel Jason Guinasso attempted to explain why Trustee Dent needed to be excluded. Trustee Tim Callicrate then also voiced objection to Trustee Dent being excluded. While I do not recall specific comments by any individual participant, the debate certainly became very heated and uncivil. Trustee Callicrate and Trustee Dent did though, exclaim that this Litigation Non Meeting was a violation of the Open Meeting Law and after more argument both walked out of the room.

I do not recall if it was immediately before or immediately after Trustees Dent and Callicrate walked out, but at about that time Counsel Jason Guinasso recommended not moving forward that evening with the Litigation Non Meeting and instead said he would contact each of the four Trustees separately to update us on what he was going to cover in the Litigation Non Meeting. The remaining three Trustees (Kendra Wong, Phil Horan and myself) were happy with this suggestion and the meeting concluded and we all left.

The above statement is my best recollection of events regarding OML Complaint 13897-257. I would be happy to swear to that as needed and/or required.

Peter W Morris  
Trustee

Incline Village General Improvement District

EXHIBIT F

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EXHIBIT F

**AFFIDAVIT OF STEVEN J. PINKERTON**

STATE OF NEVADA     )  
                                  ) ss.  
**COUNTY OF WASHOE**     )

Under penalty of perjury, I, Steven J. Pinkerton, hereby swear that the information contained in this Affidavit is true and accurate:

1. My name is Steven J. Pinkerton.
2. I am a resident of the State of Nevada.
3. I am over 18 years of age.
4. I serve as the General Manager for Incline Village General Improvement District ("IVGID").
5. On November 15, 2017, we were not able to conduct the non-meeting we had planned for the following reasons:
6. A dispute about whether one Trustee could participate in the non-meeting could not be resolved; and
7. Tensions between a few of the Trustees resulted in uncivil discourse.

DATED: This 19<sup>th</sup> day of December, 2017.

Steve J. Pinkerton

SUBSCRIBED and SWORN to before me  
This 19<sup>th</sup> day of December, 2017.

Susan A. Herron  
NOTARY PUBLIC

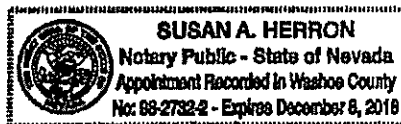


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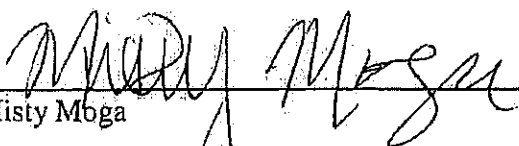
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11. As Trustee Callicrate and Trustee Dent left the ballroom, Mr. Pinkerton opened the double doors to the ballroom to indicate no meeting was being conducted.

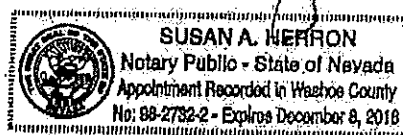
12. The legal non-meeting was over; it lasted approximately 5 minutes.

DATED: This 19<sup>th</sup> day of December 2017.

  
Misty Moga

SUBSCRIBED and SWORN to before me  
This 19<sup>th</sup> day of December 2017.

  
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1 public comment period, even though the power had gone out, and once everyone had an  
2 opportunity to speak, she adjourned the meeting.

3 8. Immediately thereafter, Chairwoman Wong adjourned the regular meeting and then she  
4 asked the Trustees to stay to participate in a litigation non-meeting. As she attempted  
5 to commence the meeting, a member of the public would not leave the room after  
6 multiple requests, so Chairwoman Wong asked Gerry Eick, IVGID Director of Finance,  
7 to escort the person out of the room.

8 9. Once the litigation non-meeting commenced, I asked Trustee Matthew Dent to excuse  
9 himself from the meeting because of a conflict-of-interest regarding the subject of the  
10 litigation non-meeting.

11 10. Trustee Callicrate objected to Trustee Dent being asked to leave and became  
12 belligerent.

13 11. In response, Trustee Horan expressed his frustration with Trustee Callicrate, which then  
14 escalated into uncivil discourse between the Trustees.

15 12. Consequently, I concluded the litigation non-meeting and offered to meet with each  
16 Trustee individually.

17 13. The litigation non-meeting did not last more than ten minutes.

18 14. After the meeting, I did follow up with each Trustee and was able to meet with four of  
19 the five Trustees individually by phone or in person.

20 15. I am not at liberty to discuss the subject matter that was to be discussed during the  
21 litigation non-meeting. Everything discussed during the litigation non-meeting is  
22 confidential and protected by the attorney-client privilege.

