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.

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Supreme Court Case No. 69100

Appeal from First Judicial District Court, Carson City, Nevada, Case No. 15 OC 00076 1B

RESPONDENTS' ANSWER TO PETITION FOR EN BANC RECONSIDERATION

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INTRODUCTION

Respondents Assemblymen Ira Hansen and Jim Wheeler (the Assemblymen), by and through their counsel the Legal Division of the Legislative Counsel Bureau (LCB), hereby file this answer to the petition for en banc reconsideration filed by Appellant Commission on Ethics (Commission). This Court should deny the petition for en banc reconsideration of the panel's opinion because: (1) the Commission has not met the stringent standards for en banc reconsideration under NRAP 40A; and (2) the panel correctly determined that public bodies must comply with the Open Meeting Law (OML) in NRS Chapter 241 when authorizing legal counsel to file an appeal. Comm'n on Ethics v. Hansen, 396 P.3d 807 (Nev.2017).

Under NRAP 40A(a), en banc reconsideration is disfavored and should not be granted unless it is necessary to preserve precedential uniformity or the case implicates important precedential, public policy or constitutional issues. Huckabay Props. v. NC Auto Parts, 322 P.3d 429, 432 (Nev.2014). In this case, there are no questions of precedential uniformity because the panel's opinion is consistent with McKay v. Bd. of Cnty. Comm'rs, 103 Nev. 490, 491-96 (1987), in which this Court rejected creating implied attorney-client exceptions to the OML and clearly held that the OML requires attorneys for public bodies to perform their professional duties and provide their attorney-client representation within the reasonable parameters established by the OML.

Additionally, there are no important precedential, public policy or constitutional issues because the panel's opinion is consistent with the public policy clearly established by the Legislature in its 2001 OML amendments which unequivocally provided that public bodies can take actions regarding litigation ***only*** in OML-compliant meetings. NRS 241.015(3)(b)(2); Legis. History AB225, 71st Leg., at 1771-75, 1810-16, 2064-70, 2442-43, 2475-79 (Nev. LCB Resch. Libr. 2001).[1] During the 15-plus years since the Legislature established that clear public policy, the Attorney General has advised public bodies—in both its Open Meeting Law Manual (OMLM) and its Open Meeting Law Opinions (OMLOs)—that although public bodies may deliberate regarding litigation in private conferences with their attorneys, they can take actions regarding litigation ***only*** in OML-compliant meetings. OMLM §3.05; §4.11 (12th ed. 2016); OMLM §4.05; §5.11 (9th ed. 2001; 10th ed. 2005; 11th ed. 2012); OMLO 2005-04 (Mar. 7, 2005).

The panel's opinion is also consistent with the long-standing democratic concept of majority rule under which public bodies are governed by fundamental principles of decision-making that must be followed to give legal effect and

[1] A copy of Legis. History AB225, supra, is available at: http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/2001/AB225,2001.pdf.

validity to their decisions. Mason's Manual Legis. Proc. §42 (NCSL 2010). Under these fundamental principles, the decision-making powers of public bodies can be exercised ***only*** in meetings where a quorum is present. Mason's §43. Therefore, the panel's opinion protects these fundamental principles because it ensures that public bodies are empowered to authorize appeals only if a majority approves the appeal in OML-compliant meetings. Mason's §50 ("A fundamental and seemingly universal principle is that at least a majority of the vote cast is required to make decisions for a group."); Black's Law Dictionary 967 (7th ed. 1999) (defining "majority rule" as "[a] political principle that a majority of a group has the power to make decisions that bind the group.").

Under the view of the Commission and the dissent, any number less than a quorum would be empowered to authorize appeals without holding OML-compliant meetings. Hansen, 396 P.3d at 812-13 (Pickering, J., dissenting). This view would undermine both the principle of majority rule and the purpose of the OML to require public bodies to make decisions regarding litigation ***only*** in OML-compliant meetings. NRS 241.015(3)(b)(2); Legis. History AB225, supra; McKay, 103 Nev. at 491-96.

This view would also create the odd situation that a minority of the members of a public body would be empowered to authorize appeals without holding OML-compliant meetings, but a majority would not be so empowered unless the majority

holds such meetings. Worse yet, if a minority authorized an appeal without holding an OML-compliant meeting, a majority could not counteract the minority's action unless the majority holds such a meeting. This odd imbalance between the respective powers of the majority and minority would stand the principle of majority rule on its head.

