Case Number _____

IN THE SUPREME COURT OF THE STATE OF NEVADA

EX PARTE MICHAEL MARKING and NANCY E. FLEMING, Petitioners	PETITION FOR REVIEW OF RULES

COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Petitioners, and hereby submit their PETITION FOR REVIEW OF RULES.

WHEREAS

This Court has adopted a common law rule requiring a legal entity to be represented in Nevada courts by an attorney (see page 10); and

Without such representation, such an entity may not appear before Nevada courts; and

A corporation, which is one such legal entity, is a person with respect to First and Fourteenth Amendment rights (see page 12); and

Complete denial of the right to use of the courts, merely for lack of representation, is in violation of the First and Fourteenth Amendments (see page 13); and

Overly broad remedies are forbidden (see page 17); and

The aforementioned rule regarding representation of legal entities is an overly broad remedy for the problems addressed (see page 18); and

The aforementioned rule discriminates against a class of persons, and thus violates the Equal Protection clause of the Fourteenth Amendment (see page 20); and

Other jurisdictions, though having similar rules, relax the restrictions where appropriate, on both equitable and Constitutional grounds (see page 21).

THEREFORE

Petitioners respectfully petition this Court to review its rules regarding appeals and non-attorney representation of legal entities, and to modify said rules to bring them into conformity with the requirements of the First and Fourteenth Amendments by providing either but preferably both of the following remedies:

1. Allow non-attorney representation in Nevada courts of corporations by their officers, with restrictions as this Court sees fit, on a case-by-case basis, when the corporation cannot afford an attorney, and when the stockholders and directors are the same persons and unanimously approve of same, and with other conditions as described herein. (see page 24)
2. When legal entities do not have representation, allow abbreviated appeals satisfying the Constitutional requirements of due process, said appeals to consist of a review of the lower court record by the appellate court, with a brief allowed to be submitted. (see page 25)

WE NOTE that, concurrently with the filing of this Petition, Petitioners also are filing their EMERGENCY EX-PARTE MOTION FOR STAY OF PROCEEDINGS.

IN SUPPORT of this PETITION, Petitioners attach their MEMORANDUM OF POINTS AND AUTHORITIES.

DATED this Saturday, 7 August 2010.

_____

Michael Marking, Petitioner

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Nancy E. Fleming, Petitioner

both at: General Delivery, Austin, Nevada 89310

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Memorandum of Points and Authorities

1. Background and history. The impetus behind this Petition lies in a separate case, which is an appeal, *Bionic Buffalo Corp. v. Integrated Systems, Inc.*, No. 52912 (2010). (judgment entered, appeal dismissed for lack of attorney, but remittitur not yet issued) Although Petitioners were aware of this Court's rule requiring an attorney to represent a corporation, the appellant could not afford an attorney. However, appellant had been dissolved and Petitioners, as trustees of the dissolved corporation, reasoned in their Motion for Substitution of Parties, for Leave to Submit Briefs, and for Oral Arguments that, as trustees of the dissolved corporation's assets, they were acting pro se and not as representatives of a legal entity. This Court concluded that the trust created by NRS 78.590 was, itself, an entity, and required representation by an attorney.

2. Still unable to afford an attorney, Petitioners filed a second motion, named a Motion for Reconsideration, challenging the rule itself, on grounds similar to the ones stated herein. This Court was gracious enough in its discretion to file the second motion, but dismissed it without considering the arguments. In its opinion, the Court wrote, "Mr. Marking has now submitted a motion requesting reconsideration of our order denying his motion to substitute himself and another former director as trustees in the place of Bionic. We deny that motion." (Order Denying Motion and Dismissing Appeal, p.3, 14 July 2010, in *Bionic Buffalo*) Unfortunately, however, that was a mischaracterisation of the second motion, which, though perhaps inaptly named, was not about substitution. Apparently, our Motion for Reconsideration was denied without being read.

3. This Court has been generous with its time. While it appears that the Court did not

read the MOTION FOR RECONSIDERATION, at the same time it was, under its own rules, under no obligation to do so. We presume that it must receive many frivolous requests from proper person litigants, and might with good reason have assumed that we were merely taking a second shot at the question. Moreover, under the rules, despite the indulgence of this Court, we are not allowed, as non-attorneys, to represent a legal entity, so filing yet another motion in *Bionic Buffalo* would be disrespectful of this Court.

