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.	)	Supreme Court No. 69100

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

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STATEMENT OF IDENTITY OF AMICUS CURIAE

Nevada Rule of Appellate Procedure ("NRAP") 29(a) authorizes a political subdivision of the State of Nevada to file an amicus curiae brief without the consent of the parties or leave of court. NRAP 29(a). The Nevada State Board of Medical Examiners ("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. The Board's brief supports the Commission's Petition for Rehearing. The Board has an interest in the outcome of the Commission's Petition because the proceeding has significant ramifications on the daily operations of Boards and Commissions under the Nevada Open Meeting Act ("NOMA") and could significantly hinder the Board's mandate to protect the quality of medical practice for the protection and benefit of the public pursuant to NRS 630.003.

MEMORANDUM OF POINTS AND AUTHORITIES

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

I. ARGUMENT

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

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

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

Third, the Court has ignored its own precedent in *Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 64 P.3d 1070 (2003), in which the Court held that "absent serial communication of the discussions, there was no quorum and therefore no deliberations in_violation of the Open Meeting Law." Id. at 99, 64 P.3d at 1078. The Court noted that "the Open Meeting Law is not intended to prohibit every private discussion of a public issue. Instead, the Open Meeting Law

only prohibits collective deliberations or actions where a quorum is present." *Id.* at 95, 64 P.3d at 1075 (emphasis added).

In the June 29, 2017, Opinion, the Court instead relies on *Johnson v. Tempe Elementary School District No. 3 Governing Board*, 20 P.3d 1148, 1151 (Ariz. Ct. App. 2000). However, the statutes governing Arizona's open meeting law, and which informed the Arizona court's decision, specifically required that "[a] public vote must be taken before any legal action binds the public body." Ariz. Rev. Stat. § 38-431.03(D). Legal action taken in violation of the statute is null and void, with one exception: the Arizona open meeting law provides a means for ratification of a legal action. Ariz. Rev. Stat. 38.431.05. The Arizona statute specifically allows the public body to ratify an action taken in violation of the Arizona open meeting law, which would allow counsel to cure any failure to obtain a public vote prior to filing a notice of appeal. Nevada statutes, in contrast, allow for ratification only prospectively. Also, the court in Johnson specifically noted that "the open meeting issue was promptly raised in the appellate court when, arguably, there may have been time to correct the violation . . . ." *Johnson*, 20 P.3d at 1151. In contrast,

there was no time, if ratification was not allowed, to correct the lack of a public meeting to authorize an appeal by the time Respondents raised the argument for the first time in their reply.

Fourth, the Panel's decision creates uncertainty regarding the scope of the applicability of the Court's opinion. For example, this Board often is the respondent to petitions for judicial review in trial court. When a licensee files a petition for judicial review, must the Board convene a meeting to authorize counsel to respond to the Petition? Similarly, must the Board authorize counsel to respond to an emergency petition for extraordinary writs or for temporary restraining orders, which has been requested by opposing parties in recent years at both the trial and appellate court levels? If so, how will the Board be able to comply with the time constraints in responding to emergency writ petitions, when written notice of a public meeting must be given at least 3 working days before the meeting under NRS 241.020?

For example, in a case before this Court (Case No. 65421), the petitioner filed an emergency petition for writ of mandamus or prohibition on April 14, 2014

against the Board.[1] On April 17, 2014, the Court ordered the Board to file an Answer by 4 p.m. that day. It would not have been possible to notice and calendar a Board meeting prior to filing an answer. Yet, pursuant to the Panel's decision, if counsel had filed an answer pursuant to the scheduling order without a Board meeting and vote, such answer would be void and could only be ratified going forward. While NRS 241.020 provides an exception to the notice requirement for emergencies, the term "emergency" is not defined. If a public attorney files an answer to protect his or her client's interest, as Rule of Professional Conduct (NRPC) 1.3[2] requires, the Panel's decision in this matter does not allow a public body to subsequently ratify the representation by the public attorney to protect the

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[1] The Court "may take judicial notice of facts generally known or capable of verification from a reliable source" pursuant to NRS 47.150(1). The Court may also "take judicial notice of facts that are '[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute.'" *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (quoting NRS 47.130(2)(b) (abrogated in part on other grounds by *Grisham v. Grisham*, 128 Nev. 679, 289 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.

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

client's interests. Instead, it creates an untenable situation where public bodies may be subject to vexatious litigation in the form of emergency petitions in the hopes that the public body will not be able to convene a public meeting in time, which would allow the other party to prevail on a procedural loophole, rather than on the merits.

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

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[3] *See* NRS 630.003(1)(b) ("For the protection and benefit of the public, the Legislature delegates to the Board of Medical Examiners 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 this chapter").

Finally, the June 29, 2017, Opinion basically removes from public attorneys the cloak of implied authority with which non-public attorneys are imbued when they make an appearance on behalf of their clients.[4] See NRPC 1.2(a) ("A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.") "[T]he appearance of an attorney for a party raises a presumption that the attorney has the authority to act on that party's behalf." *Graves v. United States Coast Guard*, 692 F.2d 71, 74 (9th Cir. 1982). "When an attorney files an appeal, it is presumed he has the requisite authority to do so." *T. Ryan Legg Irrevocable Trust v. Testa*, 75 N.E. 3d 184, 188 (Ohio 2016) (quotation omitted). "When an attorney of record appears in an action for one of the parties, his authority, in the absence of any proof to the contrary, will be presumed." *Hill v. Mendenhall*, 88 U.S. 453, 454 (1874). "[A] litigant party shall not be permitted to deny the authority of his attorney of record, whilst he stands as such on the docket. He may revoke his attorney's authority, and give notice of it to the court and to the adverse party; but whilst he so stands, the party must be bound by the

[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.

acts of the attorney." *Gottwals v. Rencher*, 60 Nev. 47, 53, 98 P.2d 481, 485 (1940).

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

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

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II. CONCLUSION

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

DATED this August 23, 2017.

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CERTIFICATE OF COMPLIANCE

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

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

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

Dated this 23 day of August, 2017.

Respectfully submitted:

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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:

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