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' RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITIES

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Pursuant to NRAP 31(e), 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 response to the notice of supplemental authorities filed by Appellant Commission on Ethics (Commission). The notice cites a letter issued by the Office of the Attorney General (OAG) on June 28, 2016. In the letter, the OAG opines that certain proceedings conducted by the investigative committees of the Board of Medical Examiners are not subject to the Open Meeting Law (OML) in NRS Chapter 241 because there are specific statutory exceptions in NRS 630.311 and NRS 630.336 of the Board of Medical Examiners Law which exempt those proceedings from the OML.

This Court should reject the Commission's notice of supplemental authorities because it does not meet the requirements of NRAP 31(e), which provides that a party may file a notice of supplemental authorities "[w]hen pertinent and significant authorities come to a party's attention after the party's brief has been filed, but before a decision." First, in interpreting appellate rules similar to NRAP 31(e), courts in other jurisdictions have found that it is generally improper to use a notice of supplemental authorities to cite preexisting authorities which could have been cited at earlier stages in the appellate proceedings. See Ogden Allied Servs. v. Panesso, 619 So.2d 1023, 1023-24 (Fla. Dist. Ct. App. 1993);

Brown & Williamson Tobacco Corp. v. Young, 690 So.2d 1377, 1380 (Fla. Dist. Ct. App. 1997); Cleveland v. State, 887 So.2d 362, 364 (Fla. Dist. Ct. App. 2004).

In this case, the Commission could have cited the OAG's June 28, 2016 letter in a notice of supplemental authorities filed in the 12 months before the three-justice panel issued its published opinion on June 29, 2017. The Commission also could have cited the letter in its petition for rehearing filed on August 7, 2017, or in its petition for en banc reconsideration filed on October 31, 2017. Because the Commission failed to cite the letter at these earlier stages in the appellate proceedings, the Commission should not be permitted to submit its notice of supplemental authorities shortly before oral argument. As explained by the Florida Court of Appeals in striking a notice of supplemental authorities filed shortly before oral argument:

> We believe such filings to be a misuse of [the appellate rules]. Those rules are intended to permit a litigant to bring to the court's attention cases of real significance to the issues raised which were not cited in the briefs, either because they were not decided until after the briefs had been filed; or because, through inadvertence, they were not discovered earlier. They are not intended to permit a litigant to submit what amounts to an additional brief, under the guise of "supplemental authorities"; or to ambush an opponent by deliberately withholding significant case citations until just before oral argument.
>
> We simply do not have time, on the eve of oral argument, to read numerous cases and then to attempt to divine why it is that the party submitting them believes they are relevant to the issues raised. Moreover, permitting such a practice places the opposing party at a disadvantage. He or she must divert attention from preparation for the argument to read the submission and determine what type of response, if

> any, is appropriate. Not infrequently, the opposing party is forced at oral argument to request an opportunity to respond in writing to such a submission. Although fairness mandates that such a request be granted, the results include increased cost to the litigants, a waste of oral argument time and delay in resolving the appeal.

Ogden Allied Servs., 619 So. 2d at 1024. For similar reasons, this Court should reject the Commission's notice of supplemental authorities.

Additionally, this Court should reject the Commission's notice of supplemental authorities because the OAG's letter is not a pertinent and significant authority that has any relevance to the issues presented by the Assemblymen's motion to dismiss this appeal for lack of appellate jurisdiction. In its notice of supplemental authorities, the Commission contends that the letter supports its argument that based on statutory provisions in NRS 281A.440 of the Ethics Law, the Commission is exempt from the OML "in all pre-panel proceedings." The Commission is wrong as a matter of law.