4. However, the questions we bring in this Petition are new, and would appear to have import not only for us but also for other litigants. Research shows that the arguments are reasonable, and do not rely on some marginal corner of law and precedent. As far as we can tell, Nevada has never addressed these questions, so the argument we make is new to this Court.

5. This Court having been reasonable before, we would prefer to give it the opportunity of responding to these arguments, rather than to make them in Federal courts. If we have not anticipated some overarching problem, then we sincerely expect this Court to tell us where we are wrong. This is an attempt to arrive at the correct action, and not merely another try to remedy a perceived injustice.

6. Finally, bringing this argument in an *ex parte, pro se* petition obviates the problem of the rule against non-attorney representation of entities. We are mindful of NRAP 46B, but have concluded that, under the First Amendment we have, at least, a right to make this Petition. Our right to petition for a redress of grievances would be hollow if interpreted to exist without a concomitant obligation on the part of this Court to listen.

7. This Court has adopted a common-law rule requiring a legal entity to be represented in Nevada courts by an attorney. The rule under discussion is not formalized, as are, for example, SCR, NRAP, NRCP, or NRS. It is found in various opinions of this Court. This Court, in *Bionic Buffalo*, has recently referred to the rule by citing *State v. Stu's Bail*

Bonds, 115 Nev. 436, 991 P.2d 469 (1999); *Salman v. Newell*, 110 Nev. 1333, 885 P.2d 607 (1994); and *Sunde v. Contel of California*, 112 Nev. 541, 915 P.2d 298 (1996).

8. "At common law a corporation was considered incapable of appearing personally in any action. 1 *Coke.Litt.*, 1st Amer.Edit., §§ 90, 66b; *Chitty*, vol. 1 (16th Amer.Ed.) 577." (*Brandstein v. White Lamps, Inc.*, 20 F.Supp. 369, S.D.N.Y. (1937)) "The common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this State, shall be the rule of decision in all the courts of this State." (NRS 1.030)

9. The reasoning for the rule is explained in *Brandstein*, at 370: "While a corporation is a legal entity, it is also an artificial one, existing only in the contemplation of the law; it can do no act, except through its agents. Since a corporation can appear only through its agents, they must be acceptable to the court; attorneys at law, who have been admitted to practice, are officers of the court and subject to its control. See *Nightingale v. Oregon Cent. Ry. Co.*, 18 Fed. Cas. p. 239, No. 10,264."

10. In other words, it is within the Court's discretion who to accept as an agent, and Courts prefer attorneys for the reasons given above.

11. This Court, of course, has authority to make appropriate rules in this area. The authority for this Court's rule making in this area comes from two sources: NRS 2.120, which delegates to the Supreme Court authority granted to the Legislature by the Nevada Constitution; and NRS 7.285, which acknowledges the Supreme Court's role in regulation of the practice of law. Neither statute, nor any other, explicitly states any rule which forbids non-attorney representation in all cases.

12. This Court has held that statutes must be interpreted strictly. However, the statutes do not explicitly forbid the representation of entities by non-lawyers in all cases. In fact, NRS 73.012 explicitly allows such representation in small claims actions, contrary to this Court's rules. From the outset, then, this Court's rules, being overly broad and inclusive, contravene

the statutes.

13. However, this Court's authority to make rules regarding who may appear before it as the representative of another also convey to it the discretion to allow, at times, those who are not attorneys.

14. We note as follows: We are aware of the distinction between the right to self-representation and the right to due process. Furthermore, we are aware of the distinction between the self-representation right conveyed by the Constitution for criminal matters, and the right to self-representation for civil matters conveyed by the Judiciary Act of 1789. We also distinguish in civil matters between rights in Nevada courts and rights in Federal courts.

15. We observe that pro se representation shares many of the problems of non-attorney representation, and some observations by various authorities are applicable to both.

16. There are two arguments in this petition. One is that the Constitution guarantees an appeal right which may be satisfied without any representation at all, except for a brief stating the appellant's case. The second is not an argument for a right of self-representation by corporations, but rather that non-attorney representation of corporations must be allowed under certain limited circumstances to satisfy the requirements of due process and the right to petition for redress of grievances.

