

1 Docket 69100 Document 2017-26828

Statement of Interest

The Board was created by the Nevada Legislature pursuant to NRS Chapter 630, and is charged with "the power and duty to determine the initial and continuing competence of physicians, perfusionists, physician assistants and practitioners of respiratory care who are subject to the provisions" of NRS Chapter 630, for "the protection and benefit of the public." NRS 630.003(1)(b). The Board must ensure "the interests of the medical profession do not outweigh the interests of the public," and ensure that "unfit physicians, perfusionists, physician assistants and practitioners of respiratory care are removed from the medical profession so that they will not cause harm to the public," among many other duties. NRS 630.003(1)(c)-(d). The Board currently licenses and supervises the conduct of more than 10,000 medical professionals in Nevada.

The Board carries out its duties by conducting many hundreds of independent investigations every year, and by necessarily pursuing administrative disciplinary actions against its licensees, and defending its investigations and formal actions from a variety of challenges launched in Nevada trial and appellate courts. The Board is a party to numerous active cases in various Nevada courts at any given time, which cases must be constantly supervised and pursued for the benefit of the public. Thus, the Board has a strong interest in the outcome of the Commission on Ethics of the State of Nevada's Petition because the Court's opinion regarding the application of the Nevada Open Meeting Act ("NOMA") to the pursuit of Board interests in Nevada courts will have a

1 major impact on the daily operations of the Board, and could significantly hinder the
2 Board in carrying out one of its most critical functions of engaging in litigation for the
3 protection and benefit of the public.
4

5 **The Board's Amicus Brief is Desirable**

6 The Board's brief will shed light on the broader implications of the Court's
7 interpretation of NOMA and its application to the actions of professional licensing
8 boards. The brief will demonstrate the uncertainty and great administrative burden that
9 the Court's opinion may cause with regard to the scope of application of NOMA's
10 requirements. Thus, the brief will demonstrate how, if the Court's June 29, 2017,
11 Opinion is not revised, the public interest will be harmed, which may not have been
12 contemplated by the Court in issuing its Opinion.
13
14
15

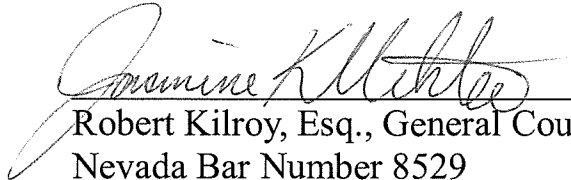
16 ///

17 ///

18 ///

1 For these reasons, the proposed amicus curiae requests that the Court grant its
2 Motion.

3 DATED this August 10, 2017.
4

5
6 
7

Robert Kilroy, Esq., General Counsel

Nevada Bar Number 8529

Jasmine K. Mehta, Esq., Deputy General Counsel,

Nevada Bar Number 8188

Aaron B. Fricke, Deputy General Counsel,

Nevada Bar No. 11129

NEVADA STATE BOARD OF MEDICAL EXAMINERS

1105 Terminal Way, Suite 301

Reno, Nevada 89502

Telephone: (775) 324-9349

Facsimile: (775) 688-2321

E-Mail: rkilroy@medboard.nv.gov

jmehta@medboard.nv.gov

africke@medboard.nv.gov

Attorneys for Amicus Curiae Nevada

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

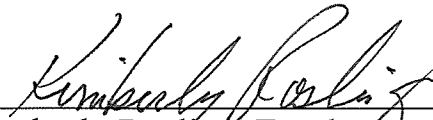
CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of the Nevada State Board of Medical Examiners, and on this day, I did cause a true and correct copy of **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE COMMISSION ON ETHICS OF THE STATE OF NEVADA'S PETITION FOR REHEARING**, to be electronically served, through the Nevada Supreme Court's electronic filing system, as follows:

Brenda J. Erdoes, Esq.
Legislative Counsel
Kevin C. Powers, Esq.
Chief Litigation Counsel
Eileen G. O'Grady, Esq.
Chief Deputy Legislative Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, NV 89701
Email: erdoes@lcb.state.nv.us
Email: kpowers@lcb.state.nv.us
Email: ogrady@lcb.state.nv.us

Tracy L. Chase, Esq.
Commission Counsel
Nevada Commission on Ethics
704 W. Nye Lane, Suite 204
Carson City, NV 89703
Email: tchase@ethics.nv.gov

DATED this 10th day of August, 2017.



