

1 **-IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3
4 THE COMMISSION ON ETHICS OF THE
5 STATE OF NEVADA,

6 Appellant,

7 vs.

8 IRA HANSEN, in his official capacity as Nevada
9 State Assemblyman for Assembly District No. 32;
10 And JIM WHEELER, in his official capacity as
11 Nevada State Assemblyman for Assembly District
12 No. 39,

13 Respondents.

Electronically Filed
Nov 24 2015 03:23 p.m.
Tracie K. Lindeman
NO. 69100 ~~Clerk of Supreme Court~~

DOCKETING STATEMENT
CIVIL APPEALS

14 **GENERAL INFORMATION**

15 All appellants not in proper person must complete this docketing statement. NRAP 14(a). The
16 purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction,
17 classifying cases for en banc, panel, or expedited treatment, compiling statistical information
and identifying parties and their counsel.

18 **WARNING**

19 This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme
20 Court may impose sanctions on counsel or appellant if it appears that the information provided
21 is incomplete or inaccurate. *Id.* Failure to attach requested documents, fill out the statement
22 completely, or to file it in a timely manner constitutes grounds for the imposition of sanctions,
including a fine and/or dismissal of the appeal.

23 A complete list of documents that must be attached appears as Question 26 on this docketing
24 statement. Failure to attach all required documents will result in the delay of your appeal and
may result in the imposition of fines.

25 This court has noted that when attorneys do not take seriously their obligations under NRAP
26 14 to complete the docketing statement properly and conscientiously, they waste the valuable
27 judicial resources of this court, making the imposition of sanctions appropriate. *See KDI*
28 *Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab
dividers to separate any attached documents.

1. Judicial District First Department II County Carson City

Judge Honorable James E. Wilson, Jr.

District Ct. Case No. 15OC000761B

2. Attorney filing this docketing statement:

Attorney Tracy L. Chase, Esq., Telephone (775) 687-5469

Firm Nevada Commission on Ethics

Address 704 W. Nye Lane, Suite 204, Carson City, Nevada 89703

Client(s): Nevada Commission on Ethics

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

N/A

3. Attorney(s) representing respondent(s):

Brenda J. Erdoes, Esq.
Legislative Counsel
Kevin C. Powers, Esq.
Chief Litigation Counsel
Eileen G. O'Grady, Esq.
Chief Deputy Legislative Counsel
401 S. Carson Street
Carson City, Nevada 89701
Telephone No.: 775-684-6830

Clients:
Ira Hansen, Assemblyman, District 32
Jim Wilson, Assemblyman, District 39

4. Nature of disposition below (check all that apply):

- | | |
|--|---|
| <input type="checkbox"/> Judgment after bench trial | <input checked="" type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input checked="" type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

1 **5. Does this appeal raise issues concerning any of the following?**

- 2 ☐ Child custody
3 ☐ Venue
4 ☐ Termination of parental rights

5 **6. Pending and prior proceedings in this court.** List the case name and docket number of all
6 appeals or original proceedings presently or previously pending before this court which are
related to this appeal:

7 None

8 **7. Pending and prior proceedings in other courts.** List the case name, number and court of
9 all pending and prior proceedings in other courts which are related to this appeal (e.g.,
10 bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

11 None

12 **8. Nature of the action.** Briefly describe the nature of the action, including a list of the causes
13 of action pleaded, and the result below:

14 **Parties:**

15 The Nevada Commission on Ethics (“Commission”) is an independent administrative
16 agency established and composed of Legislative and Executive branch appointees which has
17 authority over the interpretation and application of the provisions of the Nevada Ethics in
18 Government Law (“Ethics Law”) set forth in NRS Chapter 281A, applicable to public officers
19 and employees of the legislative and executive branches of government. The Commission
20 received two Third-Party Requests for Opinion (“RFOs”) alleging that Respondents Hansen
21 and Wheeler, while holding public office as assemblymen, had allegedly violated certain
22 provisions of the Ethics Law.

23 **Factual Background:**

24 In synopsis, the limited underlying facts presented with the RFOs originated with a
25 Department of Wildlife official’s encounter with Respondent Hansen regarding the proximity
26 of Hansen’s placement of snare traps to a major road, purportedly in violation of NRS 503.580.
27 After this encounter, while criminal charges were imminent, Respondent Hansen contacted the
28 Nevada Legislative Counsel Bureau (“LCB”) to request a legal opinion regarding the
applicability of snare traps to NRS 503.580. Due to a potential conflict of interest, LCB did not

1 issue an opinion to Respondent Hansen. Instead, under the advice of LCB and at Hansen's
2 request, Respondent Wheeler requested the opinion from LCB on Hansen's behalf. Shortly
3 thereafter, Hansen was formally charged with four misdemeanor counts of unlawfully setting
4 traps under NRS 503.580. Prior to conclusion of the criminal proceedings, LCB issued its
5 opinion that NRS 503.580 did not apply to snare traps.

