

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE COMMISSION ON ETHICS OF THE
STATE OF NEVADA,

Appellant,

vs.

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,

Respondents.

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No. 69100

**OPPOSITION TO RESPONDENTS'
MOTION TO EXCEED PAGE LIMIT ("MOTION TO EXCEED") FOR
RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS
APPEAL FOR LACK OF APPELLATE JURISDICTION, ETC.
("OPPOSITION")**

AND

APPELLANT'S MOTION TO STRIKE

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Procedural Status of Appeal

Appellant, the Nevada Commission on Ethics (“Commission”), by and through its counsel, Tracy L. Chase, Esq., files this Opposition and Motion to Strike in response to the Motion to Exceed filed on February 10, 2016, by Respondents Ira Hansen (“Hansen”) and Jim Wheeler (“Wheeler”), in their official capacities as Nevada Assemblymen (“Assemblymen”). On December 7, 2015 Respondents filed the Motion to Dismiss this appeal based on an alleged violation of the Open Meeting Law as alleged in the First OML Complaint, requesting leave to exceed allowable page limits for such motion, which was not opposed by the Commission.

On December 21, 2015, the Court referenced NRAP 27(d)(2) to enter its order granting Respondent’s request to exceed the page limit for the Motion to Dismiss, allowing the 37-page motion, but otherwise limiting the number of pages for Appellant’s response and Respondents’ reply to 18 pages and 5 pages, respectively (“Page Limit Order”). Despite the Court’s Page Limit Order, the Assemblymen now seek to file an excessive and improper 18-page reply in support of their Motion to Dismiss.

After submitting the 18-page Reply, the Assemblymen untimely submitted for filing, without requesting leave of the court, Respondents’ Supplemental Exhibits to their Motion to Dismiss (“Supplemental Exhibits”), adding 60 pages of exhibits to support the Motion to Dismiss. The Supplemental Exhibits include a recently filed 17-page complaint against the Commission before the First Judicial District Court, Case No. 160C0002913 (“Second OML Complaint”), which contains superfluous factual allegations and lengthy legal argument. The Second OML Complaint seeks to void the Commission’s approval of Agenda Item No. 4 at its regular meeting held on December 16, 2015, incorrectly asserting that the Commission was required to provide individual notice to the Assemblymen that

their character, alleged misconduct or professional competence (collectively “character or competence”) might be discussed in the meeting under the requirements of NRS 241.033.

B. Second OML Complaint

The Commission’s December 16, 2015 meeting, Agenda Item No. 4, authorized Commission Counsel to continue to defend and represent the interests of the Commission in this appeal, and sought ratification and approval of the actions of Commission Counsel in filing the appeal.¹ After receiving public comment, the item was unanimously approved.

NRS 241.033 of the OML requires that individual notice must be provided for matters in which a public body makes an administrative decision with respect to a person’s character or competence. The Second OML Complaint is premised upon the unfounded and unreasonable supposition that the Commission’s deliberation and action on Agenda Item No. 4 “necessarily had to evaluate the potential merits of the appeal which meant that the Commission needed to ‘think about’ or ‘take into account or bear in mind’ the allegations in Hansen I (ethics case) assailing the Assemblymen’s character, alleged misconduct or professional competence.” *See* Second OML Complaint, specifically allegation 49.

However, the individual notice provisions of NRS 241.033 simply do not apply. Agenda Item No. 4 did not relate to taking administrative action against a person during which that person’s character or competence would be considered or discussed in a public meeting. Instead, the agenda item was tailored and limited to ratifying the filing of the notice of appeal and providing direction to Commission Counsel to continue to defend the case and pursue this appeal. The open meeting

