

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

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

5 vs.

6 IRA HANSEN, IN HIS OFFICIAL
7 CAPACITY AS NEVADA STATE
8 ASSEMBLYMAN FOR ASSEMBLY
9 DISTRICT NO. 32; AND JIM
10 WHEELER, IN HIS OFFICIAL
11 CAPACITY AS NEVADA STATE
12 ASSEMBLYMAN FOR ASSEMBLY
13 DISTRICT NO. 39,
14 Respondents.

Supreme Court No. 69100

Electronically Filed
Aug 03 2017 03:19 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

15 **CITY OF RENO AMICUS CURIAE BRIEF**
16 **SUPPORTING APPELLANT'S PETITION FOR REHEARING**

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1 **STATEMENT OF IDENTITY OF AMICUS CURIAE**

2 A political subdivision of the State of Nevada may file an amicus curiae
3 brief without the consent of the parties or leave of court. NRAP 29(a). The City of
4 Reno (the “City”) is a special charter city under NRS chapter 268, and a political
5 subdivision of the State of Nevada. The City’s brief supports the Petition for
6 Rehearing (the “Motion”) submitted by the Appellant Nevada Commission on
7 Ethics (the “Commission”). The City has an interest in the outcome of the
8 Commission’s motion because the proceeding involves substantial precedential,
9 and public policy issues, and in particular, whether the Nevada Rules of Appellate
10 Procedure requires a public body to take action authorizing an appeal in an open,
11 public meeting pursuant to the Nevada Open Meeting Law (“NOMA”) as a
12 condition precedent to filing a notice of appeal pursuant to NRAP 4(a)(1)?
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I. FACTS

On October 29, 2015, Commission Counsel filed a timely notice of appeal in accordance with NRAP 4(a)(1). See, Opinion, at 3.

On December 1, 2015, Respondent Hansen filed a complaint against the Commission in district court claiming that Commission Counsel filed a notice of appeal that violated the NOMA. Id.

On December 16, 2015, in an open, public meeting, the Commission authorized Commission Counsel to pursue the appeal in Case No. 69100 and defend and represent the interests of the Commission. Id.

On June 29, 2017, the Court held that a decision to file a notice of appeal requires “action” in an open, public meeting by a public body since an appeal involves the commitment of public funds. Id., at 6. The Panel reasoned that any “legal advice” exception to the NOMA cannot be extended “to include a final decision to appeal” because such a decision “transcends ‘discussion or consultation’ and entails a ‘commitment’ of public funds.” *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 20 P.3d 1148, 1151 (Ariz. Ct. App. 2000). Id. at 5.

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II. ARGUMENT

In general, the City concurs with the legal reasoning provided by Justice Pickering and the Commission regarding the inapplicability of NOMA in the

1 present case. In addition, the City offers the following three reasons why the Court
2 should grant the Commission's Motion for Rehearing.

3 First and foremost, dismissal of the appeal on NOMA procedural grounds
4 violates NRAP Rules 1 and 3 by arbitrarily preventing the appeal from being
5 decided on its merits.

6 Under NRAP 3, an appellant's failure to take any step other than the timely
7 filing of a notice of appeal **does not affect the validity of the appeal**, but is
8 ground only for the court to act as it deems appropriate [...]. [Emphasis added.]
9 Rule 1(b) of the Nevada Rules of Appellate Procedure further provides that the
10 Rules shall not be construed to [...] limit the jurisdiction of the Supreme Court or
11 the Court of Appeals as established by law. Moreover, the Rules shall be liberally
12 construed to [...] promote and facilitate the administration of justice by the courts.
13 NRAP 1(c).

14 In light of the liberal construction of the Rules, the Opinion smacks of
15 hyper-technical, legal formalism and should be reversed. Specifically, by invoking
16 NOMA and focusing on *when* the Commission took action instead of the
17 *substance* of the action taken by the Commission within the context of the NRAP,
18 the Court effectively elevates legal form over substance, thwarts legislative intent,
19 and frustrates the administration of justice.

20 Here, no one disputes the fact that the Commission endorsed a timely filed
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1 notice of appeal. On its face, however, the Opinion is both arbitrary and
2 discriminatory—arbitrary because the Commission had no prior notice under
3 NRAP that the Court would apply NOMA to limit its jurisdiction; and,
4 discriminatory because members of the private bar are not held to a similar
5 standard, i.e., required to prove that they have client authority prior to filing a
6 notice of appeal. Instead of hearing the Commission’s case, the Court invokes
7 NOMA to amend NRAP on the fly and dismiss the appeal on procedural grounds.
8 This incorporation of NOMA into NRAP prevents a decision on the merits.

