

BEFORE 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 32; AND JIM WHEELER,)
IN HIS OFFICIAL CAPACITY AS)
ASSEMBLYMAN FOR ASSEMBLY)
DISTRICT 39,)

Respondents.)
_____)

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NEVADA STATE CONTRACTORS BOARD'S AMICUS CURIAE BRIEF
IN SUPPORT OF PETITION FOR *EN BANC* REVIEW

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I. POINTS AND AUTHORITIES

A. STANDING AS AMICUS CURIAE

NRAP 29(a) provides: “The United States, the State of Nevada, an officer or agency of either, a political subdivision thereof, or a state, territory or commonwealth may file an amicus curiae brief without the consent of the parties or leave of court.” The Nevada State Contractors Board (the Board) is an agency of the State of Nevada, created and authorized by NRS chapter 624. The Board, therefore, may file and participate in this matter as amicus curiae without consent of the parties or leave of this Court.

B. STANDARD OF REVIEW ON PETITION FOR *EN BANC* REVIEW

NRAP 40A(a)(2) allows this Court to grant *en banc* review where “the proceeding involves a substantial precedential, constitutional or public policy issue.” *En banc* consideration is appropriate and should be granted where the original three-justice panel split and where the opinion by the three-justice panel was incorrect. *Davis v. Ewalefo*, 131 Nev. ____, ____, 352 P.3d 1139, 1140 (2015). NRAP 40(c)(2)(B) allows this Court to consider rehearing a matter, “When the court has overlooked, *misapplied or failed to consider a statute, procedural rule*, regulation or decision *directly controlling a dispositive issue in the case.*” (Emphasis supplied.) “Under our long-

established practice, rehearings are not granted to review matters that are of no *practical consequence*. Rather, a petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, *or when otherwise necessary to promote substantial justice*.” (Emphasis supplied.) *In re Estate of Hermann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). The petition for *en banc* review filed by the Nevada Commission on Ethics demonstrates that this is the rare case of great practical consequence for which substantial justice can only be promoted by reconsideration of the majority opinion in this matter; thus, this is an appropriate case for *en banc* review.

C. ARGUMENT

The Board urges this Court to grant *en banc* consideration of this matter to rehear and reconsider the majority opinion issued by the three-justice panel in this matter for two reasons: (1) the majority opinion violates sound public policy that favors the making of court rules through amendments to the NRAP and the making of laws through legislative action, and in so doing, has raised considerable and far-reaching practical consequences and concerns, and (2) the majority opinion misapplied or failed to consider controlling Rules of Appellate Procedure and provisions of the Nevada Open Meeting Law.

1. The Majority Opinion Is Against Sound Public Policy

It is axiomatic that legislatures make law and courts apply it. This Court, though, does possess the inherent power to administer its affairs, including the power of rule-making. *Goldberg v. Eighth Jud'l Dist. Ct.*, 93 Nev. 614, 615-616, 572 P.2d 521, 522 (1977). In the instant matter, neither this Court's NRAP nor NRS chapter 241 authorize or compel the majority's ruling. No provision of the NRAP or NRS chapter 241 mandates that a state agency must establish *as a condition precedent* that it publicly heard and determined to pursue an appeal or that a subsequent public ratification of the actions of its staff to timely perfect an appeal is inconsequential and of no effect. Nothing contained in NRAP 3, 3A, or 4 supports such a ruling, even though the Court amended NRAP 3, 3A, and 4 as recently as January or August, 2015. Nothing contained in NRS chapter 241 supports such a ruling, even though the Legislature of which Mr. Hansen and Mr. Wheeler are members just recently heard bills related to NRS chapter 241.

It is ironic that the parties arguing for the judicial creation of a nonexistent condition precedent in NRS chapter 241 are themselves legislators who might normally be expected to argue on behalf of the Legislature's exclusive power to make Nevada's laws. It also is troubling that this Court has

chosen to add a condition precedent to the NRAP through fiat rather than through its rule-making process. Had amendments been pursued through the Court's or the Legislature's usual and ordinary processes, the public, attorneys, and affected public agencies could have participated in the crafting of any such new rules so that the particulars of such rules would be workable and reflect sound public policy. Instead, the majority opinion leaves all state agencies governed by boards or commissions to guess at the possible parameters for what types or kinds of legal determinations require a majority vote of the board or commission and what types or kinds of legal determinations can be made by the board's or commission's staff and counsel. And if the board or commission guesses wrong, the merits of the board's or commission's otherwise legitimate public policy and public protection concerns and actions may be nullified without recourse. This is obviously not good, sound public policy.