6 **Procedural Background – Administrative:**

7 The underlying administrative proceedings before the Commission commenced in
8 March 2014, with the filing of the two separate RFOs with the Commission seeking review of
9 the actions of Hansen and Wheeler to determine whether their respective conduct violated the
10 provisions of the Ethics Law. With respect to Respondent Hansen, the RFO alleged that he
11 used his official position to seek a legal opinion from LCB to benefit his personal interests
12 related to his arrest and criminal proceedings rather than seeking independent or private legal
13 counsel which actions implicated potential violations of NRS 281A.020; NRS 281A.400(1),
14 (2), (5), (8) and (9); and NRS 281A.420(1). With respect to Respondent Wheeler, the RFO
15 alleged that he used his official position to seek a legal opinion from LCB providing an
16 unwarranted benefit to a fellow legislator's private legal needs, a person to whom Wheeler was
17 alleged to have a "commitment in a private capacity," and that Wheeler used non-public
18 information obtained through the use of government resources to benefit a private person,
19 which actions implicate potential violations of NRS 281A.020; NRS 281A.400(1), (2), (5), (8)
20 and (9); and NRS 281A.420(1).

21 Respondents, represented by LCB in the RFO proceedings, submitted a motion
22 contending that the Commission lacked jurisdiction based upon an assertion of legislative
23 privilege and immunity, as set forth in NRS 41.071, and made applicable to Commission
24 proceedings under NRS 281A.020(2)(d). On March 3, 2015, the Commission issued an Order
25 on Review of Jurisdictional Determination ("Order"), which was preliminary in nature and not
26 a final determination on jurisdiction or dispositive of the case, indicating that jurisdictional
27 fact-finding was needed to "determine whether the Subjects' conduct properly falls within the
28 scope of legitimate legislative activity and/or conduct related to the representation of the

1 interests of their constituents...” Although the Order denied Respondents’ relief, it included a
2 stay of the Commission’s jurisdictional investigation until conclusion of the 2015 Session of
3 the Nevada Legislature, so that the Commission’s administrative proceedings would not
4 interfere with the duties of the assemblymen during the 2015 Session.

5 Despite the stay, approximately one month prior to the adjournment of the 2015
6 Session, Respondents sought judicial review (“Judicial Review”) of the Commission’s Order
7 under Nevada’s Administrative Procedures Act set forth in NRS Chapter 233B (“APA”),
8 contemporaneously seeking an alternative Petition and Application for Writ of Certiorari,
9 Review or Prohibition Pursuant to Article 6, Section 6 of the Nevada Constitution and NRS
10 Chapter 34 (“Writ Petition”). Complicating the Judicial Review and Writ Petition was the
11 Legislature’s adoption of an amendment to NRS 41.071, pursuant to Assembly Bill 496,
12 introduced by the Legislative Counsel Bureau on the last day of the 2015 Legislative Session
13 as an emergency measure, expanding legislative immunity protections in Nevada. The new law
14 included provisions of retroactive application to pending administrative matters. This pending
15 administrative matter was not disclosed during legislative hearings, nor did the Commission
16 have the opportunity to testify regarding the implication of such a new law on this case or the
17 Commission’s jurisdiction with respect to State Legislators and legislative employees.

18 **Procedural Background – District Court:**

19 The Commission objected to the Judicial Review on various grounds, including:

- 20 1. Judicial Review was premature under the APA because administrative
21 remedies had not been exhausted and the Order was not a final determination,
22 as required for judicial review under NRS 233B.135.
- 23 2. The Commission’s authority to assess its jurisdictional boundaries includes
24 consideration of relevant jurisdictional facts and such fact-finding is not
25 precluded by the mere assertion of legislative immunity.
- 26 3. A reviewing court shall not substitute its judgment for that of the agency as to
27 the weight of evidence on a question of fact, including a determination that
28 there are insufficient facts under NRS 233B.135(3).

1 4. Respondents did not meet their burden to establish that the Commission's
2 Order was invalid under the required criteria set forth in NRS 233B.135(3)
3 because the Commission had not made an error of law, abused its discretion or
4 acted arbitrarily or capriciously.

5 5. AB 496 violates separation of powers infringing on the authority of the
6 judiciary to interpret the law and AB 496 should not be applied retroactively
7 because it expands rather than clarifies existing law.