In the Assemblymen's prior briefs, they established that based on the plain language of NRS 281A.440, there are no statutory provisions in the Ethics Law which expressly exempt the Commission's decision-making from the OML when the Commission makes a decision or takes action to appeal a district court's order. See Respondents' Motion to Dismiss Appeal at 14-16; Respondents' Reply in Support of Motion to Dismiss Appeal at 13-15; Respondents' Answer to Petition

for Rehearing at 13-17; Respondents' Answer to Petition for En Banc Reconsideration at 16-20.

Furthermore, in the Assemblymen's prior briefs, they also established that based on the plain language of 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); Legis. History AB225, 71st Leg., at 1771-75, 1810-16, 2064-70, 2442-43, 2475-79 (Nev. LCB Resch. Libr. 2001).[1] 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 v. Bd. of Cnty. Comm'rs, 103 Nev. 490, 491-96 (1987) (holding that there are no implied OML litigation exceptions).

Because the Commission has not argued that it was acting under the limited attorney-client litigation exception in the OML, there are simply no statutory provisions in the Ethics Law which expressly exempt the Commission's decision-

[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.

making from the OML when the Commission makes a decision or takes action to appeal a district court's order. In the absence of such an express statutory exception in the Ethics Law, the Commission's supplemental citation to the OAG's letter—which concerns express statutory exceptions in the Board of Medical Examiners Law—is not a pertinent and significant authority that has any relevance to the issues presented by the Assemblymen's motion to dismiss this appeal for lack of appellate jurisdiction.

Finally, this Court should reject the Commission's notice of supplemental authorities because the OAG's letter contains legal statements that are overly broad and legally imprecise. In the letter, the OAG states that "NRS 241.016(3), as amended by S.B. 70 [2015], makes it clear that the OML has no application to proceedings governed by NRS Chapter 630." This statement is overly broad and legally imprecise because NRS 241.016(3) does not exempt ***all*** proceedings governed by NRS Chapter 630 from the OML. To the contrary, almost all proceedings governed by NRS Chapter 630 ***are*** subject to the OML, with the limited exceptions for the proceedings governed specifically by NRS 630.311 and NRS 630.336. However, even when the Legislature has enacted such specific OML exceptions, this Court has stated that such "exceptions to the Open Meeting Law must be construed narrowly to favor openness and public bodies should meet openly whenever possible." Chanos v. Nev. Tax Comm'n, 124 Nev. 232, 239

(2008). As a result, "exceptions to the Open Meeting Law extend only to the portions of a proceeding specifically, explicitly, and definitely excepted by statute." Id. Indeed, the plain language of the OML clearly and unambiguously provides:

> A meeting that is closed pursuant to a specific statute may only be closed to the extent specified in the statute allowing the meeting to be closed. All other portions of the meeting must be open and public, and the public body must comply with all other provisions of this chapter to the extent not specifically precluded by the specific statute.

NRS 241.020(1).

Thus, unless there is a specific statutory exception that expressly exempts a public body's decision-making from the OML, the public body may make a decision or take action regarding a matter only in an open and public meeting that complies with the OML. NRS 241.020(1); McKay v. Bd. of Cnty. Comm'rs, 103 Nev. 490, 492-93 (1987) (stating that "the wording of the open meeting law requiring exceptions to be expressly enacted and 'specifically provided' forecloses the court from reading in or implying exceptions.").

Because there are no statutory provisions in the Ethics Law which expressly exempt the Commission's decision-making from the OML when the Commission makes a decision or takes action to appeal a district court's order, the Commission's supplemental citation to the OAG's letter—which concerns express statutory exceptions in the Board of Medical Examiners Law—is not a pertinent

and significant authority that has any relevance to the issues presented by the Assemblymen's motion to dismiss this appeal for lack of appellate jurisdiction. Therefore, this Court should reject the Commission's notice of supplemental authorities.

DATED: This **28th** day of February, 2018.

Respectfully submitted,

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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 **28th** day of February, 2018, 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 Respondents' Response to Notice of Supplemental Authorities, by electronic means to registered users of the Nevada Supreme Court's electronic filing system, directed to the following:

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