

Opinion No. 94-42

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Opinion Request Regarding ROLAND MASSIMINO and JAMES WEAVER

This Opinion is in response to a request filed on August 22, 1994, with the Nevada Commission on Ethics (Commission' by Thomas Mitchell, Editor of the Las Vegas Review-Journal. Mr. Mitchell requested that the Commission determine whether the Code of Ethical Standards at NRS 281.481 was violated by an agreement (herein called the "Supplemental Contract") which provided for payment of additional income to University of Nevada-Las Vegas (UNLV) Basketball Coach Roland Massimino.

Mr. Mitchell's request for an opinion was reviewed by the Commission on September 6, 1994 in Las Vegas, Nevada. The Commission determined it had jurisdiction over the subject matter of the request pursuant to the provisions of NRS 281.511 (2) .At the time the opinion request was filed, Coach Roland Massimino and Athletic Director James Weaver were both public employees involved in the events relating to the Supplemental Contract and over whom the Commission had jurisdiction pursuant to NRS 281.436 and 281.511(2). The Commission does not have statutory jurisdiction over former public employees and therefore did not attempt to exercise jurisdiction over former University Legal Counsel Bradley Booke or former UNLV President Robert Maxson, both of whom were also involved in the events relating to the Supplemental Contract while serving as public employees.

On September 28, 1994, the Commission held a preliminary administrative hearing in Las Vegas, Nevada, to determine whether just and sufficient cause existed for the Commission to conduct a full hearing on the merits of the opinion request and issue an opinion pursuant to the provisions of NRS 281.511(2) and (5). Mr. Massimino and Mr. Weaver were duly noticed for the hearing and present with their counsel. Stephen J. Peek and Carl Hirsch appeared on behalf of Mr. Massimino, and William C. Hammer appeared for Mr. Weaver. Also present and testifying as witnesses were opinion requestor Thomas Mitchell, Interim UNLV President Kenny Guinn, and University of Nevada System General Legal Counsel Donald Klasic. Former Assistant General Counsel Bradley Broke was also present. Mr. Weaver waived confidentiality of the request and proceedings pursuant to NRS 281.511(4); however, Mr. Massimino did not do so. Accordingly, all procedures were confidential.

The hearing was continued to October 19, 1994, in Las Vegas, Nevada, for taking evidence and testimony from Mr. Massimino, Mr. Weaver and Mr. Booke. On October 19, 1994, Mr. Massimino, through his counsel Mr. Peek, moved to dismiss the proceedings with respect to Mr. Massimino upon the ground that he was no longer employed by UNLV as a public employee. If he was no longer a public employee, the Commission no jurisdiction over him. The Commission granted Mr. Massimino's motion subject to its receipt of documentary evidence of termination. Such evidence was later received and made a part of the administrative record of this matter. Mr. Massimino remained at the October 19, 1994, hearing and testified as a witness.

Upon granting Mr. Massimino's motion to dismiss, Mr. Weaver, through his counsel, requested that proceedings be open to the public upon his earlier waiver of confidentiality. All proceedings and the record relating to the matter were then made open and available to the public.

Mr. Weaver stipulated to the existence of just and sufficient cause and requested that the Commission immediately proceed with the matter as a hearing on the merits in order to expedite the issuance of an opinion. His request was granted and the matter proceeded as a hearing on the merits. Mr. Weaver also further stipulated that evidence previously received would be admitted as part of the record of the hearing on the merits. Mr. Weaver, Mr. Broke, and Mr. Massimino testified at the hearing on October 19, 1994.

The hearing was continued to November 2, 1994, in Las Vegas, Nevada, for further testimony. Mr. John Irsfeld, former UNLV Vice President and Deputy to former President Robert Maxson; Carolyn Sparks, former chair of the Board of Regents and a present Regent; and Mr. John Goolsby, former UNLV Chairman, personally appeared and testified before the Commission. Dr. Maxson, in Long Beach, California, appeared and testified by auditory telephonic communication. Mr. Hammer, Mr. Weaver's counsel, was present during the hearing; Mr. Weaver was present during the evening portion of the hearing. At the conclusion of the hearing, the Commission closed the administrative record of the matter. It now issues the following Findings and Conclusion.

FINDINGS

1. The Commission has jurisdiction over this matter pursuant to the provisions of NRS 281.511(2).
2. At all times relevant to this inquiry, Athletic Director James Weaver was and continues to be a public employee as defined in NRS 281.436. Coach Roland Massimino was a public employee as defined in NRS 281.436 until October 19, 1994, when the agreement terminating his employment by UNLV was approved by the Board of Regents. Bradley Booke was a public employee during the events discussed in these findings, but thereafter left public employment. Dr. Robert Maxson was a public employee during the events described in these findings, but thereafter left public employment in March 1994.
3. On April 1, 1992, Roland Massimino signed a 5-year public employment contract (herein called "The Contract") with UNLV to coach men's basketball. The Contract provided that Mr. Massimino would be compensated by the payment of:
 - i) an annual salary of \$106,000.00;
 - ii) an additional \$105,000.00 annual consideration for "such personal appearance duties as the University shall reasonably arrange and schedule to assist in the recruitment of students and to enhance the regional and national reputation of the University"; and
 - iii) \$175,000.00 annual compensation for "performance of such television and radio appearances as are reasonably arranged and scheduled by the University."(Article V, §§ 501 (a), (b) and (d) of The Contract).

In addition to various fringe and state retirement benefits, Mr. Massimino's total annual compensation package as a public employee of UNLV was \$386,000.00. The Contract with UNLV was signed by Athletic Director Jim Weaver on April 1, 1992, and by Dr. Robert Maxson as president of UNLV on April 2, 1992.

The Contract provided that its terms and conditions were strictly confidential, that access to The Contract by anyone other than the parties required prior written approval by the parties, and that its provisions would not be disclosed "**unless so required by law.**" (Article II of The Contract). Nevada's Open Record Law prohibits confidentiality of The Contract pursuant to NRS 239.010.