Kimberly Rosling, Employee

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2
3 THE COMMISSION ON ETHICS OF THE) Supreme Court No. 69100
4 STATE OF NEVADA,)
5 Appellant,)
6 vs.)
7 IRA HANSEN, IN HIS OFFICIAL CAPACITY)
8 AS NEVADA STATE ASSEMBLYMAN FOR)
9 ASSEMBLY DISTRICT NO. 32; AND)
10 JIM WHEELER, IN HIS OFFICIAL CAPACITY)
11 AS NEVADA STATE ASSEMBLYMAN)
12 FOR ASSEMBLY DISTRICT NO. 39,)
13 Respondents.)

14 **AMICUS CURIAE BRIEF OF THE NEVADA STATE BOARD OF**
15 **MEDICAL EXAMINERS IN SUPPORT OF THE COMMISSION ON**
16 **ETHICS OF THE STATE OF NEVADA'S PETITION FOR REHEARING**

17 Robert Kilroy, Esq., General Counsel
18 Nevada Bar Number 8529
19 Jasmine K. Mehta, Esq., Deputy General Counsel,
20 Nevada Bar Number 8188
21 Aaron B. Fricke, Deputy General Counsel,
22 Nevada Bar No. 11129
23 NEVADA STATE BOARD OF MEDICAL EXAMINERS
24 1105 Terminal Way, Suite 301
25 Reno, Nevada 89502
26 Telephone: (775) 324-9349
27 Facsimile: (775) 688-2321
28 E-Mail: rkilroy@medboard.nv.gov
jmehta@medboard.nv.gov
africke@medboard.nv.gov
Attorneys for Amicus Curiae Nevada
State Board of Medical Examiners

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii, iv

STATEMENT OF IDENTITY OF AMICUS CURIAE..... v

I. ARGUMENT..... 1, 2, 3, 4, 5

II. CONCLUSION..... 5

CERTIFICATE OF COMPLIANCE..... 7

TABLE OF AUTHORITIES

Cases

<i>Dewey v. Redevelopment Agency of Reno,</i> 119 Nev. 87, 64 P.3d 1070 (2003).....	1
<i>Gottwals v. Rencher,</i> 60 Nev. 47, 53, 98 P.2d 481, 485 (1940).....	5
<i>Graves v. United States Coast Guard,</i> 692 F.2d 71, 74 (9 th Cir. 1982).....	4
<i>Grisham v. Grisham,</i> 128 Nev. 679, 289 P.3d 230 (2012).....	3
<i>Hill v. Mendenhall,</i> 88 U.S. 453, 454 (1874).....	5
<i>Johnson v. Tempe Elementary School District No. 3 Governing Board,</i> 20 P.3d 1148, 1151 (Ariz. Ct. App. 2000).....	2
<i>Mack v. Estate of Mack,</i> 125 Nev. 80, 91, 206 P.3d 98, 106 (2009).....	3
<i>T. Ryan Legg Irrevocable Trust v. Testa,</i> 75 N.E. 3d 184, 188 (Ohio 2016).....	5

Statutes

NRS 47.150(1).....	3
NRS Chapter 241.....	1
NRS 241.016(2)(b).....	1
NRS 241.016(3).....	1
NRS 241.020.....	3

1	NRS 281A.440.....	1
2	NRS 281A.440(16).....	1
3	NRS 630.003(1)(b).....	4
4		
5	Ariz. Rev. Stat. § 38-431.03(D).....	2
6	Ariz. Rev. Stat. 38.431.05.....	2
7		
8	<u>Rules</u>	
9	NRPC 1.3.....	3
10	NRPC 1.2(a).....	4
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The Nevada State Board of Medical Examiners (the “Board”), by and
3 through its undersigned counsel, files this Brief as Amicus Curiae in support of
4 the Commission on Ethics’ (the “Commission”) Petition for Rehearing. The
5 Nevada Supreme Court’s ruling on June 29, 2017 in this matter, dismissing the
6 Commission’s Notice of Appeal as untimely, has significant ramifications on
7 other Boards and Commissions and creates uncertainty as to how Boards and
8 Commissions must operate under the Nevada Open Meeting Act (“NOMA”).