¹ Full title of the Agenda Item is: “Authorization for Commission Counsel to continue to defend and represent the interests of the Ethics Commission of the State of Nevada in pending legal proceedings entitled ‘Hansen and Wheeler vs. The Commission on Ethics of the State of Nevada,’ Case No. 150C000761B, filed in the First Judicial District Court of Nevada, and associated Appeal filed in the Supreme Court of the State of Nevada, Case No. 69100, entitled ‘The Commission on Ethics of the State of Nevada vs. Hansen and Wheeler,’ including direction to Commission Counsel to continue to pursue the Appeal, and ratification and approval of the actions taken by Commission Counsel to file or institute the Appeal, as the official legal counsel of the Nevada Commission on Ethics. (This item is not an admission of wrongdoing for the purposes of civil action, criminal prosecution or injunctive relief.)”

verbatim transcript confirms that the Commission made no mention whatsoever of either Assemblyman's character or competence.² *See* Opposition to Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction etc. filed January 19, 2016 ("Opposition to Motion to Dismiss"), Volume II, Exhibit F. The Second OML Complaint obviously lacks merit and is improperly before this Court since it has yet to be litigated before the district court.

C. Motion to Strike

In its Opposition to the Motion to Dismiss, the Commission requested an outright denial of the Motion to Dismiss, which references the First OML Complaint because, similar to Respondents' improper Reply and Supplemental Exhibits, it is also without merit and presents matters not properly before the Court under NRAP 3A. The procedural flaws are fatal. Consideration of the Motion to Dismiss in this appeal prior to adjudication of the First OML Complaint, and now possibly the Second OML Complaint, will deprive the Commission of its due process rights. *Also See* Opposition to Motion to Dismiss.

Consequently, the Commission opposes the Motion to Exceed and moves to strike the Motion to Dismiss, Reply and Supplemental Exhibits³ in their entirety because such pleadings violate the Nevada Rules of Appellate Procedure ("NRAP"), established case and statutory law and exceed the boundaries of appellate process established to review matters based upon the official record of proceedings. If these pleadings are not stricken, the Commission will be deprived of its due process rights to defend the cases in the district court and will continue to be held hostage by a lack of resolution of the underlying issue in this appeal, which is the jurisdictional boundaries of the Commission in responding to complaints against State Legislators.

² *See*, NRS 241.033(7)(b) expressly instructing that "[c]asual or tangential references to a person or name of a person during a closed session do not constitute consideration of the character, alleged misconduct, professional competence, or physical or mental health of a person."

³ The Reply and Supplemental Exhibits are received, yet have not been accepted by the Court for filing.

II. STANDARD OF REVIEW

Appellate practice and briefing is limited to appeal from an appealable judgment or order and is confined to the official record before the lower court. *See* NRAP 3A and 28. Motion practice before the Court is governed by NRAP 27 and the following sections apply:

1. NRAP 27(a)(2) - "...If a motion is supported by affidavits or other papers, they shall be served and filed with the motion." (Emphasis added).
2. NRAP 27(a)(4) - "...A reply shall not present matters that do not relate to the response." (Emphasis added).
3. NRAP 27(d)(2) and Page Limit Order - "A reply to a response shall not exceed 5 pages." (Emphasis added).

The Court has inherent power to strike matters, including errant pleadings or submissions that do not comply with applicable rules so it may be free from burdensome, irrelevant, immaterial or scandalous matters. *See* NRAP 3A, 10, 27 and 28; *Dep't of Taxation v. Kelly-Ryan, Inc.*, 110 Nev. 276, 871 P.2d 331 (1994)(improper references to matters outside of the official record); and *Hernandez v. State*, 117 Nev. 463, 24 P.3d 767 (2001)(Denial of motion to file 124-page brief to "raise every issue of arguable merit" with allowance to file an 80-page brief and imposing other restrictions on litigants. Such limitations are ordinary practices employed by courts to assist in efficient case management).