4. Mr. Massimino also signed a 5-year supplemental contract (hereinafter called the "Supplemental Contract") on April 1, 1992, with the UNLV Foundation (hereinafter Foundation) to "perform *other and different* duties to enhance and promote the growth, reputation and development of the University, consistent with and in furtherance of the goals and objectives of the Foundation." (Article I, Supplemental Contract, emphasis added).

Pursuant to the language of the Supplemental Contract, Mr. Massimino was employed by the Foundation for purposes of performing the duties specified therein. Those duties required Mr. Massimino to:

- i) engage in public relations and promotional activities on behalf of the University, such as speaking to civic groups and community and national organizations, and otherwise representing the University, to enhance the regional and national reputation of UNLV: and
- ii) conduct summer and youth basketball programs at the University which are intended to promote the reputation of and enrollment at the University, as well as providing instruction in and development of basketball skills.

(Article III, Supplemental Contract, emphasis added).

The Supplemental Contract provided that Mr. Massimino would be compensated in the following manner:

(a) As consideration for Mr. Massimino's services under this agreement and to provide for him in his retirement years, within (30) days of the conclusion of each basketball season in which Mr. Massimino serves as Head Coach of the men's basketball program, the Foundation will tender a Promissory Note to Mr. Massimino, in the principal sum of \$100,000.00, bearing interest at a rate which is in no event lower than the rate of interest then obtained by the Foundation on its short-term investment portfolio, with principal and accrued interest to be due and payable to Mr. Massimino or his heirs upon his sixty-fifth birthday.

(b) Recognizing that Mr. Massimino will develop, manage and conduct summer youth basketball programs substantially similar to those he now conducts, which will attract young students to UNLV, enhance the University's national reputation, and generate supplemental income, and recognizing further that a period of time will be required to develop these programs to levels of participation and revenue equal to the youth programs related to his present employment will require a period of time, the Foundation agrees to arrange the following payments to Mr. Massimino as consideration for the conduct of summer youth basketball programs:

(1) For the summer of 1992, that amount necessary to insure that Mr. Massimino earns a net income of \$50,000.00 from summer youth programs;

(2) For the summer of 1993, that amount necessary to insure that Mr. Massimino earns a net income of \$150,000.000 from summer youth programs;

(3) For the summer of 1994, that amount necessary to insure that Mr. Massimino earns a net income of \$200,000.00 from summer youth programs;

(4) For the summer of 1995, that amount necessary to insure that Mr. Massimino earns a net income of \$300,000.00 from summer youth programs;

(5) For the summer of 1996, that amount necessary to insure that Mr. Massimino earns a net income of \$300,000.00 from summer youth programs; provided however, that if such summer youth programs generate net revenues in excess of \$200,000.00 per annum, the excess shall be divided equally Between Mr. Massimino and the Foundation. In the event this agreement is terminated before the conclusion of the last summer program described above, the parties agree that the Foundation will arrange for payment to Mr. Massimino of such sums as are necessary to make the average annual payment under this paragraph equal to \$200,000.00 per year. The parties recognize that the Department of Intercollegiate Athletics at UNLV may pay expenses associated with the administration and promotion of summer youth programs, and the parties agree that all such expenses shall be

reimbursed from the gross revenues of such programs. All sums due under this paragraph shall be paid by each party to the other within 45 days of the closing of the last summer program session in each year identified above.

(c) The parties acknowledge that Mr. Massimino presently receives the annual sum of \$200,000.00 pursuant to a commercial shoe endorsement agreement. Consistent with the desire of the parties that Mr. Massimino should not suffer any loss of income by virtue of taking employment at UNLV, the Foundation agrees that, in the event his commercial shoe endorsement agreement should pay less than \$200,000.00 per year during the term of this agreement, the Foundation will arrange payment to Mr. Massimino in an amount equal to the difference between \$200,000.00 and the actual annual amount received by Mr. Massimino, provided, however, that if commercial shoe companies should completely cease involvement in endorsement or consulting agreement with college basketball coaches, the Foundation's obligation under this paragraph shall cease; provided, further, that if such shoe companies reduce the fee structure for such endorsement or consulting agreements, the Foundation's obligation under this paragraph shall be reduced to an amount equal to the annual average of the top ten (10) endorsement or consulting fees then paid to college basketball coaches.

(Article V, § (a), (b) and (c), Supplemental Contract).

Depending on the amount of net revenue generated by the summer youth program and outside shoe contracts, and possible interpretations of the ambiguous provisions of the Supplemental Contract as outlined above, the total amount of Mr. Massimino's guaranteed compensation under the supplemental contract could be up to \$350,000 in 1992; \$450,000 in 1993; \$500,000 in 1994; and possibly up to \$600,000 in 1995. Based upon the foregoing analysis, the total compensation guaranteed to Mr. Massimino under both The Contract with UNLV and the Supplemental Contract with the Foundation was \$736,000 in 1992; \$836,000 in 1993; \$886,000 in 1994; and \$986,000 in 1995.

As with The Contract with UNLV, the terms and conditions of the Supplemental Contract with the Foundation were required to be kept strictly confidential and the parties to the contract agreed that access to the agreement could not be given to anyone without the written consent of the other party "unless so required by law."^[1] (Article II, Supplemental Contract).

5. The parties to the Supplemental Contract subsequently entered into a Novation Agreement by which the Varsity Club, a not for profit corporation, was substituted as a party in the place of the Foundation.

6. The Foundation was incorporated on November 3, 1981, under NRS Chapter 82 (formerly NRS 81.290 through 81.340), the private, not for profit corporation law of Nevada.

The Foundation was not established by the Legislature or as a result of legislation, nor is it a department or a part of any state institution. It performs no governmental function as such.

7. The Foundation was organized exclusively for charitable and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code and is considered to be a "satellite" organization which supports another tax exempt organization, namely UNLV (Articles of Incorporation, Article III, p. 2).