17. A corporation, which is one such legal entity, is a person with respect to First and Fourteenth Amendment rights. "It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment. *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 6 S.Ct. 1132, 30 L.Ed. 118 (1886); see *Covington & Lexington Turnpike R. Co. v. Sanford*, 164 U.S. 578, 17 S.Ct. 198, 41 L.Ed. 560 (1896)." (*Citizens United v. Federal Election Commission*, 130 S.Ct. 876, FN15 (2010))

18. The Fourteenth Amendment says, "...nor shall any State deprive any person [or corporation] of life, liberty, or property, without due process of law; nor deny to any person

[or corporation] within its jurisdiction the equal protection of the laws." (*United States Constitution*, Amend. 14, §1)

19. Further, in Nevada, "Corporations may sue and be sued in all courts, in like manner as individuals." (*Nevada Constitution*, Art. 8, §5)

20. Corporations also enjoy First Amendment rights: "The Court has recognized that the First Amendment applies to corporations, e.g., *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 778, n. 14, 98 S.Ct. 1407, 55 L.Ed.2d 707" (*Citizens United*, at 883)

21. "Freedom of speech and the other freedoms encompassed by the First Amendment always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause, see [citations omitted] and the Court has not identified a separate source for the right when it has been asserted by corporations." (*Bellotti*, at 780)

22. The First Amendment says, "Congress shall make no law [...] abridging [...] the right of the people [...] petition the Government for a redress of grievances." (*United States Constitution*, Amend. 1)

23. (Some authorities consider a judicial action to be such a petition under the first Amendment, while others consider it to be a matter of due process under the Fourteenth Amendment. We have found no finally authoritative statement, but, since both Amendments apply to corporations, the question may not be significant here.)

24. Complete denial of the right to use of the courts, merely for lack of attorney representation, is in violation of the First and Fourteenth Amendments, As the requirements of the Constitution are different for trial and for appeal, we take them separately.

25. "In the context of judicial proceedings, due process unquestionably requires that the parties be afforded an opportunity to be heard. See *Boddie v. Connecticut*, 401 U.S. 371, 377-79, 91 S.Ct. 780, 785-786, 28 L.Ed.2d 113 (1971); *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)." (*Ad+Soil, Inc., v. County Commissioners of Queen*

Anne's County, 307 Md. 307, 513 A.2d 893, (1986))

26. Fundamental requisites of due process are the opportunity to be heard, to be aware that a matter is pending, to make an informed choice whether to acquiesce or contest, and to assert before the appropriate decision making body the reasons for such choice. (*Trinity Episcopal Corp. v. Romney*, D.C.N.Y., 387 F.Supp 1044)

27. Ordinarily, these basic requirements may produce difficulties, but not impossibilities. Indeed, there are reasons for the rule requiring attorney representation of legal entities, but the requirements of the Constitution are paramount.

28. The rules of courts in Nevada do not make access to the courts optional or discretionary. Indeed, the Constitution would not allow it. For the courts to outright deny access to corporations or other legal entities would violate the equal protection clause of the 14th Amendment. Yet, that is effectively what is done when the courts enforce a rule requiring an attorney and the legal entity cannot afford one.

29. Reserving questions of difficulties for a discussion below, it is logically untenable to hold that the usual agents of a legal entity are always incapable of speaking for that entity before a court. Corporations act through their officers and directors. They enter into contracts, hire employees, buy, sell, advertise, lobby, design, manufacture, and, occasionally, commit crimes. They are presumed capable of understanding the law, and cannot plead its ignorance when they ignore it. To conclude, merely because those agents do not have specific legal training, that they do not know enough about the law to deal with some legal situations, is absurd.

30. Since it is possible, though not always desirable, for a corporation to appear through its officers and directors, the Constitutional requirements may thereby be met, and it would be a violation of the Constitution to deny such an appearance when there are no other feasible choices. "We recognize that no law consistent with the First Amendment could limit to licensed professionals the right to petition the government for redress of grievances [...]"

(*State ex rel. Reed v Schwab* (1979) 287 Or 411, 600 P2d 387, 24 ALR4th 422, cert den 444 US 1088, 62 L Ed 2d 776, 100 S Ct 1051, reh den 445 US 955, 63 L Ed 2d 792, 100 S Ct 1609)

31. The requirements for appeals are much simpler, because the appeal process need only be, basically, a matter of review.