8 In addition to filing a Motion to Dismiss and other pleadings, the Commission sought
9 specific relief from the District Court under NRS 233B.131 for leave to present additional
10 evidence to the Commission so it would be provided the opportunity to complete its statutory
11 duty to obtain, weigh and review jurisdictional facts to determine whether the conduct of
12 Respondents was or was not protected by legislative immunity.

13 The District Court issued an Order Denying Motion to Dismiss and Granting Petition
14 for Judicial Review making factual determinations and ruling that the Respondents' actions fell
15 within the sphere of legislative activity protected by AB 496. In doing so, the District Court
16 expressly acknowledged that the Commission's Order was not final and it had discharged its
17 duties responsibly and reasonably stating "[t]he court does **not** conclude that the substantial
18 rights of Petitioners [Respondents] were prejudiced under any of the grounds stated in NRS
19 233B.135(3)," which statute establishes the required standards to overturn a final decision of
20 an administrative agency. (Emphasis added). The District Court observed that "[t]he issue of
21 whether [Respondents'] acts were within the sphere of legitimate legislative activity was
22 unclear during the time the matter was before the Commission" and "[a]fter [Respondents']
23 filed their petition for judicial review, the Legislature made clear, through AB 496, that
24 [Respondents'] acts were within the sphere of legitimate legislative activity."

25 Further, the District Court dismissed the Writ Petition. Although this appeal does not
26 specifically seek review with respect to this portion of the District Court's decision, the
27 Commission reserves its rights and arguments asserted before the District Court.

1 **9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets
2 as necessary):

3 1) The District Court erred in denying the Commission's Motion to Dismiss, which
4 contended that Judicial Review was premature under the requirements of the APA.

5 2) The District Court erred in issuing jurisdictional fact findings and in application of an
6 extension of legislative immunity, substituting its judgment for that of the Commission and
7 refusing to grant leave for the Commission to obtain, consider and weigh jurisdictional facts
8 for purposes of determining its jurisdictional boundaries, including whether the conduct of
9 Respondents was or was not protected by legislative immunity.

10 3) The District Court erred in granting judicial review under NRS 233B.135 because the
11 substantial rights of Respondents were not prejudiced under any of the grounds required to
12 overturn an agency's decision set forth in NRS 233B.135(3).

13 4) The District Court erred in applying AB 496 retroactively to a pending administrative
14 investigation and proceedings without adequate consideration of the law and evaluation of the
15 timing, motive, or legislative history, including the separation of powers doctrine.

16 After unequivocally finding that the Commission properly discharged its duties
17 responsibly and reasonably and concluding it did not commit any prejudicial error relating to
18 the substantial rights of Petitioners under NRS 233B.135(3), the District Court proceeded to
19 complete jurisdictional fact finding and retroactively applied a new law which was enacted
20 during the pendency of the judicial review proceedings and expanded rather than clarified
21 existing law.

22 Rather than determining the Commission had not completed its jurisdictional
23 determination and remanding proceedings to the Commission, appropriately deferring to the
24 agency to complete its statutory charge, the District Court halted proceedings and precluded
25 any jurisdictional fact-finding and application of the law by the Commission. The decision not
26 only restricts the authority of the Commission to interpret and apply the Ethics Law, it
27 improperly limits the ability of the Commission to review or weigh the conduct of any
28 legislator when legislative immunity is asserted, even under circumstances where mixed
questions of fact and law are evident. The underlying administrative proceedings were in their

1 infancy and the Commission was within its authority to make a determination of necessity of
2 additional jurisdictional fact finding relevant to determine its jurisdiction. However, the
3 District Court's decision eliminated the Commission's authority to ascertain the extent of
4 jurisdictional facts, determine whether the conduct performed was within the "sphere of
5 legitimate legislative authority" under case law, including consideration of the application of
6 the new law, enacted after, and likely in response to, the Commission's jurisdictional review.

7 The interests of the Commission are to seek compliance with the requirements of NRS
8 Chapter 233B, including affording deference to the administrative agency in completing its
9 charge. Moreover, the Supreme Court may guide the Commission on whether AB 496 is
10 properly applied retroactively.

11
12 **10. Pending proceedings in this court raising the same or similar issues.** If you are aware of
13 any proceeding presently pending before this court which raises the same or similar issues
14 raised in this appeal, list the case name and docket number and identify the same or similar
15 issues raised:

16 N/A

17 **11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the
18 state, any state agency, or any officer or employee thereof is not a party to this appeal, have
19 you notified the clerk of this court and the attorney general in accordance with NRAP 44 and
20 NRS 30.130?