8. The object and purposes of the Foundation and the nature of business to be conducted by it are as follows:

(a) To aid, support, and assist the maintenance, promotion, growth, and improvement of UNLV, its faculty, staff, students, and facilities, and to enhance and stimulate the quality of education at, and the standards and potentials of, UNLV, as an institution of higher learning (Articles of Incorporation, Article III, p. 2);

(b) To receive, maintain, and administer a fund of real and personal property, derived from all sources whatsoever, and subject to the terms of any specific gift, grant, bequest, or devise and to the restrictions set forth below, to use, apply, and distribute the income from and the principal of such a fund exclusively to, for the benefit of, or to carry out the purposes of UNLV or any organizations that are affiliated with UNLV and are exempt from federal taxation (Articles of Incorporation, Article III, p. 2);

(c) To Serve as an innovative, flexible, and efficient vehicle to facilitate the solicitation and management of gifts, grants, bequests, and devises for the benefit of UNLV (Articles of Incorporation, Article III, p. 3);

(d) To provide or make available funds for expenditures by the administration of UNLV for general or specific administrative purposes, including without limitation defraying capital and ordinary expenses, financing professorships and graduate fellowships, sponsoring lectures, conferences, institutes, and symposia, assisting authors, artists, scholars, scientists, and other persons whose knowledge, talent, and skill contribute importantly to the welfare of humanity, and securing for UNLV the benefit of the wisdom, experience, and abilities of distinguished persons who have excelled in their respective fields of endeavor (Articles of Incorporation, Article III, p. 3);

(e) To grant or provide scholarships, loans, or other assistance to individuals who have demonstrated academic promise or achievement, to encourage and furnish funds for research, public service, and teaching, and otherwise to assist in the development of enhanced and expanded educational opportunities for, and service to, the citizens of the State of Nevada and UNLV (Articles of Incorporation, Article III, p. 3); and

(f) To do and engage in all lawful activities that further or are consistent with the preceding objects and purposes of the Foundation (Articles of Incorporation, Article III, p. 3).

9. The members of the Board of Regents of the University of Nevada constitute the membership of the Foundation (Articles of Incorporation, Article VU, p. 6). (These members are similar to stockholders in a for profit corporation.)

10. The affairs and management of the Foundation are under the control of the Board of Trustees (Articles of Incorporation, Article VIII, p. 7). (This Board of Trustees is similar to a Board of Directors in a for profit corporation.) The Board of Trustees consists of at least 13 trustees, each of whom is appointed by members of the Foundation (Board of Regents)^[2] from candidates nominated either by the members (Board of Regents) or the Board of Trustees, to serve for a term of six years (Articles of Incorporation, Article VIII, p. 7).

11. The members of the Board of Regents are not on the Board of Trustees.

12. The Board of Trustees has the power to make such bylaws as it may deem proper for the management of the affairs of the Foundation (Articles of Incorporation, Article IX, p. 8).

13. The Foundation raised and required funding for its activities from private donations.

14. The Foundation is a private corporation, and not a public or governmental agency under the laws of the State of Nevada. As such, the Foundation is a private entity even though the Board of Regents are "members:" of the Foundation, which are shareholders of the corporation, While the circumstances of the relationship Between the Foundation and UNLV are public in character and purpose, the private characteristics of the Foundation remain, Accordingly, funds paid to university officers or employees from Foundation funds are paid by a "private source." See, *In the Matter of the Opinion Requests of Professor Looney and Joseph N. Crowley*, [Opinion # 92-17](#).

15. The Supplemental Contract Between Mr. Massimino and the Foundation, and later the Varsity Club, provided compensation to Coach Massimino which augmented his public salary for the performance of duties already required of him as a public employee by The Contract with UNLV. The Supplemental Contract provided for minimum levels of guaranteed compensation, paid unconditionally to Mr. Massimino if his business ventures with the summer youth basketball camp and shoe contract promotions did not produce the minimum levels of income while he was UNLV head basketball coach. The terms of his employment for payment of such guaranteed compensation from private money while serving as head coach for UNLV is characterized in the Supplemental Contract as being for "other and different duties to enhance and promote the growth, reputation and development of the University, consistent with and in furtherance of the goals and objective of the Foundation," (Article I, Supplemental Contract).

Except for the private commercial shoe endorsements and conducting the summer youth basketball programs, there are in actuality no "other and different" duties under the Supplemental Contract required of Mr. Massimino that were not already required of him as head coach of the UNLV basketball team.

16. Article III of the Supplemental Contract requires that during the period Mr. Massimino is employed as Head Coach of the men's basketball program "he will engage in public relations and promotional activities on behalf of the University such as speaking to civic organizations, and otherwise representing the University, to enhance the regional and national reputation of UNLV. "

Such public relations and promotion of UNLV, however, were already required as part of the head coach's responsibilities to UNLV as specifically provided by the Contract. Section 5.01(b) of The Contract with UNLV provided for payment to Mr. Massimino the annual sum of \$105,000 "as consideration for the Employee's performance of such personal appearance duties (exclusive of television and radio appearance fees) as the University shall reasonably arrange and schedule to assist in the recruitment of students and to enhance the regional reputation of the University."

Additionally, The Contract with UNLV provides that the head coach is required to:

'Be reasonably available to and cooperative with the media...Be reasonably available to appear before faculty, administrators, students, alumni, and civic groups; ...Work to integrate intercollegiate athletics into the whole spectrum of academic life to complement the University and its mission in the community;' and to 'Keep public statements complimentary to the athletic program and to the University.' (Article III, §§ 302(c) iii.)

Section 3.02(a) of The Contract requires the Head Coach to be a "loyal employee of the University" and to "use his best efforts to keep positive and constructive in tone any public comments he makes about the University policies or actions taken by senior administrators."

In his testimony, Mr. Booke attempted to distinguish between the public relations responsibilities of the head coach under The Contract with UNLV and those under the Supplemental Contract. The attempt to distinguish the public relations and appearances duties required by The Contract and the Supplemental Contract is, however, merely an attempt to make a distinction where no material difference exists at all. Under both agreements, Mr. Massimino is paid compensation, publicly from the State of Nevada under The Contract with UNLV and privately under the Supplemental Contract with the UNLV Foundation (and later Varsity Club), for the performance of public relation duties on behalf of the University while acting as head coach of the University's basketball team.