In its opposition to the motion to dismiss, the Commission conceded that it violated the principle of majority rule by admitting several times—once with emphasis—that "the Commission did not hold any meeting to provide direction to Commission Counsel to file the Notice of Appeal" and that "[t]he Commission simply did not hold a meeting, serial or otherwise, to provide direction to file the Notice of Appeal." Opp'n at 10. Based on the Commission's admissions, both the panel and the dissent found that the Commission did not hold any meeting authorizing its counsel to file the appeal. Hansen, 396 P.3d at 810 n.7 ("There is no question in this case that there was no meeting."); id. at 812 (Pickering, J., dissenting) ("[T]here was no meeting at which an action was taken.").

However, after the panel's opinion, the Commission improperly attempted in its petition for rehearing to completely erase its prior admissions by seeking to introduce new and contradictory evidence in an affidavit from its executive director who claimed for the first time that long before this case was filed in the district court or subject to an appeal, the Commission anticipated the need for an

appeal and secretly met and provided its counsel with express authority to file the appeal more than 18 months before there was an appealable order. Pet. Reh'g Aff. at 3. Because the Commission cannot introduce new evidence into the record on a petition for rehearing or en banc reconsideration, the Commission's improperly submitted affidavit must be disregarded or stricken. NRAP 40A(c) (stating that "no point may be raised for the first time" in petitions for en banc reconsideration).

Furthermore, even assuming the assertions in the improperly submitted affidavit are accurate, all they prove is that the Commission has been improperly taking actions to delegate authority to file appeals to its chair and staff without any statutory authority under the Ethics Law and without holding OML-compliant meetings. Because any purported delegation by the Commission would have been without statutory authority and in violation of the OML, the Commission's purported delegation would have been an *ultra vires* act that was void from its inception and invalid as a matter of law and could not have authorized its counsel to file the appeal. Consequently, the Commission's counsel was not properly authorized to file the appeal as a matter of law, even if credence is given to the new and contradictory evidence in the Commission's improperly submitted affidavit.

Accordingly, given that the Commission's counsel was not properly authorized to file the appeal as a matter of law, this Court should deny the petition for en banc reconsideration because the panel correctly determined—based on the

clear public policy established by the Legislature in the 2001 OML amendments and based on the long-standing democratic principle of majority rule—that public bodies must comply with the OML when exercising their decision-making powers to authorize legal counsel to file an appeal.

ARGUMENT

I. This Court and its panels are the only judicial bodies that may determine whether there is appellate jurisdiction in this case.

The Commission incorrectly claims that this Court and its panels lack jurisdiction to determine whether the Commission properly filed the appeal because the OML issues must be decided first by the district court. Pet. Recons. at 5-6. However, this Court and its panels have inherent and exclusive jurisdiction to determine whether the Commission properly filed the appeal.

Every appellate court has the power, at any time in the appellate proceedings, to determine whether the party asserting the right to appeal has properly invoked the court's appellate jurisdiction. United States v. Ruiz, 536 U.S. 622, 628 (2002) (stating that an appellate court "always has jurisdiction to determine its own jurisdiction."); Davis v. Packard, 33 U.S. 312, 323 (1834) (stating that "the court of [last] resort in every state, decides upon its own jurisdiction, and upon the jurisdiction of all the inferior courts to which its appellate power extends."). Therefore, the state's highest court is the only judicial body that determines whether it has appellate jurisdiction because "[i]t and it alone necessarily ha[s]

jurisdiction to decide whether the case [is] properly before it." United States v. United Mine Workers, 330 U.S. 258, 291 (1947).

When the panel determined that this case was not properly before this Court, the panel correctly concluded that the Commission did not have the proper legal authority to file the appeal due to its violation of the OML. Johnson v. Tempe Elementary Sch. Dist., 20 P.3d 1148, 1151 (Ariz.Ct.App.2000), *review denied* (Ariz. Oct. 3, 2001). The panel also correctly concluded that because the Commission failed to file a legally valid notice of appeal during the jurisdictional appeal period, it could not treat the "improperly-filed notice of appeal as vesting jurisdiction in this court." Guerin v. Guerin, 116 Nev. 210, 214 (2000). Therefore, the panel properly dismissed the appeal because "the notice of appeal [was] defective, and thus, this court lacks jurisdiction to consider the Commission's appeal." Hansen, 396 P.3d at 810.