9 **I. ARGUMENT**

10 On June 29, 2017, the Court held that a public body’s decision to file a
11 notice of appeal requires “action” in an open, public meeting by the public body
12 pursuant to NRS Chapter 241. The Board urges this Court to rehear the argument
13 on several bases.

14 First, the Board generally agrees with the reasoning set forth in the dissent
15 regarding the inapplicability of the NOMA to this particular set of facts.

16 Second, NRS 241.016(2)(b) provides that “[t]he following are exempt from
17 the requirements of this chapter . . . (b) Judicial proceedings....” The Notice of
18 Appeal was a procedural requirement in a judicial proceeding, and, therefore, is
19 exempt from the NOMA by the plain language of the statute. Additionally, NRS
20 241.016(3) and NRS 281A.440 exempt from the NOMA meetings, hearings, and
21 deliberations of the Commission to receive and consider information or evidence
22 concerning the propriety of the conduct of a public officer or employee. NRS
23 281A.440(16). Taken together, neither the underlying proceeding nor the decision
24 to appeal the district court’s order dismissing the case were subject to the NOMA.

25 Third, the Court has ignored its own precedent in *Dewey v. Redevelopment*
26 *Agency of Reno*, 119 Nev. 87, 64 P.3d 1070 (2003), in which the Court held that
27 “absent serial communication of the discussions, there was no quorum and
28

1 therefore no deliberations in violation of the Open Meeting Law.” *Id.* at 99, 64
2 P.3d at 1078. The Court noted that “the Open Meeting Law is not intended to
3 prohibit every private discussion of a public issue. Instead, the Open Meeting
4 Law only prohibits collective deliberations or actions where a quorum is present.”
5 *Id.* at 95, 64 P.3d at 1075 (emphasis added).

6 In the June 29, 2017, Opinion, the Court instead relies on *Johnson v.*
7 *Tempe Elementary School District No. 3 Governing Board*, 20 P.3d 1148, 1151
8 (Ariz. Ct. App. 2000). However, the statutes governing Arizona’s open meeting
9 law, and which informed the Arizona court’s decision, specifically required that
10 “[a] public vote must be taken before any legal action binds the public body.”
11 Ariz. Rev. Stat. § 38-431.03(D). Legal action taken in violation of the statute is
12 null and void, with one exception: the Arizona open meeting law provides a
13 means for ratification of a legal action. Ariz. Rev. Stat. 38.431.05. The Arizona
14 statute specifically allows the public body to ratify an action taken in violation of
15 the Arizona open meeting law, which would allow counsel to cure any failure to
16 obtain a public vote prior to filing a notice of appeal. Nevada statutes, in contrast,
17 allow for ratification only prospectively. Also, the court in *Johnson* specifically
18 noted that “the open meeting issue was promptly raised in the appellate court
19 when, arguably, there may have been time to correct the violation” *Johnson*,
20 20 P.3d at 1151. In contrast, there was no time, if ratification was not allowed, to
21 correct the lack of a public meeting to authorize an appeal by the time
22 Respondents raised the argument for the first time in their reply.

23 Fourth, the Panel’s decision creates uncertainty regarding the scope of the
24 applicability of the Court’s opinion. For example, this Board often is the
25 respondent to petitions for judicial review in trial court. When a licensee files a
26 petition for judicial review, must the Board convene a meeting to authorize
27 counsel to respond to the Petition? Similarly, must the Board authorize counsel
28

1 to respond to an emergency petition for extraordinary writs or for temporary
2 restraining orders, which has been requested by opposing parties in recent years at
3 both the trial and appellate court levels? If so, how will the Board be able to
4 comply with the time constraints in responding to emergency writ petitions, when
5 written notice of a public meeting must be given at least 3 working days before
6 the meeting under NRS 241.020?