21 ☒ N/A

22 ☐ Yes

23 ☐ No

24 If not, explain:

25 *****

26 **12. Other issues.** Does this appeal involve any of the following issues?

27 ☐ Reversal of well-settled Nevada precedent (on an attachment, identify the case(s))

28 ☒ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☒ An issue of public policy

☒ An issue where en banc consideration is potentially necessary to maintain uniformity
of this court's decisions

☐ A ballot question

1 If so, explain:

2 This appeal potentially implicates separation of powers established under Article 3,
3 Section 9(I) of the Nevada Constitution and the application of Federal Legislative Privilege
4 and Immunity based upon the Speech and Debate Clause of Section 6 of Article I of the
5 Constitution of the United States codified by reference pursuant to NRS 41.071. Further
6 implicated is an issue of public policy with respect to consistency of Ethics in Government
7 Law as applicable to all public officers including Legislators and staff of LCB. The Nevada
8 Supreme Court's prior opinions which may be implicated by this appeal include *Commission*
9 *on Ethics v. Hardy*, 125 Nev. 285, 212 P.3d 1098 (2009) and there may be implications with
10 consistency with retroactivity cases, including *Valdez v. Empls Ins. Co.*, 123 Nev. 170, 162
11 P.3d 148 (2007) and *Fernandez v. Fernandez*, 126 Nev. Adv. Rep. 3, 222 P.3d 1031, 1035 n.6
12 (2010) (noting that a legislative amendment meant to clarify, not change a statute applies
13 retroactively).

14 13. **Trial.** If this action proceeded to trial, how many days did the trial last? _____
15 Was it a bench or jury trial? _____

16 N/A

17 14. **Judicial disqualification.** Do you intend to file a motion to disqualify or have a justice
18 recuse him/herself from participation in this appeal? If so, which Justice?

19 No

20 **TIMELINESS OF NOTICE OF APPEAL**

21 15. **Date of entry of written judgment or order appealed from October 1, 2015. Attach a**
22 **copy. If more than one judgment or order is appealed from, attach copies of each**
23 **judgment or order from which this appeal is taken.**

24 If no written judgment or order was filed in the district court, explain the basis for
25 seeking appellate review:

26 See Exhibit A.

1 **16. Date written notice of entry of judgment or order served October 26, 2015. Attach a**
2 **copy, including proof of service, for each order or judgment appealed from.**

3 Was service by:

4 ☐ Delivery

5 ☐ Mail

6 ☒ Email. Parties stipulated to service by electronic mail. See Exhibit A.

7 **17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP**
8 **50(b), 52(b), or 59),**

9 (a) Specify the type of motion, the date and method of service of the motion, and the
10 date of filing.

11 ☐ NRCP 50(b) Date served _____ By delivery ☐ or by mail ☐ Date of filing _____

12 ☐ NRCP 52(b) Date served _____ By delivery ☐ or by mail ☐ Date of filing _____

13 ☐ NRCP 59 Date served _____ By delivery ☐ or by mail ☐ Date of filing _____

14 **Attach copies of all post-trial tolling motions.**

15 **NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration**
16 **do not toll the time for filing a notice of appeal.**

17 (b) Date of entry of written order resolving tolling motion NA.

18 **Attach a copy.**

19 (c) Date written notice of entry of order resolving tolling motion served NA.

20 **Attach a copy, including proof of service.**

21 Was service by:

22 ☐ Delivery

23 ☐ Mail

24 **18. Date notice of appeal filed October 29, 2015.**

25 If more than one party has appealed from the judgment or order, list the date each
26 notice of appeal was filed and identify by name the party filing the notice of appeal:

27 **19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g.,**
28 **NRAP 4(a), NRS 155.190, or other NRAP 4(a).**

NRAP 4(a).

1 **SUBSTANTIVE APPEALABILITY**

2 **20. Specify the statute or other authority granting this court jurisdiction to review the**
3 **judgment or order appealed from:**

- 4 ☐ NRAP 3A(b)(1) ☐ NRS 38.205
5 ☐ NRAP 3A(b)(2) ☒ NRS 233B.150
6 ☐ NRAP 3A(b)(3) ☐ NRS 703.376
7 ☐ Other (specify) _____

8 Explain how each authority provides a basis for appeal from the judgment or order:

9 **NRS 233B.150** provides that “[a]n aggrieved party may obtain a review of any final
10 judgment of the district court by appeal to the Supreme Court. The appeal shall be
11 taken as in other civil cases.”