Furthermore, the Commission also conceded that it violated the principle of majority rule when it admitted several times that it did not hold ***any*** meetings to authorize its counsel to file the appeal. Opp'n at 10. Based on its admissions, the Commission, as a body, never exercised its decision-making power to authorize its counsel to file the appeal at a meeting of the body where a quorum was present. Therefore, by failing to properly authorize its counsel to file the appeal, the

Commission failed to file a legally valid notice of appeal during the jurisdictional appeal period.

Finally, the Commission suggests, without citation to any authorities, that the panel's dismissal of the appeal "has vaporized the Commission's due process rights to defend the [OML] cases" in the district court. Pet. Recons. at 6. However, "[s]tate agencies have never been included under the umbrella of the right to due process." Associated Press v. Bd. of Pub. Educ., 804 P.2d 376, 379 (Mont.1991). Consequently, the panel's dismissal of the appeal could not have "vaporized the Commission's due process rights" because the Commission does not have any due process rights as a matter of law. See Whitehead v. Comm'n on Jud. Discipline, 110 Nev. 380, 425 (1994) (collecting cases); Limestone Cnty. Dep't of Human Res. v. Long, 182 So.3d 541, 545 (Ala.Civ.App.2014).

II. Because the Assemblymen—in their motion to dismiss—clearly raised the issue that only the governing board of a public body can authorize an appeal, the Assemblymen did not raise that issue for the first time in their reply.

The Commission and dissent incorrectly claim that "for the first time in reply," the Assemblymen raised the issue that "only the governing board of a public body can authorize an appeal, not the entity's chair, its executive director, or its in-house lawyer." Hansen, 396 P.3d at 813 (Pickering, J., dissenting); Pet. Recons. at 7. However, for 15 pages in their motion to dismiss, the Assemblymen methodically established that public bodies cannot take actions authorizing or

delegating authority to counsel to file appeals unless such actions are taken ***only*** in OML-compliant meetings. Mot. Dismiss at 14-29.

Because the Assemblymen clearly argued that decisions to file appeals can be made ***only*** by the public body in OML-compliant meetings, that argument establishes that such decisions cannot be made by the body's chair, executive director and in-house lawyer. Indeed, the Assemblymen specifically discussed caselaw holding that a public body's attorney cannot take actions to file appeals without first obtaining the public body's approval in OML-compliant meetings. Id. at 27-28. Therefore, in their motion, the Assemblymen clearly raised the issue that only the governing board of a public body can authorize appeals in OML-compliant meetings, which precludes its chair, executive director and in-house lawyer from directing or filing appeals without the body's prior authorization in OML-compliant meetings.

Furthermore, until the Commission filed its opposition and admitted for the first time that its counsel filed the appeal without the full body's prior authorization, there was no way to know that the Commission never held any meetings to authorize its counsel to file the appeal. Opp'n at 10. Considering this information was in the exclusive possession of the Commission and was not revealed until the Commission's opposition, it was not only appropriate but incumbent upon the Assemblymen to address this information in their reply.

NRAP 27(a)(4) (providing that a reply must present only matters that relate to the opposition); NRAP 28(c) (providing that a reply brief must be "limited to answering any new matter set forth in the opposing brief.").

Additionally, the Commission specifically argued in its opposition that its counsel had the legal authority to file the appeal without the full body's prior authorization. Opp'n at 16-17. Therefore, because the Commission raised this argument in its opposition, the Assemblymen were permitted to address that argument in their reply by counter-arguing that only the governing board of a public body can authorize an appeal. NRAP 27(a)(4); NRAP 28(c). Consequently, because the arguments in the reply directly addressed each matter raised by the Commission in its opposition, the reply conformed with the appellate rules and appropriately discussed the Commission's contention that its counsel had the legal authority to file the appeal without the full body's prior authorization.

Finally, even if the reply had raised matters for the first time, this Court has stated that "it is our prerogative to consider issues a party raises in its reply brief, and we will address those issues if consideration of them is in the interests of justice." Powell v. Liberty Mut. Fire Ins., 127 Nev. 156, 161 n.3 (2011). Because the Commission used its opposition to raise and argue the issue that its counsel had the legal authority to file the appeal without the full body's prior authorization, the

interests of justice would have permitted consideration of the Assemblymen's counter-arguments even if they had been raised for the first time in the reply.