17. Mr. Massimino was also compensated from private funds under the Supplemental Contract for his performance of duties, other than public relations, which were also already required of him by The Contract with UNLV. Article VII of the Supplemental Contract fully incorporates by reference Article IX of The Contract with UNLV, entitled "Miscellaneous." Article IX provides for duties and responsibilities of the coach as a public employee of the

University to:

- i) hire, assign responsibilities and terminate assistant coaches subject to approval by the athletic director;
- ii) oversee activities of the assistant coaches as they relate to the educational and athletic interests of the University;
- iii) ensure compliance with the policies of the University, NCAA, and with the rules and regulations of the team's conference; and
- iv) arrange, with the athletic director, each season's men's basketball schedule and to meet and maintain the University's objectives in all intercollegiate athletics.

(Article IX, §§ 9.01, 9.02)

18. Article IX, Section 9.04 of The Contract requires approval by the Board of Regents of The Contract with UNLV, and Section 9.20 of Article IX also provides that The Contract with UNLV is subject to the provisions of the Code of the University and Community College System of Nevada (UCCSN). Since Article IX of The Contract is incorporated by reference into the Supplemental Contract, Board of Regents approval was also required for the Supplemental Contract, and the UCCSN Code was also applicable to the Supplemental Contract.

At the time of the formation of the Supplemental Contract in 1992, the UCCSN Code provided the following administrative and accounting guidelines with respect to a University of Nevada System (UNS) foundation making expenditures to or on behalf of any University employee:

Expenditure for Grant Authorization. The Board of Regents must accept all grants from any institution foundation to or on behalf of any UNS institution or its employees. ...*The foundations are precluded from making direct expenditures to or on behalf of any UNS institution or its employees except when it is documented that the expenditures are in the best interest of the institution and approved by the president or his designee after which the expenditures shall be reported to the Board of regents at its next meeting.* All expenditures to or for the benefit of the UNS institution or its employees must be in the form of a grant of money, sum certain, to the institution except as documented above.

Estimated amounts of all salaries, consulting fees, or perquisites paid in cash or in kind by an institution foundation to institution employees must be submitted in advance in writing to the Board of regents for their initial approval or changes. Perquisites include, but are not limited to, automobiles and related expenditures, automobile allowances, host allowances, housing and related expenditures, membership dues, retirement funds, and so forth. A schedule of these items including the amount actually received by or paid on behalf of the employee should be provided to the Board of regents no later than three months after the corporation's financial year end. Loans to institution employees are prohibited.

(UCCSN Code; Title 4, Chapter 10, Page 17, Section 3 (Rev. 8/88); subsequently revised with stricter provisions in 4/93 and 2/94.)

The disclosure requirements of Article IX and the UCCSN Code were not met. The responsibility for such disclosure to the Board of Regents rested most directly with UNLV President Robert Maxson and its legal counsel, Bradley Booke. The other individuals involved, Mr. Goolsby, Mr. Weaver, Mr. Massimino and Ms. Sparks, all reasonably

relied on representations of Mr. Boone and Dr. Maxson as to the propriety of the Supplemental Contract and its confidentiality.

19. Article V of The Contract even more specifically directs compliance with Board of regents policy and the UCCSN Code in relation to earning outside income; Article V, Section 5.07(a) provides the following:

5.07 Opportunities To Earn Outside Income

While the Employee is representing the University as Head Coach of its intercollegiate men's basketball program, he shall have the opportunity to earn outside income as a result thereof and he is encouraged to make public appearances and participate in public speaking engagements, but only upon the following terms and conditions.

a. *General Provisions Concerning Outside Income.* The following general terms and conditions shall apply to each case in which the Employee seeks to or makes arrangements to earn outside income as a result of his being Head Coach of the University's men's basketball program.

i. *University Obligations Are Primary.* Such outside activities shall not interfere with the full and complete performance by the Employee of his duties and obligations as a University employee, recognizing always that the Employee's primary obligations lie with the University and its students.

ii. *NCAA Rules Control.* In no event shall the Employee accept or receive, directly or indirectly, any monies, benefits or any other gratuity whatsoever from any person, corporation, University booster club or alumni association or other benefactor, if such action would violate the laws of the State of Nevada, NCAA legislation or the constitution, by-laws, rules and the University Code or policies of the University or its Board of Regents, or the conference of which the University is a member. Changes of such legislation, policies, constitution, by-laws, rules and regulations, or interpretations thereof shall automatically apply to this agreement without the necessity of a written modification.

iii. *University Approval Is Required.* To the extent required by NCAA regulations, the Employee shall obtain the advance written approval of the University's President, through the Athletic Director, before entering into agreements to receive outside income, which approval shall not be unreasonably withheld.

iv. *University Is Not Liable.* Such activities are independent of the Employee's University employment, and the university shall have no responsibility or liability for payment of any such income or for any claims arising therefrom.

....

d. *Shoe, Apparel And Equipment Contracts.* Subject to the provisions of Section 5.07.a hereof, the Employee may retain any monies offered by shoe, apparel or equipment manufacturers or sellers in exchange for an agreement that the University's men's basketball team shall wear its shoes, apparel or equipment during practice and competition or that the Employee shall wear, promote, endorse or consult with the manufacturer or seller concerning the design and/or marketing of such shoes, apparel or equipment, provided that such agreement are in writing, do not extend beyond the term of this Agreement, would be coterminous with the Employee 's termination of employment, and are subject to the approval of the University President, through the Athletic Director.

e. *Disclosure of Outside Income.* In accordance with NCAA regulations, the Employee shall report annually in writing to the President of the University through the Athletic

Director, at the time required by Athletic Department policy, all athletically related income from all sources outside the University.

Quite obviously, the provisions in Article V of The Contract with UNLV relate to the circumstances under which Mr. Massimino may enter into agreements for outside income. Article V, Section (a) III, requires Mr. Massimino to obtain approval from the University President, through the Athletic Director, of all outside income; subsection (d) allows Mr. Massimino to engage in shoe, apparel and equipment contracts; and subsection (e) requires annual reporting of all athletically related income to the President of the University.

In light of the inclusion of these provisions, going to and providing for institutional control over the outside income of Mr. Massimino in The Contract with UNLV, the Supplemental Contract does not appear to have been necessarily created to ensure, as asserted, University compliance with NCAA institutional control requirements for public university coaches.