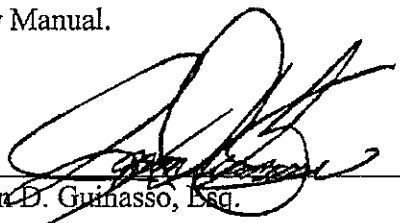
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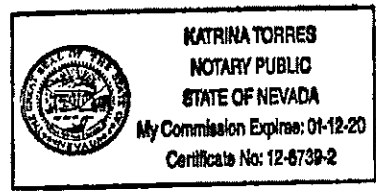
16. That said, the litigation non-meeting never commenced. However, if the non-meeting would have proceeded, the meeting was to be held in accordance with NRS 241.015 (3)(b) and Section 3.05 of the Open Meeting Law Manual.

DATED: This 22<sup>nd</sup> day of December 20, 2017.

SUBSCRIBED and SWORN to before me  
This 22 day of December, 2017.

  
\_\_\_\_\_  
NOTARY PUBLIC

  
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Jason D. Guinasso, Esq.



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EXHIBIT I

EXHIBIT I

# OPEN MEETING LAW COMPLAINTS

Date	Complaint Number	Who Filed	Outcome/Status
06/19/2017	13897-224	Judith Miller	CLOSED – On 11/15/2017 agenda-Finding of no violation
04/04/2017	13897-226	Frank Wright	CLOSED – On 11/15/2017 agenda-Finding of no violation
06/15/2017	13897-233	Frank Wright	CLOSED – On 11/15/2017 agenda-Finding of no violation
02/27/2017	13897-234	Frank Wright	CLOSED – On 11/15/2017 agenda-Finding of no violation
01/29/2016	13897-180	Aaron Katz	CLOSED – On 04/27/2016 agenda-Finding of no violation
08/17/2016	13897-204	Linda Newman	CLOSED – On 10/11/2016 agenda-Finding of no violation
10/21/2015	13897-171	Aaron Katz	CLOSED – On 04/27/2016 agenda-Finding of no violation
10/15/2015	13897-159	Frank Wright	CLOSED – On 01/27/2016 agenda-Finding of no violation
09/11/2015	13897-164	Frank Wright	CLOSED – On 2/24/2016 agenda (AG warned the Board to ensure that its agenda topics are clearly and completely stated-IVGID took corrective action by including the OAG Opinion in the next meeting agenda and included the Opinion in the supporting material of the next meeting)
07/01/2015	13897-155	Frank Wright	CLOSED – On 01/27/2016 agenda- Finding of no violation
08/05/2011	11-024	Frank Wright	CLOSED – Finding of no violation- Finding of no violation
08/05/2011	11-025	Paul Olsen	CLOSED – Finding of no violation- Finding of no violation
08/05/2011	11-026	Aaron Katz	CLOSED – Finding of no violation- Finding of no violation
08/05/2011	11-030	Aaron Katz	CLOSED – Finding of no violation- Finding of no violation
12/22/2011	11-037	Frank Wright	CLOSED – Finding of no violation- Finding of no violation
09/28/2012	12-030	Frank Wright	CLOSED – AG provided some guidance; no corrective action required- Finding of no violation
03/18/2013	13-005	Judith Miller	CLOSED- Finding of no violation
04/02/2013	13-008	Aaron Katz	CLOSED- Finding of no violation
04/03/2013	13-010	Frank Wright	CLOSED- Finding of no violation
06/06/2013	13-017	Aaron Katz	CLOSED – IVGID took corrective action- Finding of no violation
08/29/2013	13-031	Aaron Katz	CLOSED – IVGID took corrective action- Finding of no violation
09/24/2013	13-032	Aaron Katz	CLOSED - IVGID took corrective action – Finding of no violation

# ETHIC COMMISSION COMPLAINTS

Date	Complaint Number	Who Filed	Outcome/Status
2006	06-82	Steven Kroll	CLOSED – determined no hearing by Commission needed
2006	06-83	Steven Kroll	CLOSED – determined no hearing by Commission needed
2011	11-27A, -28A, -29A, -30A, -36A		CLOSED
2011	11-24C, -22C, -19C, -21C	Larry Pesetski, Paul Olson, Chris Crow, Howard Amundsen (via Katz)	CLOSED
2012	11-19C, -21C, -22C, -23C	Aaron Katz	CLOSED
2012	13-39C	Frank Wright	CLOSED - Not referred to Commission, dismissed RFO in its entirety
2013	13-07C, 08C, -11C	Aaron Katz	CLOSED - Not referred to Commission, dismissed RFO in its entirety