III. ARGUMENT

A. The Motion to Exceed Page Limit should be Denied.

This Court has already issued the Page Limit Order governing pleadings associated with the Motion to Dismiss. The Motion to Exceed seeks permission to once again exceed page limits requesting the 18-page reply be allowed. Of concern is that just after filing the Motion to Exceed, the Assemblymen submitted for filing extensive Supplemental Exhibits, without seeking leave of court. The Supplemental Exhibits contain the Second OML Complaint which includes 17 pages of both factual allegations and lengthy argument in matters not properly before this Court or within the official record on appeal.

In combination, the Reply and untimely Supplemental Exhibits have cumulative pages of approximately 80 pages of factual allegations and legal argument. Respondents' failure to comply with NRAP 27(a)(2) and the Court's Page Limit Order is evident. The Supplemental Exhibits not only present matters outside of the official record, the exhibits were not timely submitted with the Motion to Dismiss as required--instead, they were submitted surreptitiously after the filing of the Commission's Opposition to Motion to Dismiss.

Motions to exceed page limits are disfavored. NRAP 32(a)(7)(D). Moreover, the protections afforded by NRAP 27 allow the Court to control its calendar, provide adequate notice of filings and an opportunity for an opposing party to respond. These protections have been diluted, if not stripped, to the detriment of the Commission's due process. It is evident that the Supplemental Exhibits are a transparent attempt to bolster the Motion to Dismiss and confuse the record of appellate proceedings before this Court. These improper tactics should not be tolerated and have placed the Commission in the position to file this Opposition and Motion to Strike in response to the Motion to Exceed. Accordingly, the Commission requests the Motion to Exceed be denied and all errant pleadings improperly pending before this Court be stricken.

B. The Motion to Dismiss, Reply and Supplemental Exhibits should be Stricken from the Record

The Motion to Dismiss, Reply and Supplemental Exhibits rely on pleadings filed after perfection of the appeal and before those cases have been litigated, and bring into these proceedings, the First OML Complaint and now the Second OML Complaint. Interjection of these two complaints into appellate proceedings undermines appellate procedure and creates substantial due process issues.

Moreover, Respondents' attempt to interpose these complaints burdens the Court with improper submissions and distracts the Court from its purpose to decide the underlying issue on appeal. Appeals are fundamentally confined to the record and a party may not raise a new theory on appeal. NRAP 3A and 28; *Physicians*

Ins. Co. of Wis., Inc. v. Williams, 128 Nev. Adv. Rep. 30, fn.3, 279 P.3d 174, fn.3, citing *Schuck v. Signature Flight Support*, 126 Nev. 42, 245 P.3d 542, 544 (2010)(determining that “[p]arties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below,” *quoting Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997)). If an argument is not raised before the district court, the Supreme Court will decline to consider it. *Singer v. Chase Manhattan Bank*, 111 Nev. 289, 293, 890 P.2d 1305, 1307 (1995), *citing Gibbons v. Martin*, 91 Nev. 269, 534 P.2d 915 (1975).

These prohibitions have specific application and are critical for maintaining the efficiency of the Court and due process rights of litigants, especially in those circumstances where a party seeks to raise or argue new issues for the first time in a reply because such improper tactics deprive the other party of any meaningful opportunity to address the contentions with specificity. *See Elvik v. State*, 114 Nev. 883, 888, 965 P.2d 281, 284 & n. 6 (1998). The Supreme Court has confirmed that “this court may decline to decide an issue that was not fully litigated or decided by the district court.” (Emphasis added) *Mason v. Fakhimi*, 109 Nev. 1153, 1158, 865 P.2d 333, 336, (1993), *citing McKay v. City of Las Vegas*, 106 Nev. 203, 789 P.2d 584 (1990).