20. The necessity of maintaining confidentiality of the outside income was asserted as the reason for the Supplemental Contract. Aside from the impropriety of such confidentiality as identified in the above findings, however, Mr. Massimino himself testified that his request for confidentiality was a request he made just in passing. He testified that the only reason for confidentiality was that:

...just in passing, I indicated that, only because I was working for a private institution and I didn't think it was fair for Villanova University, and I have a lot of loyalties to Villanova University, to have anyone know what compensation I was making and dealt with that, that was the only reason I asked ...I asked for that, and they said fine...they structured it, they said this is the way we can do it, it was fine, there was no debate, no major discussion in any way.

(Transcribed testimony of Roland Massimino (tape 3, side B) taken 10/19/94.)

21. Bradley Booke, a lawyer, was employed as Assistant General Counsel for the UCCSN from April or May of 1989 until December 31, 1993. Assistant General Counsel is a public employment position pursuant to the provisions of NRS 281.436. As such, Mr. Booke was required to provide a full range of legal services to the UNLV, including legal assistance on UNLV employment matters.

Mr. Booke's supervisor was UCCSN General Counsel Donald Klasic, whose responsibility was to provide legal counsel to the UCCSN Board of Regents and to the presidents of the educational institutions within the UCCSN system. Mr. Klasic testified that Mr. Booke's responsibilities, "were to provide legal representation to the Board of Regents and to the officers and employees of the institutions of the University of Nevada. II (Transcript of testimony of Mr. Donald Klasic taken 9/28/94, page 41.)

22. From May 1990 until June 1992, Bradley Booke had a supplemental employment agreement to act as special counsel to UNLV President Robert Maxson for National Collegiate Athletic Association (NCAA) affairs. Mr. Klasic did not know about Mr. Booke's agreement or special counsel duties to Dr. Maxson until November 1991. Mr. Booke testified that Dr. Maxson assured him that he had specific approval for Mr. Booke to work as special counsel to him from the Chancellor of the University and from Mr. Booke's immediate supervisor, Mr. Klasic. Mr. Klasic, however, testified in this regard as follows:

By and large, I did not know that he was special counsel to Dr. Maxson for about a year and a half or about a year, rather. I knew he was special counsel for the period of May to September 1990. I knew that because Dr. Maxson went behind my back to get approval from Chancellor Dawson to do that.

But both Chancellor Dawson and I assumed that the contract would end on September 1, 1990. I was not aware of the fact that there was this situation until November of 1991. When I found out about it, I told him, because he had the contract, I said, 'okay, let it lapse,' but I said, 'you need to understand that as far as I'm concerned, you are working for me, not Dr. Maxson and don't forget that.'

(Transcript of testimony of Mr. Donald Klasic taken 9128194, page 43.)

23. After the resignation of Coach Tarkanian, then head basketball coach, in June 1991, which became effective at the end of the 1992 basketball season, Dr. Maxson asked Mr. Boone to determine how other universities maintained institutional control over coaches' outside income as required by NCAA rules. After some investigation, Mr. Boone determined that coaches have a contract with the university who employed them, and an outside contract with a booster club, or a university foundation for outside income.

Mr. Boone advised President Maxson of the dual contract practice by which a coach's outside income could be arranged and controlled in a separate contract with a private entity. President Maxson decided to use this approach in employing a new UNLV coach.

Mr. Weaver had no knowledge about the foregoing activity of Mr. Boone and Mr. Irsfeld or the decision with respect to structuring two contracts for university and outside employment and other income.

24. Mr. Weaver was employed as UNLV Athletic Director on November 20, 1991. By December 1991, before arriving on the UNLV campus to begin work, he had begun making telephone calls to solicit input from individuals across the country who could help him identify candidates for the vacant UNLV head basketball coach position. One person Mr. Weaver contacted for such assistance was Roland Massimino, with whom he had worked at Villanova University.

Between January and mid-March, 1992, Mr. Weaver continued to evaluate potential candidates for the position. By mid-March he had developed a short list of potentially qualified candidates. From mid to late March, 1992, Mr. Boone, Mr. Weaver, President Maxson, and on occasion, Mr. Irsfeld, met at President Maxson's home to discuss the short list of candidates.

By late March, 1992, Mr. Massimino's personal interest in the UNLV head coach position became clear. Mr. Massimino was then head coach for the Villanova men's basketball team, a position he had held for 19 years.

25. On March 29, 1992, Mr. Maxson, Mr. Weaver and Mr. Boone flew to Philadelphia to meet with Mr. Massimino. Mr. Boone had prepared and brought a draft of the Contract with him. The draft of the Contract was complete in every respect except for the sum of money Mr. Massimino would be paid as head coach. Mr. Weaver went to the Philadelphia meeting knowing the maximum amount of money UNLV could offer Mr. Massimino, which was substantially less than the compensation offered Mr. Massimino in the Supplemental Contract with the Foundation. Mr. Weaver was not aware at that time that a Supplemental Contract would be offered to Mr. Massimino. However, Mr. Boone and Dr. Maxson had anticipated that possibility.

On the flight to Philadelphia, Dr. Maxson told Mr. Weaver and Mr. Boone that they could not come back from the trip empty handed.

26. Dr. Maxson, Mr. Weaver and Mr. Boone met with Mr. Massimino in his home on Sunday, March 29, 1992, to discuss the terms of employment with UNLV. The primary point of the discussion was agreeing upon a level of compensation that would at least be equal to Mr. Massimino's level of income as coach at Villanova. During the

meeting, in response to Mr. Massimino's inquiry as to whether the amount of his income had to be made public, Mr. Boone advised "yes as to some and no as to some."

27. Subsequently, when discussing with Mr. Weaver and Dr. Maxson the level of income needed to pay Mr. Massimino, Mr. Boone told Mr. Weaver that a supplemental contract could be used to bring Mr. Massimino's compensation to a competitive level. Mr. Weaver, newly employed, did not question the university's legal counselor president about the propriety of the Supplemental Contract. He was familiar with the existence of separate contracts for coaches who had outside income. Mr. Weaver did question Mr. Boone as to who would be responsible for raising the additional income for the Supplemental Contract, because he knew the athletic budget did not have it. Mr. Boone assured Mr. Weaver that Dr. Maxson had identified contributors who would fund the Supplemental Contract.