2013	12-72C, -73C, -74C	Frank Wright	CLOSED
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11/28/2017

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EXHIBIT J

EXHIBIT J

Video containing excerpts of what Mr. Wright has said and how he has acted at meetings over the last eighteen months, contained in the following drop box link:

[https://www.dropbox.com/s/b6rshzk663mtjvf/Wright\\_Frank\\_Highlights.mp4?dl=0](https://www.dropbox.com/s/b6rshzk663mtjvf/Wright_Frank_Highlights.mp4?dl=0)

# COMPLAINT

ADAM PAUL LAXALT  
*Attorney General*



NICHOLAS A. TRUTANICH  
*Chief of Staff*

KETAN D. BHIRUD  
*General Counsel*

STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

555 E. Washington Ave. Suite 3900  
Las Vegas, Nevada 89101

November 30, 2017

**via Certified Mail 7009 2250 0001 8859 8693**

Incline Village General Improvement District -- Board of Trustees  
Kendra Wong, Chair  
895 Southwood Boulevard  
Incline Village, NV 89451

Dear Chair Wong:

The Office of the Attorney General (OAG) has the authority to investigate and prosecute alleged violations of the Open Meeting Law (OML). NRS 241.039. The OAG is in receipt of a Complaint alleging OML violations by the Incline Village General Improvement District Board of Trustees (Board).

The OAG requests that the Board prepare a response and/or defense to the allegations contained in the attached Complaint. Please include any records or documentation that support the Board's response including, but not limited to, audio and/or video recordings of the Board's November 15, 2017 meeting in question. Please also provide a copy of the agenda and support materials from the September 20, 2017 meeting.

Due to the time limitations set forth in NRS 241, the OAG asks that you respond on or before December 15, 2017.

Should you have any questions, please contact Althea Zayas at (702) 486-3224 or via email at [azayas@ag.nv.gov](mailto:azayas@ag.nv.gov).

Sincerely,

ADAM PAUL LAXALT  
Attorney General

By: /s/ Caroline Bateman  
Chief Deputy Attorney General  
Boards and Open Government Division

CB:arz  
Enclosure



STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

100 N. Carson St.  
Carson City, NV 89701  
Phone: 775-684-1100  
Fax: 775-684-1108

www.ag.nv.gov

For official use only

Received by: \_\_\_\_\_

Date Received: \_\_\_\_\_

Complaint Type: \_\_\_\_\_

Referred to: ☐ BCP ☐ GI  
☐ IFU ☐ OML ☐ MFU  
☐ MFCU ☐ PIU ☐ WCFU  
(Select one)

## OPEN MEETING LAW COMPLAINT FORM

The information you report on this form may be used to help us investigate alleged violations of Nevada's Open Meeting Law – NRS chapter 241. When completed, mail or fax your form and supporting documents (if any) to the office location listed above. Upon receipt, your complaint will be reviewed by a member of our staff. The length of this process can vary depending on the circumstances and information you provide with your complaint. The Attorney General's Office may contact you if additional information is needed. If you have a claim against the State of Nevada, complete the Tort Claim Form found on our website.

INSTRUCTIONS: Please TYPE/PRINT your complaint in dark ink. You must write LEGIBLY. All fields MUST be completed.

### SECTION 1.

#### COMPLAINANT INFORMATION

Salutation: ☒ Mr. ☐ Mrs. ☐ Ms. ☐ Miss

Your Name: Wright Frank

Your Address: P.O. Box 186 Crystal Bay NV 89402

Your Phone Number: 775-253-4919 818-601-1996

Email: alpineport55@gmail.com

Call me between 8am-5pm at: ☒ Home ☒ Cell ☒ Work

Age: ☐ Under 18 ☐ 18-29 ☐ 30-39 ☐ 40-49 ☐ 50-59 ☒ 60 or older

#### ALLEGED OPEN MEETING LAW VIOLATION IS AGAINST

Name of Public Body: Incline Village General Improvement Dist  
(i.e., specific board, commission, agency, or person(s) etc.)

Date of meeting where alleged violation occurred (mm/dd/yyyy): \_\_\_\_\_

Over  
✓  
P. 2 on Back

## SECTION 2.

Please detail the specific violations against the board, commission, or agency or person listed in Section 1. Include the who, what, where, when, and why of your complaint. You may use additional sheets if necessary. Remember the Open Meeting Law applies only to public bodies (see NRS 241.015 for definition) and only to members of public bodies.