32. "At the appellate level, however, the constitutional right to be heard is satisfied where the parties are provided an opportunity to present their arguments to the court through the submission of written briefs, without oral argument. As we said in *Chevy Chase Village v. Board*, 249 Md. 334, 346, 239 A.2d 740 (1968), '[a] hearing in an appellate court is an argument-type hearing and appellate courts ... can decide and often have decided important cases and issues on printed arguments without oral presentation.' The cases are generally in accord. See *Groendyke Transport, Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir.), cert. denied, 394 U.S. 1012, 89 S.Ct. 1628, 23 L.Ed.2d 39 (1969); *Moore v. Spangler*, 401 Mich. 360, 258 N.W.2d 34, 37-38 (1977); *Byrd v. Columbia Falls Lions Club*, 183 Mont. 330, 599 P.2d 366, 367-68 (1979); *State ex rel. Reed v. Schwab*, 287 Or. 411, 600 P.2d 387, 390 (1979), cert. denied, 444 U.S. 1088, 100 S.Ct. 1051, 62 L.Ed.2d 776 (1980)." (*Ad+Soil, Inc., v. County Commissioners of Queen Anne's County*, at 899)

33. The First Amendment right to petition for redress of grievances "does not mean that an appellate court may not require that such a 'petition' be submitted in the form of written rather than oral arguments. If that may be required, it does not deny equal protection of the law to limit oral argument to those who are professionally competent to respond to the court's questions about the exact legal issues presented by the appeal." (*State ex rel. Reed v. Schwab*, at 391)

34. Already in Nevada, based on reading JCRCP and NRAP, there is the possibility of appeals from justice courts to district courts with neither briefs nor oral arguments, at the district court's discretion. In other words, the appellant's and respondent's appearance before

the appellate (district) court is minimal or nonexistent, and the appeal may possibly consist of a review of the record. (see JCRCP 75A, NRAP 34). We note, however, that while briefs may not be required for an appeal, the First Amendment right to petition for redress of grievances precludes refusal to accept such a brief, and, once accepted, requires that it be given reasonable consideration. An appeal argument is, at heart, an expression of a grievance not against the other party but rather against the trial court for purported misconduct of the hearing or other error, so it is in fact a petition against an action or inaction of the government itself.

35. Even without briefs, a diligent litigant likely will have indicated in the record an objection to the ostensible error by the trial court. Very possibly, he or she will have done it in some conspicuous way, such as a Rule 59 motion, or by summarizing the problem on the notice of appeal. After all, if the would-be appellant cannot briefly describe the error at the time the appeal is filed, perhaps there is no justification for an appeal in the first place. Either way, a litigant has ways to signal the gravamen of the appeal to the higher court, so the burden on that higher court to review the record need not be so substantial as it might be supposed.

36. Every school child learns that an assertion or argument should be considered on its merits and not on who makes it. An argument is true or not, regardless of who does the arguing. This is a basic lesson children are taught in debating classes, or when learning about propaganda. Similarly and presumably, the court reviews each brief on its merits, unbiased by the knowledge that the brief was submitted by a particular attorney, party, or litigant. A brief submitted by a corporation's officer should be evaluated the same way as would be one submitted by counsel. It should stand on its own. For the court to presuppose that an argument by a lay person is likely to be less valid than such an argument by an attorney is prejudicial.

37. In summary, the Constitutional requirements for due process on appeal appear minimal. There is no reasonable ground to deny an appeal based on lack of "suitable" representation.

38. Overly broad remedies are forbidden. There is, of course, a need for regulation. Specifically, this Court has held that regulation of the practice of law serves to protect the public. (*Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 74 Nev. 186, 326 P.2d 408 (Nev.,Jun 06, 1958) (No. 4039)) It also contributes to the orderly operation of the courts. Petitioner takes no issue with these goals, but argues, instead, that the remedy of a blanket prohibition is broader than necessary and therefore wrongly deprives Petitioner and others of their rights.

39. Admittedly, the balancing of interests in this area can be complex. For one example, the discussion in *Phillips v. Tobin* (548 F.2d 408, U.S.C.A. 2 (1976)) illustrates the intricacies involved here with shareholders' derivative actions.