7 For example, in a case before this Court (Case No. 65421), the petitioner
8 filed an emergency petition for writ of mandamus or prohibition on April 14,
9 2014 against the Board.¹ On April 17, 2014, the Court ordered the Board to file
10 an Answer by 4 p.m. that day. It would not have been possible to notice and
11 calendar a Board meeting prior to filing an answer. Yet, pursuant to the Panel's
12 decision, if counsel had filed an answer pursuant to the scheduling order without
13 a Board meeting and vote, such answer would be void and could only be ratified
14 going forward. While NRS 241.020 provides an exception to the notice
15 requirement for emergencies, the term "emergency" is not defined. If a public
16 attorney files an answer to protect his or her client's interest, as Rule of
17 Professional Conduct (NRPC) 1.3² requires, the Panel's decision in this matter

18
19 ¹ The Court "may take judicial notice of facts generally known or capable of
20 verification from a reliable source" pursuant to NRS 47.150(1). The Court may
21 also "take judicial notice of facts that are '[c]apable of accurate and ready
22 determination by resort to sources whose accuracy cannot reasonably be
23 questioned, so that the fact is not subject to reasonable dispute.'" *Mack v. Estate*
24 *of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (quoting NRS 47.130(2)(b)
25 (abrogated in part on other grounds by *Grisham v. Grisham*, 128 Nev. 679, 289
26 P.3d 230 (2012)). The Court has "taken judicial notice of other state court and
administrative proceedings when a valid reason presented itself." *Mack* at 92, 206
P.3d at 106. Here, the Court can take judicial notice of its own docket, as set forth
in the Court's Appellate Case Management System, which system's accuracy
cannot reasonably be questioned.

27 ² Rule 1.3 provides: "A lawyer shall act with reasonable diligence and
28 promptness in representing a client."

1 does not allow a public body to subsequently ratify the representation by the
2 public attorney to protect the client's interests. Instead, it creates an untenable
3 situation where public bodies may be subject to vexatious litigation in the form of
4 emergency petitions in the hopes that the public body will not be able to convene
5 a public meeting in time, which would allow the other party to prevail on a
6 procedural loophole, rather than on the merits.

7 Such result places boards and commissions in an untenable position
8 whereby they are hamstrung in defending themselves against litigation. It
9 certainly could not be what the Legislature intended when it created public bodies
10 for the protection of the public.³ The Board's nine members are composed
11 primarily of licensees who have busy practices and who already take significant
12 time from their practices to attend to the business of the Board. It is simply not
13 practical to have to convene a quorum with three days' notice every time an
14 emergency petition is filed against the Board.

15 Finally, the June 29, 2017, Opinion basically removes from public
16 attorneys the cloak of implied authority with which non-public attorneys are
17 imbued when they make an appearance on behalf of their clients.⁴ See NRPC
18 1.2(a) ("A lawyer may take such action on behalf of the client as is impliedly
19 authorized to carry out the representation.") "[T]he appearance of an attorney for
20 a party raises a presumption that the attorney has the authority to act on that
21 party's behalf." *Graves v. United States Coast Guard*, 692 F.2d 71, 74 (9th Cir.

22
23 ³ See NRS 630.003(1)(b) ("For the protection and benefit of the public, the
24 Legislature delegates to the Board of Medical Examiners the power and duty to
25 determine the initial and continuing competence of physicians, perfusionists,
26 physician assistants and practitioners of respiratory care who are subject to the
27 provisions of this chapter").

28 ⁴ The Board generally agrees with the Commission's reasoning regarding its
counsel's express and implied authority set forth on pages 7-11 of the Petition for
Rehearing.

1 1982). “When an attorney files an appeal, it is presumed he has the requisite
2 authority to do so.” *T. Ryan Legg Irrevocable Trust v. Testa*, 75 N.E. 3d 184, 188
3 (Ohio 2016) (quotation omitted). “When an attorney of record appears in an
4 action for one of the parties, his authority, in the absence of any proof to the
5 contrary, will be presumed.” *Hill v. Mendenhall*, 88 U.S. 453, 454 (1874). “[A]
6 litigant party shall not be permitted to deny the authority of his attorney of record,
7 whilst he stands as such on the docket. He may revoke his attorney’s authority,
8 and give notice of it to the court and to the adverse party; but whilst he so stands,
9 the party must be bound by the acts of the attorney.” *Gottwals v. Rencher*, 60
10 Nev. 47, 53, 98 P.2d 481, 485 (1940).