The Commission has yet to answer or otherwise seek dismissal of the OML complaints, even though the Commission strongly contends that both complaints are without merit. The improper tactic of referencing pre-judgment pleadings filed in the lower courts has already placed the Commission in a position where it has no alternative but to address the lack of merit in the First OML Complaint in its Opposition to Motion to Dismiss, which was limited to 18 pages (which limitation was respected by the Commission). Moreover, the Commission now has no other opportunity before this Court to reply to the merits of the Second OML Complaint, which issues were raised in the Reply and Supplemental Exhibits received for filing. If these complaints were being litigated before the district courts, greater opportunity would be afforded to address their questionable merit because the

Commission would not be constrained by appellate page limitations and would have the ability to file fully briefed motions to dismiss and replies. See NRCP 12, DCR 12 and FJDCR 15.

C. The OML Complaints are without Merit

1. The OML Complaints

Assemblymen are seeking to have the Supreme Court rule sua sponte on alleged violations of the Open Meeting Law. The Motion to Dismiss has inappropriately placed the litigation of these matters at the appellate level rather than the district court where the litigation belongs, including the Commission's stance, supported by case and legal citation, that the Assemblymen, in their official government capacity as assemblymen, lacked standing to sue, there is no violation of OML, the Commission's administrative proceedings were exempt from OML, Arizona appellate court case law is not binding and is otherwise distinguishable, and the Commission has cured or mitigated any alleged harm by the ratification of Commission Counsel's filing of the notice of appeal and other defenses.

The submission of the Supplemental Exhibits, which includes the Second OML Complaint, has again placed the Commission in the position where it can only provide the Court with highlights of why the Second OML Complaint is without merit. The Second OML Complaint's contention that individual written notice was required by NRS 241.033 to be provided to the Assemblymen because their character and competence "might" be discussed in a public meeting is simply wrong and portrays a misleading picture of the Commission's discussion of Agenda Item No. 4. The allegations of the Second OML Complaint are frivolous and ripe for dismissal provided the Commission has an opportunity to fully brief the matters and litigate them before the district court.

The issue that the Assemblymen lack standing to sue in their governmental capacity for a violation of the OML was previously briefed for the Court in the Commission's Opposition to the Motion to Dismiss and the Commission hereby

incorporates those arguments herein because they are equally applicable to the Second OML Complaint. *See* Opposition to Motion to Dismiss at pgs. 6-10.

2. Individual Noticing Requirements of NRS 241.033 do not apply

Moreover, the allegations of the Second OML Complaint are not supported by a reasonable reading of the statutory requirements of NRS 241.033. NRS Chapter 241's substantive requirements control how public bodies conduct meetings and not subsequent litigation that may arise about them. *See* NRS 241.020 (establishing the requirements for open meetings). "NRS 241.033 prohibits a public body from holding a meeting to consider the character, alleged misconduct, professional competence, etc., of any person unless it provides *written* notice to the person of the time and place of the meeting *and* received proof of service of the notice." 2016 *Nevada Open Meeting Law Manual*, Twelfth Edition, §5.09 at p. 53 ("*OML Manual*").

"Administrative action" remains undefined in the OML; however, the Attorney General's Office has refrained from utilizing an expansive reading of the phrase to include all actions directed at an individual and instructs that "the matter must be uniquely personal to the individual" to fall within the individual notice requirements of NRS 241.033. *OML Manual* §5.10 at p. 56. The OML Manual unequivocally instructs that "If a public body discusses a pending lawsuit involving a particular person, a discussion of that lawsuit which mentions the name of that person does not require the public body to provide notice under NRS 241.033." (Emphasis added) *OML Manual* §5.09 at p. 54, citing OMLO 2003-14 (March 21, 2003). This is precisely the circumstance present here.

Further, NRS 241.015(3), defining "meeting," excludes a legal session "to receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both." The OML and its individual notice requirements contained in NRS 241.033 do not apply to a legal session even if it

includes discussion of character or competence. The Commission has full and absolute authority to consider or ‘think about’ or ‘take into account or bear in mind’ the allegations in Hansen I (ethics case) including the Assemblymen’s character and to deliberate on such matters in a legal session without holding a public meeting.