40. Very few interests in the balancing process can tip the scales against First Amendment rights. "[I]t is clear that few things, save grave national security concerns, are sufficient to override First Amendment interests." (*United States v. Progressive, Inc.*, 467 F.Supp. 990, 992, D.C.Wisc. (1979))

41. However, remedies must be appropriately crafted to the problem to be solved. It is clear that the courts and the legislature must at times balance the needs of classes of persons, or of individual persons, against one another when there are conflicts. In this instance, the need for protection of the public must be balanced against the rights of due process and equal protection which inure to the corporations, stockholders, directors, officers, and others which are affected by the parties in this case. Regardless, neither statute nor judicial rule may be overly broad when fashioning a remedy which infringes on the rights of the affected parties.

42. Recently, the U.S. Supreme Court reversed its own previous finding in a First Amendment case involving a Federal statute which regulated the political speech of corporations. Among other interests subject to balance were those of some shareholders in the affected corporations. The statute was struck down, in part, because the remedy was overly

broad to address the problem.

> When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. [...] [T]he statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders.
>
> – *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 at 911 (2010)

43. Nevada has recognized this principle. This Court overturned a statutory remedy which was too broad. "Because NRS 12.015 may operate to preclude the filing of meritorious actions by indigent persons, we conclude that the classification scheme created by the statute is arbitrary and irrational. The statute is too broad in its sweep. We conclude, therefore, that by conditioning the waiver of filing fees on an indigent's ability to obtain the certificate of an attorney that the indigent's cause of action or defense has merit, NRS 12.015 violates the equal protection guarantees contained in the Nevada and United States Constitutions." (*Barnes v. Eighth Judicial Dist. Court of State of Nev., In and For Clark County*, 103 Nev. 679, 748 P.2d 483 (Nev.,Dec 31, 1987) (Nos. 17872, 18044, 18362, 17633))

44. This principle regarding classification was also affirmed in *State Farm Fire and Cas. Co. v. All Elec., Inc.*, 9 Nev. 222, 660 P.2d 995 (Nev., Mar 31, 1983) (No. 13228, 13443)

45. The aforementioned rule regarding representation of legal entities is an overly broad remedy for the problems addressed. As explained by this Court in *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, the purpose of the regulation of legal practice is to protect the public. In addition, various other reasons can be, and at times have been, given for the prohibition of legal entity representation by non-attorneys: (a) it protects diverse persons involved in the entity (shareholders, officers, and so on) from incompetence and unscrupulous behaviour; (b) it protects the courts and other parties from incompetent actions by those who might waste the courts' and other parties' time; (c) members of the bar, being regulated, are subject to sanctions for improper and unprofessional conduct, while such sanctions are

unavailable for non-attorneys; and (d) orderly administration of the legal profession gives benefits which exceed the scope of any single case.

46. We do not take issue with these benefits from regulating the practice of law. However, they must be balanced against the costs, and they must not be sought to the extent that reasonable compliance with the Constitutional requirements is abandoned.

47. The need to protect shareholders from the misdeeds of officers, such as those who might wrongly imagine themselves competent to litigate some matter, is not absolute. “Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management.” (*First National Bank of Boston*, at 794)

48. When the shareholders, directors, and officers are the same persons, as in many small, closely held corporations, the need to protect these actors from one another is even more greatly diminished. We submit that, when there is unanimous agreement among the shareholders, directors, and officers, regarding the decision to litigate and the decision to allow an officer to represent the corporation in court, the court’s obligation to protect these persons from that officer’s potential misdeeds or incompetence vanishes for practical purposes. The fraction of cases where complete lack of access to the courts is better for the corporation than bad representation is likely to be tiny.

49. Of course, there is also a need to protect the court and the other party or parties. The court, however, is not without mechanisms to effect such protection. In *O’Reilly v. New York Times Co.* (692 F.2d 863, U.S.C.A. 2 (1982)), the court addressed the question of whether O’Reilly’s pro se representation would be “disruptive” to the proceedings: “It is far from clear what sort of ‘disruption’ the [lower court] judge anticipated. Given Rev. O'Reilly's