12 **COMPLETE THE FOLLOWING SECTION ONLY IF MORE THAN ONE CLAIM**
13 **FOR RELIEF WAS PRESENTED IN THE ACTION (WHETHER AS A CLAIM,**
14 **COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM) OR IF MULTIPLE**
15 **PARTIES WERE INVOLVED IN THE ACTION.**

16 **Attach separate sheets as necessary.**

17 **21. List all parties involved in the action in the district court:**

18 If all parties in the district court are not parties to this appeal, explain in detail why those
19 parties are not involved in this appeal, e.g., formally dismissed, not served, or other:

20 N/A

21 **22. Give a brief description (3 to 5 words) of each party’s separate claims, counterclaims,**
22 **cross-claims, or third-party claims, and the trial court’s disposition of each claim, and**
23 **how each claim was resolved (i.e., order, judgment, stipulation), and the date of**
24 **disposition of each claim. Attach a copy of each disposition.**

25 N/A

26 **23. Attach copies of the last-filed version of all complaints, counterclaims, and/or cross-**
27 **claims filed in the district court.**

28 **24. Did the judgment or order appealed from adjudicate ALL the claims alleged below**
and the rights and liabilities of ALL the parties to the action below?

- ☒ Yes
☐ No

1 **25. If you answered “No” to question 24, complete the following:**

2 (a) Specify the claims remaining pending below:

3 (b) Specify the parties remaining below:

4
5 (c) Did the district court certify the judgment or order appealed from as a final
6 judgment pursuant to NRCP 54(b)?

7 ☐ Yes

8 ☐ No

9 **If “Yes”, attach a copy of the certification or order, including any notice of
entry and proof of service.**

10 (d) Did the district court make an express determination, pursuant to NRCP 54(b), that
11 there is no just reason for delay and an express direction for the entry of judgment?

12 ☐ Yes

13 ☐ No

14 **26. If you answered “No” to any part of question 25, explain the basis for seeking
appellate review (e.g., order is independently appealable under NRAP 3A(b)):**

15 **VERIFICATION**

16 **I declare under penalty of perjury that I have read this docketing statement, that the
17 information provided in this docketing statement is true and complete to the best of my
18 knowledge, information and belief, and that I have attached all required documents to
this docketing statement.**

19
20 Nevada Commission on Ethics
Name of appellant

Tracy L. Chase, Esq.
Name of counsel of record

21
22 November 24, 2015
Date

/s/ Tracy L. Chase
Signature of counsel of record

23
24
25 Carson City/County, Nevada
State and county where signed

1 **CERTIFICATE OF SERVICE**

2 I certify that on the 24th day of November, 2015, I served a copy of this completed
3 docketing statement upon all counsel of record:

- 4 ☐ By personally serving it upon him/her; or
5 ☐ By mailing it by first class mail with sufficient postage prepaid to the following
6 address(es): (NOTE: If all name and addresses cannot fit below, please list names
below and attach a separate sheet with the addresses.)

7 ☒ By electronically filing it with the Nevada Supreme Court to:

8 Brenda J. Erdoes, Esq.
9 Legislative Counsel
10 Kevin C. Powers, Esq.
11 Chief Litigation Counsel
12 Eileen G. O'Grady, Esq.
13 Chief Deputy Legislative Counsel
14 401 S. Carson Street
15 Carson City, Nevada 89701

16 Dated this 24th day of November, 2015.

17 /s/ Darci Hayden
18 Signature
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EXHIBIT A

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EXHIBIT A

1 BRENDA J. ERDOES, Legislative Counsel
Nevada Bar No. 3644
2 KEVIN C. POWERS, Chief Litigation Counsel
Nevada Bar No. 6781
3 EILEEN G. O'GRADY, Chief Deputy Legislative Counsel
Nevada Bar No. 5443
4 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson Street
5 Carson City, Nevada 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
6 E-mail: kpowers@lcb.state.nv.us; ogrady@lcb.state.nv.us
Attorneys for Petitioners

REC'D & FILED
2015 OCT 26 AM 9:17
SUSAN MERRIWETHER
CLERK
By V. Alegria
DEPUTY

8 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
9 **IN AND FOR CARSON CITY**

10 IRA HANSEN, in his official capacity as Nevada
State Assemblyman for Assembly
11 District No. 32; and JIM WHEELER, in his
official capacity as Nevada State Assemblyman
12 for Assembly District No. 39,

13 Petitioners,

14 vs.

