

1 **Statement of Interest**

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

13 The Board carries out its duties by conducting many hundreds of independent
14 investigations every year, and by necessarily pursuing administrative disciplinary actions
15 against its licensees, and defending its investigations and formal actions from a variety
16 of challenges launched in Nevada trial and appellate courts. The Board is a party to
17 numerous active cases in various Nevada courts at any given time, which cases must be
18 constantly supervised and pursued for the benefit of the public. Thus, the Board has a
19 strong interest in the outcome of the Commission on Ethics of the State of Nevada's
20 Petition because the Court's opinion regarding the application of the Nevada Open
21 Meeting Act ("NOMA") (formerly called the Nevada Open Meeting Law) to the pursuit
22 of Board interests in Nevada courts will have a major impact on the daily operations of
23 the Board, and could significantly hinder the Board in carrying out one of its most
24 critical functions of engaging in litigation for the protection and benefit of the public.

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

26 Pursuant to NRAP 40A(a), en banc reconsideration of a panel decision is
27 appropriate "when (1) reconsideration by the full court is necessary to secure or maintain
28 uniformity of decisions of the Supreme Court or Court of Appeals, or (2) the proceeding

1 involves a substantial precedential, constitutional or public policy issue.” Both
2 circumstances are met in this case.

3 First, the Panel’s decision lacks uniformity with precedent under *Chanos v. Nev.*
4 *Tax Comm’n*, 124 Nev. 232, 239, 181 P.3d 675, 680 (2008) (concluding “[t]herefore,
5 under the Open Meeting Law, a meeting is a gathering of a *public body quorum* at which
6 it acquires information, discusses the information, or makes decisions regarding that
7 information within its jurisdiction) (emphasis added); *Dewey v. Redevelopment Agency*
8 *of City of Reno*, 119 Nev. 87, 94-95, 64 P.3d 1070, 1075 (2003) (stating “the Open
9 Meeting Law only prohibits collective deliberations or actions where a quorum is
10 present”); *Del Papa v. Board of Regents*, 114 Nev. 388, 400, 956 P.2d 770 (1998) (“The
11 constraints of the Open Meeting Law apply only where a quorum of a public body, in its
12 official capacity as a body, deliberates toward a decision or makes a decision”).

13 Second, and more importantly from the Board’s perspective, the Panel’s decision
14 involves a substantial precedential, constitutional or public policy issue. The Board’s
15 brief will shed light on the broader implications of the Court’s interpretation of NOMA
16 and its application to the actions of professional licensing boards. The brief will
17 demonstrate the uncertainty and great administrative burden that the Court’s opinion may
18 cause with regard to the scope of application of NOMA’s requirements. Thus, the brief
19 will demonstrate how, if the Court’s June 29, 2017, Opinion is not revised, the public
20 interest will be harmed, which may not have been contemplated by the Court in issuing
21 its Opinion.

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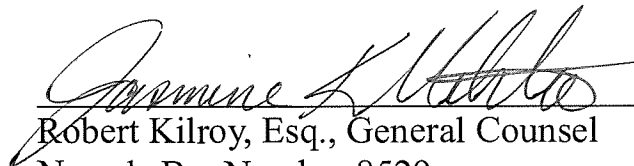
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1 For these reasons, the proposed amicus curiae requests that the Court grant its
2 Motion.

3 DATED this 9th day of November, 2017.

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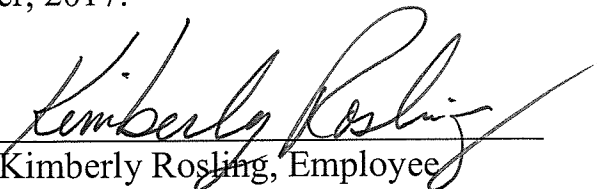
CERTIFICATE OF SERVICE

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 **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE COMMISSION ON ETHICS OF THE STATE OF NEVADA'S PETITION FOR EN BANC RECONSIDERATION**, to be electronically served, through the Nevada Supreme Court's electronic filing system, as follows:

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Kimberly Rosling, Employee

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE COMMISSION ON ETHICS OF THE)	Supreme Court No. 69100
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.)	
)	

**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 EN BANC
RECONSIDERATION**

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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 on Ethics of the State of Nevada’s (Commission) Petition for En Banc Reconsideration. 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”).

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 En Banc Reconsideration. 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. On September 29, 2017, the Commission’s Petition for Rehearing was denied. The Board urges this Court to grant en banc reconsideration of the argument on several bases.

First, and most importantly from the Board’s perspective, 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 responding 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 deployed by certain private attorneys in recent years at both the trial court 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. 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) 1.3¹ 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 client's interests. Instead, it creates an untenable situation where public bodies

¹ Rule 1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

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.² 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 in order to receive authorization to defend the Board.

Second, the conflict between the confidentiality of the Commission's pre-panel proceedings and the NOMA apply equally to the Board. Pursuant to NRS 241.016(3), which provides that NRS 630.311 and NRS 630.336, providing for an exemption from NRS Chapter 241 or authorizing a closed meeting, hearing or proceeding, prevail over NRS Chapter 241. While NRS 630.336(4) mandates the

² 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").

confidentiality of an investigation of a licensee, the Panel's decision would potentially require the Board to disclose confidential information and investigative materials in a public meeting in order for counsel to receive direction from the Board regarding litigation. In essence, the Panel's decision negates the language of NRS 241.016(3).

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

Fourth, 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 expressly 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.

Fifth, 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 ignores this precedent and 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 do not have a corresponding provision because ratification only applies prospectively. In addition, 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.

Sixth, and 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. *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 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. Although such act under the NOMA is a ratification with only prospective application, the Commission ratified the authority that the Commission's counsel already possessed. Therefore, counsel for the Commission had the requisite authority to file a Notice of Appeal and did so in a timely manner. Pursuant to *Gottwals*, the Commission was bound by the acts of its attorney, which acts on behalf of the Commission subsequently approved by public vote.

To hold otherwise places public attorneys in a difficult position whereby they may not be able to timely prosecute or defend their clients' positions and would, therefore, be unable to fulfill their ethical duties under the Nevada Rules of Professional Conduct.

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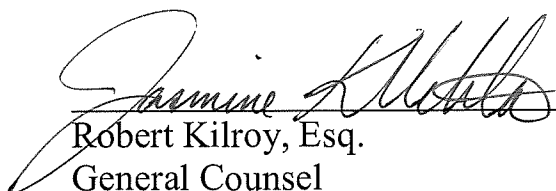
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II. CONCLUSION

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

DATED this 9th day of November, 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 1,607 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

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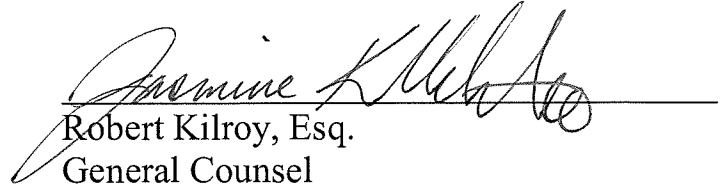
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requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of November, 2017.

Respectfully submitted:


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