inexperience with the rules of evidence and with courtroom protocol, a certain amount of confusion, delay, even irregularity, would be expected. But this sort of "disruption" accompanies pro se representation generally; it is a price the Framers of the Sixth Amendment and the First Judiciary Act thought well worth paying. See *United States v. Dougherty*, supra, 473 F.2d at 1124-25. In any event, Rev. O'Reilly's performance at the oral argument on his motion should have diminished fears of this sort. If, on the other hand, the judge thought that Rev. O'Reilly was likely to engage in deliberately disruptive or obstreperous conduct, the measure he chose was far too drastic. A potentially unruly, disrespectful, or overly passionate pro se may be clearly and firmly forewarned that he will lose his right of self-representation if he obstructs the trial or creates 'a scene'. Cf. *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (disruptive behavior may operate as constructive waiver of right to be present at trial). But the mere possibility of such disruption, especially if it is as unlikely as it appears to be here, is not a sufficient reason for denying the right of self-representation at the start. See *Dougherty*, supra, 473 F.2d at 1126." (*O'Reilly*, FN7)

50. If this Court has the authority to administer sanctions against attorneys who are not mindful of its rules, it does not seem impossible that it might also be able to administer sanctions against non-attorney representatives as a condition of their permission to appear.

51. Given that alternative options exist, this Court's absolute ban in all circumstances on non-attorney representation of legal entities is extreme and overly broad.

52. The aforementioned rule discriminates against a class of persons, and thus violates the Equal Protection clause of the Fourteenth Amendment. When a remedy discriminates against one class of persons, then that remedy is inappropriate if other remedies are reasonably available.

53. "Under Federal and State equal protection provisions, a statute may single out a

class for distinctive treatment only if such classification bears a rational relation to the purposes of the legislation." (*Laakonen v. Eighth Judicial Dist. Court In and For Clark County*, 91 Nev. 506, 538 P.2d 574 (Nev.,Jul 31, 1975) (NO. 7654)) The blanket prohibition against non-attorney representation discriminates against a class of persons, namely, small entities with one or only a few stockholders and without funds to hire attorneys. There is no mandate in the Constitution or in the statutes to protect ordinary people from themselves, and there is no public purpose served when there is no diversity between the representatives of an entity and the beneficiaries of, or responsible parties for, an action.

54. This principle applies even when the class is small, even as small as one person. (*Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060, 68 USLW 4157, 30 Envtl. L. Rep. 20,360, 00 Cal. Daily Op. Serv. 1359, 2000 Daily Journal D.A.R. 1909, 2000 CJ C.A.R. 897 (U.S.Ill.,Feb 23, 2000) (No. 98-1288))

55. The rule has no rational basis because it does not address the actual problems. Instead, it proposes a solution without scoping the problem. A rule which addressed the problem of protecting, for example, the courts from incompetent representatives would seek to weed out incompetent representatives, rather than assuming that only attorneys are competent. There is no basis in logic or science to conclude, ab initio, that there are no competent non-attorney representatives. It is rational to presume lack of competence, but irrational to conclude that there are no exceptions.

56. As another example, a rational rule to protect stockholders from officers would not apply when both were the same persons.

57. Other jurisdictions, though having similar rules, relax the restrictions where appropriate. The authorities cited by this Court in its previous rulings on non-attorney representation of legal entities derive directly or indirectly from Federal court ruling rulings. Although the Federal courts base their authority for their rule in this issue on statute as well

as common law, Federal court rulings are not binding on this Court, except for those of the U.S. Supreme Court. (*Bargas v. Warden, Nev. State Prison*, 87 Nev. 30, 482 P.2d 317 (Nev.,Jan 28, 1971) (No. 6259)) Not only do the Federal courts operate under different rules, but furthermore they derive their authority on this issue by specific statute.

58. Nevertheless, we sought instances from other states as a kind of sanity check, since this issue seems not to have been discussed previously in Nevada. In summary, where other jurisdictions have made exceptions, the bases are typically constitutional or equitable.

59. Although this Petition is brought on Constitutional grounds, there also is merit in equitable arguments. Courts may ignore the corporate entity in complaints for equitable relief. (see *Oklahoma Retail Grocers Association v. Wal-Mart Stores, Inc.*, 605 F.2d 1155, CA 79-3158, Ct. App. 10th Circuit (1979)). Certainly, there are grounds for equitable relief when a rule deprives a litigant of a basic right. At the least, equity does not contradict the Constitution here.