My complaint is:

Incline Village General Improvement District held  
An unannounced, closed, secret meeting of 5 board members  
Outside the view of the public.

See Attached Page

## SECTION 3.

Sign and date this form. The Attorney General's Office cannot process any unsigned, incomplete, or illegible complaints.

I understand that the Attorney General is not my private attorney, but rather represents the public. I am filing this complaint to notify the Attorney General's Office of alleged violations of the Open Meeting law by public bodies or individual members of a public body. I understand that the information contained in this complaint may be used by the Attorney General to investigate the public body named in my complaint. I understand that the Attorney General has statutory authority to require public bodies to comply with the Open Meeting Law. In order to resolve your complaint, we may send a copy of this form to the public body about whom you are complaining. I authorize the Attorney General's Office to send my complaint and supporting documents to the public body identified in this complaint.

  
Signature

Frank Wright  
Print Name

11-27-17  
Date (mm/dd/yyyy)

#### SECTION 4. (Optional)

The following section is optional and is intended to help our office better serve Nevada consumers. Please check the categories that apply to you.

Gender: ☒ Male ☐ Female

Have you previously filed a complaint with our office?: ☐ Yes ☐ No

If yes, enter in the approximate filing date (mm/dd/yyyy) of your original complaint: \_\_\_\_\_

**I am (mark all that apply):**

- ☐ Income below federal poverty guideline
- ☐ Disaster victim
- ☐ Person with disability
- ☐ Medicaid recipient
- ☐ Military service member
- ☐ Veteran
- ☐ Immediate family of service member/veteran

**Ethnic Identification:**

- ☒ White/Caucasian
- ☐ Black/African American
- ☐ Hispanic/Latino
- ☐ Native American/Alaskan Native
- ☐ Asian/Pacific Islander
- ☐ Other: Senior Citizen

**Primary Language:**

- ☐ English
- ☐ Spanish
- ☐ Other: \_\_\_\_\_

May we provide your name and telephone number to the media in the event of an inquiry about this matter?

☒ Yes ☐ No

How did you hear about our complaint form (please choose only one):

- ☐ Called/visited Las Vegas AG Office ☐ Called/visited Carson City Office ☐ Called/visited Reno Office
- ☐ Attended AG Presentation/Event ☐ Another Nevada State Agency/Elected Official ☐ Search Engine ☒ AG Website
- ☐ AG Social Media Sites ☐ Media: Newspaper/Radio/TV ☐ Other

Return original form to:

Office of the Attorney General – ATTN: OML Coordinator  
100 N. Carson St.  
Carson City, NV 89701  
Fax: 775-684-1108  
(Faxed copies will be accepted followed by original)

Office of the Attorney General  
State of Nevada  
OML Division

November 27, 2017

Dear MS Bateman,

I am again filing an open meeting law violation against Incline Village General Improvement district for holding a secret meeting after the November 15, 2017 regular board meeting.

Five Trustees were present, along with the General Manager, and legal counsel.

The regular meeting was adjourned, then the Trustees were told they had a closed session. But an interesting event took place, there was a power outage. The room went totally dark. But the Chairman continued with the unannounced and not publicly posted meeting. Because of the dark room, one resident who attended the regular board meeting was still present but unnoticed and sitting in the room. She was able to witness two Trustees reject the special meeting as a violation of the OML and proceeded to walk out of the room. (Matt Dent and Tim Calicrate) The resident sitting in the room was approached and ask to leave the room by the Finance Director Gerry Eick, and he escorted her to the door, and closed the door after she left the room.

This meeting had something to do with voting on litigation against a firm conducting surveys, and opinion polls. This vote should have been open to the public and discussed in an open meeting. Regardless of the content, the meeting under Nevada Law should have been posted. It is ironic that during the regular board meeting the board agenized and discussed the previous OML violations committed by the board. But not surprisingly the Legal Counsel Jason Guinasso and board Chair Kendra Wong both stated that the Attorney Generals opinions were contrite and just her opinions. Chairman Wong Stated: "it all depends on who is in the AG's office making the decisions, as to the validity of the opinions". These Statements can be viewed on the livestream. My initial opinion is that the legal Counsel and Board chair didn't view the OML opinions as a valid assessment of the behavior of the IVGID board. It sounded to me as if Chairman Wong, and Jason Guinasso, could give a "whoopy" as to what the AG has to say, or that the AG's opinions are baseless.

Resident who was present and in room during meeting:

Margaret Martini 775-722-4152

Margaretmartini@liveintahoe.com

Thank You,

Frank Wright

775-253-4919

alpinesportss@gmail.com