28. Dr. Maxson solicited private funding commitments to fund the Supplemental Contract.

29. While still in Philadelphia, on March 30, 1992, Mr. Boone met with an attorney for Mr. Massimino and discussed the terms of both The Contract with UNLV and the Supplemental Contract. Mr. Weaver was not present at this meeting.

On the evening of March 30, 1992, Dr. Maxson, Mr. Boone and Mr. Weaver again met with Mr. Massimino at his home to review the final terms of employment. The terms of both The Contract with UNLV and the Supplemental Contract with the Foundation were discussed.

The following morning, on March 31, 1992, Mr. Steve Wynn provided private air transportation for Dr. Maxson, Mr. Weaver, and Mr. Boone to return to Las Vegas and for Mr. and Mrs. Massimino to visit the Las Vegas community before signing the contracts for employment.

30. While in Las Vegas, Mr. Boone prepared the final contracts Between Mr. Massimino and UNLV and the Foundation. Mr. Boone did not consult in any respect with legal counsel for the Foundation, Mr. Les Skully, or with Mr. Klasic, his supervisor, about the Supplemental Contract with the Foundation. Mr. Klasic testified that it was not appropriately within Mr. Boone's job description, either as Assistant General Counsel for the University, or as special counsel to the President, to provide legal services to the Foundation.

Mr. Klasic testified further that although he was privy to The Contract with UNLV, in a supervisory sense, he was ignorant of the Supplemental Contract, the Novation Agreement and Mr. Boone's involvement in drafting those documents until sometime in the summer of 1994.

31. On April 1, 1992, Mr. Massimino, Mr. Weaver and Mr. Boone returned to Philadelphia. Mr. Massimino notified his present employer, Villanova, and his team, family and friends, that he was taking the UNLV position as head coach. Mr. Boone provided and Mr. Massimino executed The Contract with UNLV and the Supplemental Contract with the Foundation. Mr. Massimino did not read the contracts, but relied on Mr. Boone for their accuracy and legality. Mr. Weaver also signed The Contract and initialed the Supplemental Contract while on the airplane. Mr. Weaver also relied on Mr. Boone for the accuracy and legality of the contracts.

32. Dr. Maxson had, by April 1, 1992, obtained Mr. John Goolsby's agreement to allow the UNLV Foundation to be used as a "conduit" for the Supplemental Contract until such time as the Varsity Club was created by incorporation. As Chairman of the Foundation, Mr. Goolsby knew that the Foundation existed primarily to raise funds for educational purposes and not for athletic purposes. Mr. Goolsby therefore imposed three conditions to agreeing to the Supplemental Contract Between the Foundation and Mr. Massimino; these conditions were that:

- i) Mr. Goolsby receive verification that he, as the Foundation Chairman, was legally authorized to execute such an agreement on behalf of the Foundation;

ii) The Foundation not be responsible for raising or paying the funds guaranteed to Mr. Massimino under the Supplemental Contract; and

iii) The Foundation's agreement was temporary, pending formation of the Varsity Club which would assume by Novation the full legal responsibility for the Supplemental Contract.

Dr. Maxson agreed to Mr. Goolsby's conditions and on April 1, 1992, prepared a letter to John Goolsby providing the following:

This letter is to inform you officially that the University will be responsible for raising from the private sector an amount equivalent to or in excess of any monies committed to the new basketball coach through the UNLV Foundation. Indeed, commitments for these monies have already been secured.

Mr. Maxson's letter to Mr. Goolsby conflicts with Article V, Subsection 5.07(a)(iv) of The Contract, quoted above, which precludes University liability for payment of outside income or claims arising therefrom.

33. The following day, on April 2, 1992, Mr. Booke prepared the following letter to address Mr. Goolsby's question of the legality of the Supplemental Contract Between Mr. Massimino and the Foundation:

It is my legal opinion that you are authorized, as Chairman of the UNLV Foundation, to sign and enter that certain ' Supplemental Employment Agreement' effective April 1, 1992, Between Roland V. Massimino and the UNLV Foundation. Please note that the agreement provides for supplemental employment by Mr. Massimino with the Foundation, and not for supplemental pay for Mr. Massimino's employment at UNLV.

Please note further that the agreement requires confidentiality and non-disclosure by both parties, inasmuch as the document is not a public record under Nevada law. I would recommend that the agreement be placed under seal after signature, and I would be happy to maintain it in my office.

Please feel free to contact me if you have any questions.

34. On April 2, 1992, Dr. Maxson and Mr. Booke met in Mr. Maxson's office with Carolyn Sparks, then Chairwoman of the Board of Regents, and briefed her on the terms of employment of Mr. Massimino. Ms. Sparks was told that two contracts existed, one Between Mr. Massimino and UNLV and one Between Mr. Massimino and the Foundation and was advised in general of their terms. Ms. Sparks was advised that the Supplemental Contract was confidential. Ms. Sparks did not read either of the contracts which sat on the table in front of her during the meeting with Mr. Maxson and Mr. Booke. Ms. Sparks relied on the assurances of Mr. Booke that the contracts were legal and proper in every respect.

Mr. Goolsby joined the meeting and the conditions of the contracts were then reviewed with Mr. Goolsby by Mr. Booke and Dr. Maxson. Mr. Goolsby assumed that Ms. Sparks was present representing the Board of Regents in the matter and expected that the terms of the Supplemental Contract would be reviewed by the Board of Regents' Personnel Committee. Mr. Goolsby signed the Supplemental Contract and Mr. John Irsfeld was subsequently called into Dr. Maxson's office to attest to Mr. Goolsby signature in his capacity as corporate secretary for the Foundation. Mr. Irsfeld was not given an explanation of and did not personally know, the terms and conditions of either contract.