60. We cite some examples:

61. "Because of the constitutional dilemma presented, public policy dictates that an exception be made at this time to the prohibition against one engaging in the unauthorized practice of law.[footnote omitted] In the limited situation where the statutory liquidator makes a showing that corporate funds are unavailable for the hiring of counsel, he may perform the necessary legal services." (*In re Ellis*, 487 P.2d 286 at 291, 53 Haw. 23, (Hawai'i, Jun 25, 1971) (No. 5044))

62. "Maunder would not be practicing law in this instance by acting on behalf of her corporation. The practice of law has been defined as giving legal advice or rendering legal services to others. [...] Maunder is not acting for another in a true sense, for, although she is acting for a separate legal entity, she is the sole owner and stockholder of that entity. In effect, she is acting for herself, just as would be the case if this matter had remained in the small claims division or if this entity of hers were a sole proprietorship. [...] Finally, the

representation of the corporate plaintiff by its owner poses no threat to the public well-being." (*Margaret Maunder Associates, Inc. v. A-Copy, Inc.*, 499 A.2d 1172, 40 Conn.Supp. 361 (Conn.Super.,Jun 27, 1985) (NO. CV7-880))

63. "'In these circumstances, we may not justly disregard the interest or the right of the plaintiffs [...] to have their cause tried even in the absence of the defendant and her attorney.' [...] Therefore, appellant will not be permitted to complain that the court erred in permitting Mr. Hecht to provide it with some representation." (*Phoenix Mut. Life Ins. Co. v. Radcliffe on the Delaware, Inc.*, 266 A.2d 698, 439 Pa. 159 (Pa.,Jul 02,1970))

64. "[T]he fictitious corporate person disappeared upon dissolution, and whatever assets it might have had at that time belonged thereafter, in equity at least, to the stockholders who are thus the equitable owners of this claim against defendants. Hence, as the referee remarked, 'the presence of a representative of the artificial person would add no material element to the litigation.'" (*Reed v. Norman*, 309 P.2d 809, 48 Cal.2d 338 (Cal.,Apr 12, 1957) (NO. L.A. 24415))

65. "Although the lawyer-representation rule serves important public interests, it should not be rigidly enforced in cases where those interests are not threatened and enforcement would preclude appearance by the organization. We hold, therefore, that courts have discretion to permit an organization to appear through a non-attorney representative where the proposed representative establishes that (1) the organization cannot afford to hire counsel, nor can it secure counsel on a pro bono basis, (2) the proposed lay representative is authorized to represent the organization, (3) the proposed lay representative demonstrates adequate legal knowledge and skills to represent the organization without unduly burdening the opposing party or the court, and (4) the representative shares a common interest with the organization." (*Vermont Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 621 A.2d 225, 159 Vt. 454 (Vt.,Dec 31, 1992) (NO. 92-121))

66. "This small, closely-held corporation may proceed in this Chapter XI proceeding

represented by its sole shareholder, who is not an attorney. The bankruptcy judge may require an attorney to appear for the corporation on pain of dismissal should he find that lay representation is causing a substantial threat of disruption or injustice, or should changed economic conditions make it possible for the corporation to obtain an attorney." (*Matter of Holliday's Tax Services, Inc.*, 417 F.Supp. 182 (E.D.N.Y.,Jun 24, 1976) (No. 75 B 2910), affirmed by *Holliday's Tax Services, Inc. v. Hauptman*, 614 F.2d 1287 (2nd Cir.(N.Y.) Dec 26, 1979) (Table, No. 79-5019, 79-5020))

67. Proposed rules changes for trial courts. We are not asking the Court to allow non-attorney representation of legal entities in all cases. We are coming to this Court with a specific problem, and seek relief for that problem. We do not expand the Petition for four reasons. First, the mootness doctrine militates against any court ruling on issues which are not in actual controversy. Second, we know only that our personal rights have been affected by the denial of due process rights in one specific case, we do not pretend to know very well the implications for other situations. Third, a change in the rules may cause problems for those who have come to rely on them. Fourth, we appreciate the caution recommended by Justice Alito in his concurrence to the *Citizens United* decision:

> Because the stakes are so high, our standard practice is to refrain from addressing constitutional questions except when necessary to rule on particular claims before us. See *Ashwander v. TVA*, 297 U.S. 288, 346-348, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). This policy underlies both our willingness to construe ambiguous statutes to avoid constitutional problems and our practice " 'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' " *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 28 L.Ed. 899 (1885)).
>
> – *Citizens United v. Federal Election Commission*, at 918