The majority opinion bypassed both potential avenues to create the condition precedent that is the end result of the majority opinion, thus resulting in unworkable and untenable public policy. Rehearing and reconsideration is, therefore, necessary as the only means to correct the majority opinion's usurpation of the usual mechanisms for the creation of such policy that would and must be worked only through amendment to the NRAP

or NRS chapter 241. The majority opinion's present precedent is unworkable and unnecessarily imperils the public protection missions of Nevada's state boards and commissions, thus leading to unnecessarily unsound public policy.

2. The Majority Opinion Misapplied or Failed to Consider the Controlling Law of the Case

The majority opinion misapplied or failed to consider the clear language and import of the Court's own NRAP 3, 3A, and 4 and the Nevada Open Meeting Law (NRS ch. 241). The practical consequence and effect of the majority opinion is the creation of a new and uncodified condition precedent to the perfection of a notice of appeal by a public agency. This misapplies or fails to acknowledge the present state of the law. In particular, NRAP 3, 3A, and 4 set out in detail this Court's rules regarding what, where, when, and how a civil appeal may be pursued. Nowhere in NRAP 3, 3A, or 4 is an appellant's counsel required to prove or certify to this Court that the appeal was authorized by the client.¹ Nowhere in all of the Nevada Open Meeting Law is there a provision requiring that a public agency must publicly hear and determine any particular legal option available to the public agency, such as the

¹ Interestingly, the Court has created, in NRAP 3D, a special set of appellate rules applicable solely to proceedings of the Nevada Judicial Discipline Commission, an organization that for judges functions similarly to how the Appellant functions for state officials and employees.

filing of a notice of appeal, as a condition precedent for the validity of the public agency's taking of such legal action.

It is undisputed that counsel for the Nevada Commission on Ethics timely perfected the appeal in this matter. Nonetheless, the instant the appeal was dismissed without consideration of the merits despite the majority's identifying any portion of the NRAP with which the appellant's counsel did not comply. The majority opinion is literally unprecedented insofar as no opinion of this Court has ever invalidated a perfected appeal. In so holding, the majority did not allow the valid act of the Appellant's counsel to bind her client. The instant case is novel in dismissing an otherwise perfected and valid appeal where no violation of this Court's rules was found. Thus, the majority opinion seems to embody a decision ripe for reconsideration pursuant to NRAP 40(c)(2)(B) because it "misapplied or failed to consider a statute [or] procedural rule," and only *en banc* review can correct the "substantial precedential, constitutional or public policy issue" (NRAP 40A(a)(2)) raised by the majority opinion.

II. CONCLUSION

The Board supports the intent of the Nevada Open Meeting Law and, to the best of its ability, scrupulously complies with it. The Board is,

unfortunately, sometimes a party to civil litigation, and as such, supports the necessary work performed by this Court in such civil litigation. *En banc* rehearing and reconsideration of this matter is necessary because no provision in the NRAP or NRS chapter 241 supports or compels the outcome of the majority opinion in the instant matter. The Board would gladly participate in any open, collaborative proceeding, either conducted by this Court to amend NRAP 3, 3A, or 4 or by the Legislature to amend NRS chapter 241, to explore and craft the contours of a condition precedent to Board legal action. The instant majority opinion was the wrong vehicle by which to effectuate such a drastic, radical, and far-reaching new public policy. The matter should be reheard, reconsidered, and ultimately reversed *en banc*.

Signed this 21st day of November, 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Respondent's Notice of Change of Address 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:

[X] It has been prepared in a proportionally spaced typeface using Microsoft Word for Macintosh 2008, Version 12.3.6 in Goudy Old Style 14 Point type.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 1,480 words.

3. Finally, I hereby certify that I have read this 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 21st day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, the 21st day of November, 2017, I submitted the foregoing **NEVADA STATE CONTRACTORS BOARD'S AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR *EN BANC* REVIEW** via the Court's eFlex electronic filing system. According to the electronic service list, notification will be served upon the following:

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