35. At the April 9 110, 1992, meeting of the University Board of Regents, Mr. Massimino's five-year contract to coach men's basketball was approved. Although already in existence and signed by the parties, the actual employment

Contract with UNLV was not given to the Regents for their review. Dr. Maxson testified that he was only seeking from the Regents approval of the five-year term of The Contract, but not the substance of The Contract, which he felt he had authority to negotiate without Board of Regents approval. Mr. Weaver was not present at the Board of Regents meeting. Dr. Maxson, Mr. Boone and Mr. Massimino were present at the meeting, as was Carolyn Sparks, the only Regent who had knowledge of the Supplemental Contract Between Mr. Massimino and the Foundation.

Relying on legal advice from Mr. Boone that the Supplemental Contract was confidential, Ms. Sparks did not inform the Regents of the Supplemental Contract. Dr. Maxson also did not inform the Regents of the existence or terms of the Supplemental Contract despite a specific question from Regent Berkley inquiring of the amount the coach would be making so that she could be able to inform her constituents. Dr. Maxson had, prior to Ms. Berkley's question, outlined generally for the Regents Mr. Massimino's compensation package under The Contract with UNLV. In response to Ms. Berkley's question, Mr. Maxson spoke generally about donated vehicles for Mr. Massimino, but did not disclose the privately funded compensation for Mr. Massimino from the Foundation. Mr. Boone and Mr. Massimino also remained silent. Although The Contract had been executed a week earlier, the Regents were not given a copy of The Contract despite Ms. Berkley's statement at the meeting that the Regents should be able to see such contracts before giving their approval. Since the Regents, with the exception of Ms. Sparks, had no knowledge of the existence of the Supplemental Contract, they had no basis to ask questions or request a copy of that agreement for their review or approval.

36. On September 14, 1992, Mr. Boone prepared for Mr. Weaver's signature, Articles of Incorporation for the Varsity Club. Mr. Weaver was told by Mr. Boone that the Varsity Club must be created because a state legislative commission was considering requiring Foundation records be made public, which would according to Mr. Boone, breach the commitment of confidentiality made to Mr. Massimino.^[3] Mr. Boone also testified to the foregoing reasons for the creation of the Varsity Club. Mr. Goolsby specifically testified however, that the possibility that Foundation records would be made public was not the reason the Varsity Club was formed. Rather, it was because the Foundation's purpose was focused on charitable and educational purposes, as opposed to funding athletic activities. Although the Foundation agreed temporarily to accommodate the President's request by executing the Supplemental Contract, Mr. Goolsby stated that he was assured that a separate corporation would be formed in the near future to replace the Foundation.

In any event, Mr. Weaver relied on Mr. Boone's advice and direction in forming the Varsity Club and acting as its only officer.

As a result, on September 15, 1992, Athletic Director James Weaver signed on behalf of the Varsity Club, the Novation Agreement for the Supplemental Contract Between Mr. Massimino and the Foundation, which Mr. Goolsby executed on September 16, 1992, and Mr. Massimino executed on January 27, 1993, making it effective. Under the Novation of the Supplemental Contract, the Varsity Club assumed all rights, duties and obligations of the Foundation under the Supplemental Contract with Mr. Massimino.

37. In March 1994, Dr. Maxson resigned as President of UNLV, which was effective on June 1, 1994. Kenny Guinn was appointed as Interim President, and became aware of the Supplemental Contract, as did Don Klasic, General counsel for UCCSN, in late June or early July of 1994. Thereafter, on August 15, 1994, Mr. Guinn advised Mr. Massimino by letter that the University interpreted the Supplemental Contract to require Mr. Massimino to perform duties and obligations which he was already required to perform for UNLV pursuant to The Contract with UNLV. Mr. Guinn gave Mr. Massimino the following notice:

[T]his is to notify you the receipt of further payments from the Varsity Club under the Supplemental Employment Contract and the Novation of Supplemental Employment Contract is prohibited under NRS 281.481 and Board of Regents' Handbook, Title 4, Chapter 10, Section 9(A)(3) and A(6) without approval of the Board of Regents. ...Please

be advised, however, Article V of the Employment Contract remains unaffected.

Finally, I am aware that the Supplemental Employment Contract states it is confidential. However, Article II of the Employment Contract, recognizing disclosure of the contract may be required by law....the Nevada Open Record Law will require UNLV, as a public institution, to disclose the documents.

38. Mr. Massimino resigned his employment with UNLV with an agreed severance package from UNLV, effective October 19, 1994.

OPINION

1. The Nevada Code of Ethical Standards at NRS 281.481(4) provides the following:

A public officer or employee shall not accept any salary, retainer, augmentation, expense allowance or other compensation from any private source for the performance of his duties as a public officer or employee.

2. While the Foundation is considered to be a "public charity" for the specific and narrow purposes of the Internal Revenue Code, this does not mean the Foundation loses its private corporation status for other purposes, including those under state law. The Foundation appears to be a private corporation, not a public or governmental agency, under the laws of the State of Nevada. This corporation, formed under the private, not for profit corporation laws of Nevada, does not appear to fit into any of the categories of a public entity. Even if the Foundation is considered to be a quasi-public entity or a private entity with a public purpose, however, the same conclusion applies for the reasons stated in this opinion.

3. There is obviously a close connection Between the Foundation and UNLV. The purposes of the Foundation as defined in its Articles of Incorporation are limited to the public purposes, programs, am activities of UNLV. The members of the Board of Regents constitute the Membership of the Foundation, which is analogous to the shareholders of a for-profit corporation. The Regents, acting as members, elect the Board of Trustees.

4. While the Foundation shares and supports and the public purposes of UNLV, and its members (shareholders) are the Regents of the University of Nevada, characteristics which are public in nature, the Foundation is other respects is private in nature, based upon its creation and empowerment as a private, non-profit corporation. In short, while the circumstances of the relationship Between the Foundation and UNLV are public in character and purpose, the private characteristics of the Foundation nevertheless remain. Accordingly, it is not possible to conclude that the Foundation funds which were arranged in the Supplemental Contract to be paid directly to UNLV employee Mr. Massimino were from a "public source."

5. The Varsity Club is also a private entity. Funds raised by it are private and may not be paid to compensate a public officer or employee.