15 THE COMMISSION ON ETHICS OF THE
STATE OF NEVADA,

16 Respondent.
17

Case No. 15 OC 00076 1B
Dept. No. II

18 **NOTICE OF ENTRY OF ORDER DENYING MOTION TO DISMISS**
19 **AND GRANTING PETITION FOR JUDICIAL REVIEW**

20 **PLEASE TAKE NOTICE** that on the 1st day of October, 2015, the Court in the above-
21 titled action entered an Order Denying Motion to Dismiss and Granting Petition for Judicial Review. A
22 copy of the Order is attached hereto as Exhibit 1.

23 \\\

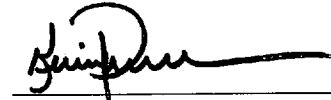
24 \\\

1 DATED: This 26th day of October, 2015.

2 Respectfully submitted,

3 **BRENDA J. ERDOES**
4 Legislative Counsel

5 By:



6 **KEVIN C. POWERS**, Chief Litigation Counsel
Nevada Bar No. 6781

7 **EILEEN G. O'GRADY**, Chief Deputy Legislative Counsel
Nevada Bar No. 5443

8 LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION

401 S. Carson Street

9 Carson City, Nevada 89701

Tel: (775) 684-6830; Fax: (775) 684-6761

10 *Attorneys for the Petitioners*

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division,
13 and that on the 26th day of October, 2015, pursuant to NRCP 5(b) and the parties' stipulation and
14 consent to service by electronic mail, I served a true and correct copy of Notice of Entry of Order
15 Denying Motion to Dismiss and Granting Petition for Judicial Review, by electronic mail, addressed to
16 the following:

17 Tracy L. Chase, Esq.
Commission Counsel
18 NEVADA COMMISSION ON ETHICS
704 W. Nye Lane, Suite 204
19 Carson City, NV 89703
E-mail: tchase@ethics.nv.gov
20 *Attorney for Respondent*

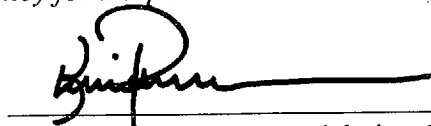
21 
22 An Employee of the Legislative Counsel Bureau

Exhibit 1

Exhibit 1

REC'D & FILED

2015 OCT -1 PM 3:58

SUSAN MERRIWETHER
CLERK

G. WINDER
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

IRA HANSEN, in his official capacity as
Nevada State Assemblyman for
Assembly District No. 32; and JIM
WHEELER, in his official capacity as
Nevada State Assemblyman for
Assembly District No. 39,

Petitioners,

vs.

THE COMMISSION ON ETHICS OF THE
STATE OF NEVADA

Respondent.

CASE NO. 15 OC 00076 1B

DEPT. 2

ORDER DENYING MOTION TO
DISMISS AND GRANTING
PETITION FOR JUDICIAL
REVIEW

PROCEDURAL BACKGROUND

An individual filed two Third-Party Request for Opinion (RFO) forms with the Commission on Ethics of the State of Nevada (the Commission) seeking review of certain actions of Assemblymen Ira Hansen (Hansen) and Jim Wheeler (Wheeler) (collectively, Petitioners). The Commission's executive director and its counsel completed a jurisdictional determination for each RFO and concluded the Commission had jurisdiction to investigate.

The parties entered into a Stipulation and Order Concerning Review of Jurisdictional Determination, which provided Petitioners with an opportunity for the Commission to consider a Pre-Panel Motion to Dismiss along with the related record. The Commission held a hearing on the Pre-Panel Motion to Dismiss and then

1 entered an Order on Review of Jurisdictional Determination. The order denied
2 Petitioners' Motion to Dismiss and ordered the Commission's executive director to
3 undertake an investigation to determine whether Petitioners' conduct properly falls
4 within the scope of legitimate legislative activity and/or conduct related to the
5 representation of the interests of their constituents that is privileged and immune
6 from review under NRS 281A.020(2)(d) and NRS 41.071.

7 Petitioners filed a Petition for judicial review, or in the alternative, a petition
8 for writ relief. Petitioners requested the court set aside the Commission's Order on
9 Review of Jurisdictional Determination. The Commission filed a motion to dismiss
10 the petition for judicial review and the petition for writ relief.

11 The Legislature passed AB496 which, among other things, broadly describes
12 acts that are covered by legislative privilege and immunity. The Commission in its
13 Reply in Support of Motion to Dismiss argued AB496 is unconstitutionally vague and
14 over broad, and violates the separation of powers doctrine.