III. The Commission's improperly submitted affidavit must be disregarded or stricken.

Even though the Commission improperly submitted its executive director's affidavit with its petition for rehearing, the Commission incorrectly claims that "the *Affidavit* was not untimely and was accepted by the Panel majority" in reviewing the petition for rehearing. Pet. Recons. at 9. Appellate courts universally hold that parties cannot introduce new or additional evidence into the record on petitions for rehearing, United States v. Maxwell Land-Grant Co., 122 U.S. 365, 375 (1887), and affidavits attached to petitions for rehearing must be disregarded or stricken. Williamsburg Rural Water & Sewer Co. v. Williamsburg Cnty. Water & Sewer Auth., 627 S.E.2d 690, 693 (S.C.2006).[2] The same rules apply to petitions for en banc reconsideration. NRAP 40A(c) (stating that "no point may be raised for the first time" in petitions for en banc reconsideration); United States v. Bongiorno, 110 F.3d 132, 133 (1stCir.1997).

Furthermore, in the panel's order denying the Commission's petition for rehearing, there is no language from the panel accepting the Commission's improperly submitted affidavit. For an order of the appellate court to establish the

[2] See also the cases cited in the answer to the petition for rehearing at 7.

law of the case, "the appellate court must actually address and decide the issue explicitly or by necessary implication." Recontrust Co. v. Zhang, 317 P.3d 814, 818 (Nev.2014). When the appellate court denies a petition for rehearing, it "signifies that the petition does not qualify under the stringent requirements imposed by [the appellate rules], nothing more." Id. at 819.

Because the panel denied the Commission's petition for rehearing without discussing the Commission's improperly submitted affidavit, there is no basis to conclude that the panel accepted the affidavit. Instead, the necessary implication is that the panel disregarded the affidavit. Therefore, the Commission's improperly submitted affidavit must be disregarded or stricken.

Additionally, the affidavit must be disregarded or stricken because it improperly supports the Commission's new legal arguments and contradicts its prior admissions. In its opposition, the Commission admitted several times that it did not hold ***any*** meetings to authorize its counsel to file the appeal. Opp'n at 10. However, in direct contradiction to the Commission's admissions, the executive director stated for the first time in the affidavit that long before this case was filed in the district court or subject to an appeal, the Commission anticipated the need for an appeal and secretly met and provided its counsel with express authority to file the appeal. Pet. Reh'g Aff. at 3.

Thus, the Commission first admitted that it did not hold any meetings to authorize its counsel to file the appeal but now claims that it secretly met and provided its counsel with "direct, express authority" to file the appeal more than 18 months before there was an appealable order. Because both of these statements of fact cannot be true, it appears that one of them may be a false statement of fact that implicates the rules of professional conduct. NRPC 3.3(a) ("A lawyer shall not knowingly . . . [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); Indep. Living Ctr. v. Maxwell-Jolly, 590 F.3d 725, 730 (9thCir.2009) (finding lawyers who make contradictory statements of fact in their briefs transgress the rules of professional conduct).

Furthermore, the Commission's contradictory statements demonstrate why the OML requires public bodies to authorize appeals only in OML-compliant meetings so there are verifiable public records conclusively proving when and how their actions were taken, instead of contradictory statements and unverifiable assertions by staff which can easily evolve and change to suit their circumstances, just like they have evolved and changed in this case. Therefore, since the unverifiable assertions in the executive director's affidavit are merely self-serving statements designed to fit the Commission's new legal arguments, they should be

rejected because they cannot serve as a proper substitute for verifiable actions of public bodies taken in OML-compliant meetings.

Finally, even assuming the assertions in the executive director's affidavit are accurate, all they prove is that the Commission has been improperly taking actions to delegate authority to file appeals to its chair and staff without any statutory authority under the Ethics Law and without holding OML-compliant meetings.

It is well established that "[a] public body cannot delegate its powers, duties or responsibilities to any other person or groups, including a committee of its own members," so "[w]here duties or responsibilities are imposed on a public body . . . that body is bound to exercise those duties and responsibilities and cannot divest itself of them by delegation to others." Mason's §51(1)-(2). For example, in Knight v. Higgs, 659 S.E.2d 742, 746-49 (N.C.App.2008), the court held a public body could not delegate its decision-making authority to its attorney and, since the body failed to make the improperly delegated decision in a public meeting, it violated the state's OML.

As correctly observed by the panel, "nothing in the statutes or regulations concerning the Ethics Commission provides for a grant or delegation of decision-making authority to the Commission's chair, director, or legal counsel to file a notice of appeal without action by the Commission as a whole." Hansen, 396 P.3d at 810. Consequently, if the Commission has been delegating authority to file

appeals to its chair and staff, it has been doing so without statutory authority under the Ethics Law.