68. We propose that a non-attorney officer of a for-profit corporation be allowed to represent the corporation in a specific action by submitting a motion making that request, in

the same way a motion for leave to proceed in forma pauperis is made. The motion must be accompanied by an affidavit attesting to the following qualifications:

(a) all stockholders and directors agree to the litigation and to the representation by the officer making the petition, and to the conditions below; and

(b) the officer holds office in the regular course of business, and not merely for purposes of the conduct of the litigation; and

(c) there has been no assignment or transfer of stock or other interest for purposes of meeting the qualifications for non-attorney representation; and

(d) the officer agrees to be bound by the rules of court, and to submit to sanctions as if he were an attorney; and

(e) the pending or proposed action raises no issues which would materially affect any of the above conditions; and

(f) the corporation is unable to afford counsel; and

(g) the corporation may not complain later of inadequate representation, except in case of fraud or gross negligence by the representing officer.

69. We further propose that, as with any motion, opposing parties may lodge objections based on the facts and the law.

70. We further propose that the court may question the officer or any stockholder or director to ascertain the truth of these statements, may request evidence in support, and may examine the officer to determine that he is reasonably competent and has a general understanding of the rules.

71. We further propose that the court will use its discretion to grant the request on a case-by-case basis.

72. Proposed rules changes for appeals. The minimum Constitutional requirements for due process on appeals appear to the right to submit a petition or brief, and the right to a

review of the lower court record for errors. We propose that, when there is no representation of a legal entity, that these two things be allowed. Instead of dismissing the appeal for lack of representation, the appellate court should grant this simplified form of appeal.

73. We observe that this Court has instituted a pilot program for proper person civil appeals in the Supreme Court only, with Rule 46B suspended if the proper person litigant wishes to file a formal brief or other type of argument. Such a program for unrepresented entities would make it easier for those without the ability to draft a formal brief, but it does not seem to be a Constitutional requirement. We cannot guess if the pilot program has resulted in less or more work for this Court, but there appears to be no requirement to give unrepresented corporations any special treatment. Our petition is for the Constitutional minimum.

74. Summary and conclusions. Corporations are persons with regard to the First and Fourteenth Amendments of the United States Constitution. As such, they are entitled to the right to petition for redress of grievances, and to the right of due process as guaranteed by those amendments. A common-law rule requires them to be represented by agents acceptable to the court. The courts, to protect the public, require that those agents must in all cases be licensed attorneys. This remedy is overly broad, and contravenes corporations' rights. Further, it discriminates against a class of small, closely held and operated corporations which cannot afford attorneys and which are not much in need of such protection anyway.

75. The specific requirements of due process are reviewed to establish the minimum requirements. The Constitutional requirements of due process for trial courts are distinguished from those of appellate courts.

76. It is observed that other jurisdictions make exceptions to the strict rule, both on Constitutional and equitable grounds.

77. It is incumbent upon the court to balance the Constitutional rights of corporations

against the need to protect the public. Any reasonable balance of interests must allow the representation of corporations by non-attorneys under limited circumstances.

78. Petitioners suggest, as more appropriate, a new rule for trial courts, and another new rule for appellate courts.

79. Petitioners pray for relief in the form of a revision of the rules to allow representation of corporations by non-attorney officers under certain limited circumstances as described herein.

Certificate of Service

I hereby certify under penalties of perjury that on this date I served true and correct copies of the foregoing document by depositing them for mailing, in sealed envelopes, U.S. postage prepaid, at Austin, Nevada, addressed as follows:

Barry L. Breslow, Esq.; Robison, Belastegui, Sharp & Low; 71 Washington Street; Reno, Nevada 89503

Carson City District Court Clerk; 885 East Musser Street, Suite 3031; Carson City, Nevada 89701

Michelle Doolin; Cooley, Godward & Kronish, LLP; 4401 Eastgate Mall; San Diego, California 92121

Dated Saturday, 7 August 2010.

_____

Michael Marking

AFFIRMATION

(Pursuant to NRS 239B.030)

I hereby affirm that the preceding document filed in the above-described manner does not contain the social security number of any person.

Dated Saturday, 7 August 2010.

_____

Michael Marking

(Petitioners' electronic document name: *emf_petition_for_review_20100806aI*