15 16 **FACTS**

17 The record contains evidence of the following facts which are stated in
18 chronological order.

19 Hansen had a dispute with a Nevada Department of Wildlife officer regarding
20 whether Hansen illegally placed snare traps too near a roadway. Hansen contacted
21 Legislative Counsel and requested a legal opinion regarding the snare trap statute,
22 NRS 503.580. Legislative Counsel told Hansen it could look like a potential conflict
23 of interest if he requested the opinion so he should ask a colleague to request the
24 opinion.

25 Hansen asked Wheeler to request the opinion. Wheeler requested Legislative
26 Counsel for an opinion as to whether the prohibition against placing or setting a steel
27 trap within 200 feet of a public road or highway applies to box traps and snare traps.

1 Hansen was charged under NRS 503.580 with four misdemeanor counts for
2 unlawfully setting traps. Legislative Counsel issued an opinion in response to
3 Wheeler's request. The Legislative Counsel's opinion contains a statutory
4 construction analysis of NRS 503.580 and concluded NRS 503.580 does not apply to
5 snare traps. Hansen told a reporter, among other things, "I will be found not guilty
6 because when you see what the LCB says and when you read the law, you will see that
7 I was in compliance."

8 Petitioners requested BDRs regarding trapping. Wheeler requested BDR31
9 which was introduced as AB335. AB335 proposed an amendment to NRS 503.580.
10 The Legislature did not pass AB335.

11 12 ISSUES

13 Does this court have jurisdiction to conduct a judicial review under the
14 Administrative Procedures Act (APA)?

15 If the court has jurisdiction under the APA, did the Commission commit
16 prejudicial error as a matter of law by denying Petitioners' motion to dismiss for lack
17 of subject matter jurisdiction?

18 If the court does not have jurisdiction under the APA, is writ relief
19 appropriate?

20 21 ANALYSIS

22 The Commission argued the petition for judicial review should be dismissed
23 because: 1) judicial review is not available to Petitioners under NRS Chapter 233B
24 because a) the Commission's Order on Review of Jurisdictional Determination is not
25 a final order and Petitioners have not exhausted their administrative remedies; and
26 2) Petitioners have an adequate remedy at law.

27 Petitioners argued they are entitled to immediate judicial review. Petitioners'
28 argument is, first, they are entitled to legislative privilege and immunity because

1 their acts at issue were within the sphere of legitimate legislative activity. Legislative
2 privilege and immunity protect legislators from the burden of defending themselves
3 as well as from the consequences of litigation results.¹ Second, if judicial review is not
4 granted now, Petitioners will lose the legislative privilege and immunity protection
5 from having to defend themselves in the Commission's administrative investigation
6 and proceedings. Third, review of a final Commission decision, one made after
7 further investigation, will not provide an adequate remedy because Petitioners will
8 have to defend themselves in the Commission's investigation and will therefore be
9 deprived of the protection of not having to defend themselves. Fourth, Petitioners
10 cite NRS 233B.130(1) which states: "Any preliminary, procedural or intermediate act
11 or ruling by an agency in a contested case is reviewable if review of the final decision
12 of the agency would not provide an adequate remedy." And fifth, because review of a
13 final decision of the Commission would not provide an adequate remedy at law they
14 are entitled to judicial review now.

15 To resolve the issue of whether Petitioners are entitled to judicial review, the
16 court must resolve the issue of whether Petitioners' acts are protected by legislative
17 privilege and immunity. Petitioners are protected by legislative privilege and
18 immunity if their questioned acts fall "within the sphere of legitimate legislative
19 activity." On the issue of whether Petitioners' questioned acts fall within the sphere
20 of legitimate legislative activity, the court also considered the parties' briefs filed in
21 support of and opposing the Petition for Judicial Review.

22 The Commission took the position that Petitioners' request to Legislative
23 Counsel for the opinion was to serve Petitioners' private, personal interests.
24 Specifically, the Commission argued Petitioners requested the opinion so Hansen
25 could use it as a defense in his criminal case. The Commission argued Petitioners'
26 acts did not fall within the sphere of legitimate legislative activity.

27
28

¹*Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S. Ct. 1425, 18 L. Ed. 2d 577
(1967) (Internal citation and quotation marks omitted.)

1 Petitioners countered with several arguments, including an argument based
2 upon NRS 41.071 as amended by AB496 during the 2015 Legislature. The NRS 41.071
3 argument is dispositive on the “sphere of legitimate legislative activity” issue.