Additionally, based on its plain language and legislative history, the OML does not allow public bodies to take actions regarding potential or existing litigation in private conferences with their attorneys, but such actions must be taken ***only*** in OML-compliant meetings. NRS 241.015(3)(b)(2); Legis. History AB225, supra; McKay, 103 Nev. at 491-96. Consequently, even if the Commission had any statutory authority to take actions delegating its power to file appeals to its chair and staff, the Commission could not have validly made such delegations without holding OML-compliant meetings.

Thus, because any purported delegation by the Commission would have been without statutory authority and in violation of the OML, the Commission's purported delegation would have been an *ultra vires* act that was void from its inception and invalid as a matter of law and could not have authorized its counsel to file the appeal. Therefore, the Commission's counsel was not properly authorized to file the appeal as a matter of law, even if credence is given to the new and contradictory evidence in the Commission's improperly submitted affidavit.

IV. The panel's opinion does not conflict with the OML or case precedent and does not create new rules to perfect appeals because the Commission's substantive rights to appeal have always been governed by the OML, and its decisions to appeal have never been exempt from the OML.

The Commission and amici incorrectly claim that the panel's opinion: (1) conflicts with the OML and case precedent and creates new rules to perfect appeals; and (2) deprives the Commission of its rights to appeal under court rules which take precedence over the OML. Pet. Recons. at 10-17. However, because public bodies are wholly creatures of the Legislature whose powers and rights are defined exclusively by statute, the Legislature has the exclusive authority to determine whether public bodies are given any substantive rights to appeal and, if so, the steps they must take to exercise those substantive rights.

In Nevada, each public body "is but the creature of the legislature, and derives all its powers, rights and franchises from legislative enactment or statutory implication." State ex rel. Rosenstock v. Swift, 11 Nev. 128, 140 (1876); Andrews v. Nev. State Bd. of Cosmetology, 86 Nev. 207, 208 (1970). Therefore, to determine whether public bodies have any substantive rights to appeal, this Court looks to the statutes that govern the public bodies. Mead v. State Dep't of Health, 91 Nev. 152, 153-55 (1975).

With certain limited exceptions, the OML governs all public bodies, including the Commission. NRS 241.015(4) & 241.016. In the OML, the Legislature expressly provided a limited attorney-client litigation exception that allows public

bodies to "receive information" and "deliberate toward a decision" regarding litigation in private conferences with their attorneys, but they cannot take action regarding litigation in such conferences because such action can be taken ***only*** in OML-compliant meetings. NRS 241.015(3)(b)(2). By expressly creating this limited attorney-client litigation exception, it must be presumed the Legislature did not intend to create other litigation exceptions by implication. McKay, 103 Nev. at 491-96 (there are no implied OML litigation exceptions).

In its opposition, the Commission did not argue that it was acting under the limited attorney-client litigation exception, thereby waiving that issue. Instead, it argued that it was acting under the OML exception in NRS 281A.440.[3] Having already argued this matter in its opposition, the Commission cannot reargue the matter in its petition for en banc reconsideration. NRAP 40A(c). Moreover, the Commission's arguments have no merit.

First, the Commission incorrectly claims that NRS 281A.440 created a complete exemption from the OML instead of a limited exception. However, because NRS 281A.440 is listed with the other OML limited-exception statutes in NRS 241.016(3), the Legislature clearly intended NRS 281A.440 to be a limited-exception statute. Chanos v. Nev. Tax Comm'n, 124 Nev. 232, 239-44 (2008)

[3] All citations to NRS 281A.440 are to the 2015 version of the statute.

(holding that a statute—NRS 360.247—listed in NRS 241.016(3) is a limited-exception statute). If the Legislature wanted to create a complete exemption, it would have listed the Commission's proceedings with the other proceedings given complete OML exemptions in NRS 241.016(2) (listing the Legislature, judicial proceedings and certain meetings of the State Board of Parole Commissioners as complete exemptions).

Second, the Commission incorrectly claims that the public-records exception in NRS 281A.440(8) excepted its decision to appeal from the OML. However, based on its plain and unambiguous language, NRS 281A.440(8) could not have excepted the decision to appeal from the OML because the statute's express terms applied only to the Public Records Act in NRS Chapter 239, not to the OML in NRS Chapter 241. Moreover, the public-records exception in NRS 281A.440(8) has no application to this case because the Assemblymen waived the public-records exception as permitted by the statute. Mot. Dismiss Ex. C at 3.