The stated agenda item and express purpose of the Commission’s December 16, 2015 meeting was to ratify or approve the Commission Counsel’s actions in filing a notice of appeal in litigation proceedings, not to take administrative action on a matter which includes discussion of character and competence. *See* OMLO 2004-14(2003)(Discussion of pending lawsuit does not amount to discussion of character, alleged misconduct, professional competence, or physical or mental health to require individual notice under NRS 241.033(1)); OMLO 2001-03 (2001)(Held that a discussion of litigation did not violate the OML, under a predecessor statute enacted prior to enactment of revisions to NRS 241.015(3) establishing an exemption for legal sessions, even though individual notice was not provided to the entity/affected persons under NRS 241.033(1)).

The misplaced contention that the Commissioners must have thought about the character or competence of the Assemblymen in its December meeting is both speculative and irrelevant. The OML’s individual notice requirement is not so expansive as to include unspoken thoughts of members of the public body. Such a statutory interpretation is unreasonable and illogical. The express language of NRS 241.033 only applies to “holding a meeting to consider, character, alleged misconduct or professional competence,” The OML controls conduct in public meetings, not unexpressed individual “possible” internal contemplations or thoughts of members of a public body.

“When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of construction.” *Cromer v. Wilson*, 225 P.3d 788, 126 Nev. Adv. Op. 11 (2010) "In assessing a statute's plain meaning, provisions are read as a whole with effect given to each

word and phrase." *City of Las Vegas v. Evans*, 301 P.3d 844, 129 Nev. Adv. Op. 31 (2013).

Also supporting that the provisions of NRS 241.033 are not applicable is the statute's lengthy notice requirement. If a party could not be located for the 5-day personal notice or 21-working day certified notice, a public body would be precluded from holding a public meeting to discuss the litigation. Depending on the month, the 21 working days requirement of NRS 241.033 has potential to exceed the 30 calendar days in which a party may file an appeal, a litigant could prevail in a case simply by avoidance of service. This dichotomy would have been addressed by the Legislature if NRS 241.033 applied to an appeal of litigation.

IV. CONCLUSION

These improper tactics should not be countenanced by the Court and it would be a detriment to the appellate process to permit newly filed complaints that have yet to be litigated, especially since the Supplemental Exhibits were received after the Commission's Opposition to the Motion to Dismiss adding the Second OML Complaint and its pages of lengthy argument, depriving the Commission of a meaningful opportunity to provide arguments and fully brief its defenses to the OML Complaints and the Motion to Dismiss. Accordingly, the Commission respectfully requests that the Motion to Exceed the already-ordered page limitation be denied. The Motion to Dismiss and the Reply should be stricken by the Court in their entirety, and the Supplemental Exhibits should not be accepted for filing.

Submitted this 7th day of March, 2016.

Respectfully,

NEVADA COMMISSION ON ETHICS

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NRAP 27(d) CERTIFICATE OF COMPLIANCE

I hereby certify that this Motion complies with the formatting requirements of NRAP 27(d)(1), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Pleading has been prepared in a proportionally spaced typeface using Microsoft Office 10 in 14 point Times New Roman.

I further certify that this Motion complies with the page limitations requirements of NRAP 27(d)(2) because it is proportionately spaced, has a typeface of 14 points or more, and contains 10 pages.

Finally, I hereby certify that I have read this Motion, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Motion complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that the accompanying Motion is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of March, 2016.

Respectfully,

NEVADA COMMISSION ON ETHICS

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of the Nevada Commission on Ethics and that on this day I placed in the Court's electronic filing system a true and correct copy of the attached **OPPOSITION TO RESPONDENTS' MOTION TO EXCEED PAGE LIMIT FOR RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL FOR LACK OF APPELLATE JURISDICTION, ETC. AND APPELLANT'S MOTION TO STRIKE** for service as follows:

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Dated: 3/7/16

/s/ Darci Hayden
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