6. The Foundation and the Varsity Club raise and receive funds for their activities in support of UNLV principally from private donations. While such funds are "private" in nature, once these funds are paid or donated to and received by the Board of Regents, such funds become public property, or public funds, in nature, although donated from private sources.

7. The public purposes of the Code of Ethical Standards and its application to individuals who hold roles as both public servants and private citizens, have been declared by the legislature in the following manner:

1. It is hereby declared to be the public policy of this state that:

(b) A public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves.

2. The legislature finds that:

(a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests.

(b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

8. The applicable standards at NRS 281.482(2) and (4) provide the following:

2. A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person.

...

4. A public officer or employee shall not accept any salary, retainer, augmentation, expense allowance or other compensation from any private source for the performance of his duties as a public officer or employee.

9. The Commission concludes that the Supplemental Contract Between Roland Massimino and the Foundation, and later Between Mr. Massimino and the Varsity Club, violated the Code of Ethical Standards at NRS 281.481(4) in that the Supplemental Contract provides for the payment to Mr. Massimino of private income from a private source for the performance, at least in part, of duties that were already required of him as a public employee. This Commission also concludes that funds paid directly to a public employee by the UNLV Foundation are from a private source of funds. The payment of such private funds directly to a public employee for performance of duties already required of such public employee is a violation of the Code of Ethical Standards at NRS 281.481(4).

Mr. Weaver, however, received no such supplementary income and therefore did not personally violate the provisions of NRS 281.481(4).

10. Mr. Weaver did not use his position to grant unwarranted preferences, privileges, advantages or economic opportunity to another, as prohibited by NRS 281.481(2).

Mr. Weaver, while participating in the discussions relating to the Supplemental Contract, did not use his position as a public employee to grant such unwarranted privileges and economic opportunity to Mr. Massimino. If anything, Mr. Weaver, in his position as Athletic Director, relied upon and was primarily guided by Mr. Boone and Dr. Maxson to facilitate the negotiation of the Supplemental Contract. Mr. Boone, as legal counsel, knew or should have known, that the payments to Mr. Massimino under the Supplemental Contract for services already required of him as a public employee were unlawful. Mr. Weaver was new to UNLV and his position, and reasonably relied on the legal counsel and representations of Mr. Boone and upon Dr. Maxson as President, to the propriety and confidentiality of the Supplemental Contract and formation of the Varsity Club. Dr. Maxson as President, not Mr. Weaver, had the responsibility to report the existence and terms of the Supplemental Contract to the Board of Regents. Dr. Maxson testified that he relied on the advice of counsel in creating and then concealing the Supplemental Contract. Nonetheless, Dr. Maxson had ultimate responsibility for the existence and concealment of the supplemental contract from the Board of Regents.

11. Mr. Boone and Dr. Maxson are also responsible for misinforming Regent Carolyn Sparks that the Supplemental Contract was legal and appropriate in every respect and that she was precluded by its confidentiality from informing

the Board of Regents of its existence and terms. The evidence is not clear why Ms. Sparks as Board Chair was invited to the April 2, 1992, meeting in Dr. Maxson's office, to be briefed on the terms of an agreement which were to remain confidential. Ms. Sparks was invited to the meeting, informed about the existence and terms of the Supplemental Contract, and simultaneously told that she could not disclose or discuss the agreement with anyone because of its confidentiality. As cited above, UCCSN policy at that time precluded foundations from making direct expenditures to any university employees except when (i) it is documented that the expenditures are in the best interest of the institution; (ii) approved by the president; and (iii) reported to the Board of Regents at its next regularly scheduled meeting. (UCCSN Code; Title 4, Chapter 10, Page 17, Section 3 (Rev. 8/88); subsequently revised with stricter provisions in 4/93 and 2/94.)

12. Mr. Booke should not have provided legal advice and services to Mr. John Goolsby as Chairman of the Foundation. Mr. Booke was not the Foundation's lawyer. Moreover, he never communicated with or informed the Foundation's legal counsel about the advice and counsel he was providing the Foundation in drafting the Supplemental Contract and advising Mr. Goolsby in relation thereto.

13. Mr. Irsfeld did not violate the provisions of NRS 281.481 *et seq.*

14. The public purpose of NRS 281.481 (4) in relation to the administrative responsibility of the Board of Regents, is that the publicly elected Board of Regents is charged with responsibility for the mission, goals, policies and administration of the University of Nevada, its universities and community colleges. The execution of that responsibility requires the undivided and undiluted accountability of the officers and employees to the Board of Regents of the University. The jurisdiction to direct those officers and employees must be solely in the Board of Regents, just as must be the jurisdiction to pay, reward and provide benefits to such officers and employees, whatever the original source of the funds to do so, whether public or private.

15. Implicit in this principle is the notion that just as Regents have the duty to define the duties and policies of UNLV officers and employees, the Regents retain the power to (i) judge and enforce their performance of such duties and policies, and (ii) determine the appropriate compensation, rewards and benefits for such performance, as distinct from a private party. This is based upon the practice that only the government normally should compensate employees for government work, so that third parties do not reward, compensate, control or influence a government or public employee's decision or service. Accordingly, it is usual for the law to forbid a supplement to a public employee's salary from private or outside sources. It is the same principle which restricts, prohibits or requires disclosure of the receipt of gifts, honoraria or other economic benefits from others when given or paid for activity related to public or government employment.^[4]

DATED: November 15, 1994.

NEVADA COMMISSION ON ETHICS

By: /s/ Thomas R. C. Wilson, Chairman

[1] Foundation records were made subject to the Nevada Open Records Law during the 1993 Legislative Session; the statutory enactment is at NRS 396.405. The Commission discusses elsewhere in this Opinion the propriety of Article III, the confidentiality clause in the Supplemental Contract.

[2] When this occurs, the members of the Board of Regents are not acting as the Board of Regents but as the membership of the Foundation.

[3] NRS 396.405 was enacted during the 1993 legislative session and makes university foundation records public

and open to inspection.

[4] See Northwestern University Law Review, Vol. 87 at page 57 (Fall 1982).