Third, at the time relevant to this appeal, the Ethics Law contained only one limited exception to the OML in NRS 281A.440(16), which exempted "[a] meeting or hearing that the Commission . . . holds to receive ***information or evidence*** concerning the propriety of the conduct of a public officer or employee ***pursuant to this section*** and the ***deliberations*** of the Commission . . . on such information or evidence." (Emphasis added.) The meetings or hearings contemplated by

NRS 281A.440(16) were adjudicatory proceedings at which the merits of the ethics complaints were adjudicated by the Commission after notice and opportunity for the subject to be heard. NRS 281A.440(11) (describing the adjudicatory proceedings conducted "pursuant to this section"). Therefore, the meetings or hearings contemplated by NRS 281A.440(16) did not include any meetings or hearings at which the Commission authorized appeals from district court decisions.

Furthermore, the plain language of NRS 281A.440(16) expressly exempted only the Commission's receipt of "information or evidence" and its "deliberations" on such information or evidence. It did not expressly exempt the Commission's ultimate decisions to take action, which must occur only in OML-compliant meetings. Chanos, 124 Nev. at 239-44. Accordingly, NRS 281A.440(16) did not expressly exempt the Commission's decision to appeal from the OML.

Finally, amici claim that the OML exemption for "judicial proceedings" applies to the Commission's decision to appeal. NRS 241.016(2)(b). This is absurd. The Commission's decision to appeal is not made during meetings or hearings before courts or other judicial bodies within the judicial branch of government under Article 6 of the Nevada Constitution. The decision to appeal is made only during the Commission's own executive-branch meetings which have always been subject to the OML. See Comm'n on Ethics v. Hardy, 125 Nev. 285, 298 (2009) (holding that the Commission is "an agency of the executive branch

with its basic source of power provided by Article 5 of the Nevada Constitution."). Therefore, the OML exemption for "judicial proceedings" has no application to this case.

V. The OML requires attorneys for public bodies to perform their professional duties and provide their attorney-client representation within the reasonable parameters established by the OML.

The Commission and amici incorrectly claim that the Commission did not need to authorize the appeal in an OML-compliant meeting because its counsel had express and implied authority to file the appeal without the full body's prior authorization. Pet. Recons. at 14-17. They also suggest that because counsel was performing professional duties under court rules to carry out the attorney-client representation, those professional duties supersede the OML. Id.

However, in McKay, this Court clearly held that the OML requires attorneys for public bodies to perform their professional duties and provide their attorney-client representation within the reasonable parameters established by the OML. 103 Nev. at 491-96. Thus, this Court rejected creating implied attorney-client exceptions based on claims that holding public meetings imposed extra burdens on the attorney-client relationship between public bodies and their attorneys because:

> Any detriment suffered by the public body in this regard must be assumed to have been weighed by the legislature in adopting this legislation. The legislature has made a legitimate policy choice—one in which this court cannot and will not interfere.

Id. at 496. The same reasoning applies to this case.

CONCLUSION

The petition for en banc reconsideration should be denied because the panel correctly determined—based on the clear public policy established by the Legislature in the 2001 OML amendments and based on the long-standing democratic principle of majority rule—that public bodies must comply with the OML when exercising their decision-making powers to authorize legal counsel to file an appeal.

DATED: This **4th** day of December, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. We certify that the foregoing Answer to Petition for En Banc Reconsideration complies with the formatting requirements of NRAP 40A(d) and NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because the answer has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14 point font and Times New Roman type.

2. We certify that the foregoing Answer to Petition for En Banc Reconsideration complies with the type-volume limitations of NRAP 40A(d) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), the answer is proportionately spaced, has a typeface of 14 points or more, and contains **4,665** words, which is less than the type-volume limit of 4,667 words.

3. We certify that we have read the foregoing Answer to Petition for En Banc Reconsideration, and to the best of our knowledge, information and belief, the answer is not frivolous or interposed for any improper purpose. We further certify that the answer complies with all applicable Nevada Rules of Appellate Procedure and that every assertion in the answer regarding matters in the record is supported by a reference to the record where the matter relied on is to be found. We understand that we may be subject to sanctions in the event that the answer is

not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **4th** day of December, 2017.

BRENDA J. ERDOES
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **4th** day of December, 2017, pursuant to NRAP 25, NEFCR 8 and 9 and the parties' stipulation and consent to service by electronic means, I filed and served a true and correct copy of the foregoing Answer to Petition for En Banc Reconsideration, by electronic means to registered users of the Nevada Supreme Court's electronic filing system and by electronic mail, directed to the following:

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