11 Not only did the Commission’s counsel have implied authority, through the
12 appearance of its attorney on the Notice of Appeal as well as through discussions
13 with its Executive Director and Chair, but the Commission subsequently voted to
14 grant express authority to its counsel to file the Notice of Appeal. Opinion at 3.
15 The Commission ratified the authority that the Commission’s counsel already
16 possessed. Pursuant to *Gottwals*, the Commission was bound by the acts of its
17 attorney, which acts the Commission subsequently approved by public vote.
18 Counsel for the Commission had the authority to file its Notice of Appeal.

19 To hold otherwise places public attorneys in a difficult position whereby
20 they may not be able to timely advocate their clients’ positions and would,
21 therefore, be unable to fulfill their ethical duties under the Rules of Professional
22 Conduct as well as their clients’ respective mandates to protect the public.

23 II. CONCLUSION

24 For these reasons, the Board respectfully requests that the Court grant the
25 Commission’s Petition for Rehearing.

26 ///

27 ///

1 DATED this August 9, 2017.

2
3 

4 Robert Kilroy, Esq.
5 General Counsel
6 Jasmine K. Mehta, Esq.
7 Deputy General Counsel
8 Aaron B. Fricke, Esq.
9 Deputy General Counsel
10 Nevada State Board of Medical Examiners
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

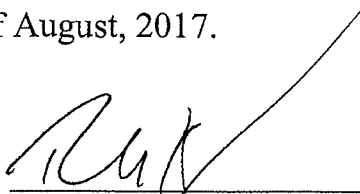
1 **CERTIFICATE OF COMPLIANCE**

2 I hereby certify that this brief complies with the formatting requirements of
3 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style
4 requirements of NRAP 32(a)(6) because this brief has been prepared in a
5 proportionally spaced typeface in Microsoft Word using 14-pt. Times New
6 Roman font. I further certify that this brief complies with the page- or type-
7 volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief
8 exempted from NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of
9 14 points or more and contains 1,486 words.

10 Finally, I hereby certify that I have read this appellate brief, and to the best
11 of my knowledge, information and belief, it is not frivolous or interposed for any
12 improper purpose. I further certify that this brief complies with all applicable
13 Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which
14 requires every assertion in the brief regarding matters in the record to be
15 supported by a reference to the page and volume number, if any, of the transcript
16 or appendix where the matter relied on is to be found. I understand that I may be
17 subject to sanctions in the event that the accompanying brief is not in conformity
18 with the requirements of the Nevada Rules of Appellate Procedure.

19 Dated this 9th day of August, 2017.

20 Respectfully submitted:

21 
22 _____
23 Robert Kilroy, Esq.
24 General Counsel
25 Jasmine K. Mehta, Esq.
26 Deputy General Counsel
27 Aaron B. Fricke, Esq.
28 Deputy General Counsel
Nevada State Board of Medical Examiners

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

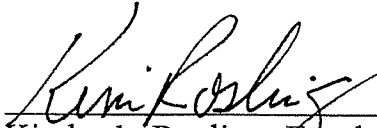
CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of the Nevada State Board of Medical Examiners, and on this day, I did cause a true and correct copy of **AMICUS CURIAE BRIEF OF THE NEVADA STATE BOARD OF MEDICAL EXAMINERS IN SUPPORT OF THE COMMISSION ON ETHICS OF THE STATE OF NEVADA'S PETITION FOR REHEARING**, to be electronically served, through the Nevada Supreme Court's electronic filing system, as follows:

Brenda J. Erdoes, Esq.
Legislative Counsel
Kevin C. Powers, Esq.
Chief Litigation Counsel
Eileen G. O'Grady, Esq.
Chief Deputy Legislative Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson Street
Carson City, NV 89701
Email: erdoes@lcb.state.nv.us
Email: kpowers@lcb.state.nv.us
Email: ogrady@lcb.state.nv.us

Tracy L. Chase, Esq.
Commission Counsel
Nevada Commission on Ethics
704 W. Nye Lane, Suite 204
Carson City, NV 89703
Email: tchase@ethics.nv.gov

DATED this 9th day of August, 2017.



Kimberly Rosling, Employee