9 By announcing this new rule of appellate procedure and dismissing the
10 appeal, the Court is essentially stating that dismissal is necessary to protect the
11 Commission (and Nevada taxpayers?) from committing public funds¹ to prosecute
12 an ongoing ethics investigation. From a public policy standpoint, this makes no
13 sense. Moreover, the Nevada Legislature—enactors of both NRS chapter 281A
14 and NRS chapter 241—clearly did not intend this result given that the NOMA does
15 not apply to judicial proceedings. See, NRS 241.016(2)(b)(judicial proceedings
16 exempt from the requirements of NRS chapter 241).

17 Second, for dismissal to be appropriate in the present case, NRAP 3(a)(3)

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19 ¹ It is not clear what “public funds” the Panel is referring to. In cases where a
20 public body did not authorized the filing of appeal, ***the public body can simply***
21 ***direct counsel to withdraw the appeal in an open, public meeting, thus avoiding***
the commitment of public funds. In the present case, in contrast, the Commission
unequivocally authorized the appeal on December 16, 2015.

1 should expressly state that, “a public body is required to authorize an appeal in an
2 open, public meeting as a condition precedent to filing a timely notice of appeal, or
3 the notice of appeal will be rejected.”

4 Currently, however, the Rules indicate the exact opposite; namely,
5 Commission Counsel’s failure to receive client authorization prior to filing a notice
6 to appeal does not affect the validity of the appeal pursuant to NRAP 3(a)(2). By
7 invoking NOMA and arbitrarily focusing on the *timing* of the Commission’s
8 authorization instead of the *clear intent* of the Commission to appeal under NRAP,
9 the Opinion frustrates the administration of justice and limits the jurisdiction of the
10 Court in violation of NRAP 1(b)-(c) and 3.

11 In response, the Panel points to the fact that ratification is only effective
12 prospectively under NRS 241.0365(5). While this is true, it has no bearing on
13 the present case because NRS 241.0365(5) is remedial, *and the Commission did*
14 *not violate the NOMA*. By all accounts, and in contrast to the facts in *Johnson*, the
15 notice of appeal was filed without any authorization (or direction) from the
16 Commission. See, Opinion, at 6. Rather, the Commission affirmatively took
17 unequivocal “action” in an open meeting on December 16, 2015, directing
18 Commission Counsel to defend and represent the interests of the Commission, and
19 further approving “action taken by the Commission’s counsel in filing the appeal.”
20 See, Opinion, at 3.

1 Because dismissal of the appeal on NOMA procedural grounds violates
2 NRAP Rules 1 and 3 by arbitrarily limiting the jurisdiction of the Court and
3 preventing the appeal from being decided on its merits, the Court should grant the
4 Commission's Motion for Rehearing.

5 Finally third, the Opinion appears to ignore the fact that the general public
6 has a substantial interest in the outcome of this appeal, and other appeals involving
7 local governments and agencies. While some appeals may involve the
8 commitment of public funds, in cases involving monetary awards against a public
9 body at the district court level, a defective appeal will *de jure* result in the
10 commitment of public funds. As a result, the "commitment of public funds"
11 rationale offered by the Panel is not a compelling basis to require a public body to
12 act prior to the filing of a notice of appeal. "Commitment of public funds" cuts
13 both ways, and given the potential financial impact of a defective appeal on the
14 general public (for whatever reason), it makes sense that if the Court is to err, it
15 should err on the side of granting jurisdiction.

16 III. CONCLUSION

17 For these reasons, the City respectfully requests that the Court grant the
18 Commission's Motion for Rehearing.
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Finally, I hereby certify that I have read this appellate brief, 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

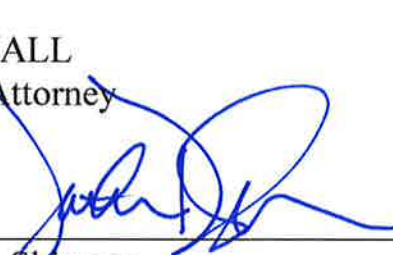
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1 sanctions in the event that the accompanying brief is not in conformity with the
2 requirements of the Nevada Rules of Appellate Procedure.

3 Dated this 3rd day of August, 2017.

4 RESPECTFULLY SUBMITTED:

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