4 AB496, section 3, paragraph 5 provides legislative privilege and immunity to
5 legislators for (a) “Any actions, in any form, taken or performed with regard to any
6 legislative measure or other matter within the jurisdiction of the Legislature ...;” ©
7 Any actions, in any form, taken or performed with regard to requesting, seeking or
8 obtaining any form of aid, assistance, counsel or services from any officer or
9 employee of the Legislature concerning any legislative matter or other matter within
10 the jurisdiction of the Legislature” Both subsections include a non-exhaustive list
11 of examples of acts that fall “within the sphere of legitimate legislative activity.” The
12 Legislature declared in AB496 that the amendments to NRS 41.071 were a legislative
13 pronouncement of already existing law intended to clarify rather than change
14 existing law and apply to pending administrative or judicial proceedings. The
15 Legislature also made the amendment effective upon passage and approval.

16 The Commission argued AB496 is unconstitutionally vague and over broad,
17 and violates the separation of powers doctrine. The Commission cited no persuasive
18 authority to support these arguments. The Commission did not show that AB496 is
19 unconstitutionally vague or over broad as applied to Petitioners’ case. Neither did the
20 Commission show that AB496 impedes the authority of the judiciary to interpret and
21 apply legal precedent.

22 23 **CONCLUSIONS OF LAW**

24 Hansen through Wheeler requested Legislative Counsel provide an opinion
25 interpreting a state trapping law. The Legislature has jurisdiction over trapping laws.
26 Therefore, under AB496, as a matter of law, Petitioners’ actions are within the sphere
27 of legitimate legislative activity and protected by legislative privilege and immunity.

28 The Commission failed to show that AB496 is unconstitutionally vague or
over broad, or violates the separation of powers doctrine.

1 Because Petitioners acts fall within the sphere of legitimate legislative activity
2 as defined in AB496, they are entitled to legislative privilege and immunity. If
3 judicial review is not granted now, Petitioners will lose the legislative privilege and
4 immunity protection from having to defend themselves in the Commission's
5 administrative investigation and proceedings. Review of a final Commission
6 decision, one made after further investigation, will not provide an adequate remedy
7 because Petitioners will have to defend themselves in the Commission's investigation
8 and will therefore be deprived of the protection of not having to defend themselves.
9 Therefore, under NRS 233B.130(1) this court has jurisdiction to conduct a judicial
10 review and the Commission's Motion to Dismiss must be denied. For the same
11 reasons, Petitioners' petition for judicial review must be granted.

12 The court does not conclude that substantial rights of Petitioners were
13 prejudiced by the Commission under any of the grounds stated in NRS 233B.135(3).
14 The Commission's personnel performed their duties under NRS 281A.240(1)©, NRS
15 281A.280(1), NRS 281A.440(3) and (4), and NAC 281A.405(1). They investigated the
16 facts and circumstances related to the RFOs to determine whether there was just and
17 sufficient cause for the Commission to render an opinion in the matter, and made a
18 recommendation that the Commission did have jurisdiction to investigate and take
19 appropriate action. The Commission held a pre-panel hearing under NAC
20 281A.405(4). The Commission did not render a final decision. The issue of whether
21 Petitioners' acts were within the sphere of legitimate legislative activity was unclear
22 during the time the matter was before the Commission. After Petitioners filed their
23 petition for judicial review, the Legislature made clear, through AB496, that
24 Petitioners' acts were within the sphere of legitimate
25 legislative activity. At that point, the matter was before this court and out of the
26 Commission's hands. The Commission discharged its duties responsibly and
27 reasonably.

28 Because Petitioners' acts were within the sphere of legitimate legislative
activity, the Nevada Assembly has sole jurisdiction to question and sanction

1 Petitioners regarding those acts. Therefore, the Commission must terminate its
2 proceedings in this matter.

3 Because Petitioners' petition for judicial review is granted, the other issues
4 raised by the parties in their pleadings and papers are moot and therefore denied.
5

6 **ORDER**

7 IT IS ORDERED:

8 The Commission's Motion to Dismiss is denied.

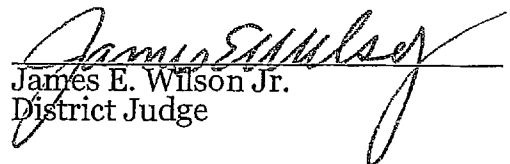
9 Petitioners' Petition for Judicial Review Pursuant to Nevada Administrative
10 Procedure Act and Nevada Ethics in Government Law is granted.

11 Petitioners' Petition and Application for Writ of Certiorari, Review or
12 Prohibition Pursuant to Article 6, Section 6 of Nevada Constitution and NRS Chapter
13 34 is denied.

14 The Commission terminate its proceedings in this matter.

15 Other requests for relief are moot and therefore denied.
16

17 October 1, 2015

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19 James E. Wilson Jr.
20 District Judge
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