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### Comm'n of Ethics of the State of Nevada v. Hansen, 134 Nev. Adv. Op. 40 (May 31, 2018)

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CIVIL APPEAL: MOTION TO DISMISS

**Summary**

The Nevada Supreme Court dismissed an appeal from a district court order granting a petition for judicial review because without authorization from the client the notice of appeal was void.

**Background**

Respondent Assemblyman Ira Hansen received multiple citations from the Department of Wildlife for allegedly violating NRS 503.5480, which prohibits animal traps near public roads. While the issue was pending, respondent Assemblyman Jim Wheeler requested, and was provided, a written legal opinion analyzing what traps violated the statute.

Fred Voltz filed an ethics complaint against each assemblyman with the State of Nevada Commission on Ethics (the Commission). Voltz's complaint alleged that the assemblymen used their positions for personal interests. Specifically, that Hansen sought to use the legal opinion to assist him in the defense of his criminal case.

Then, the assemblymen sought dismissal by the Commission. The Commission denied the dismissal. Thereafter, the assemblymen filed a petition for judicial review in the district court. The district court granted the assemblymen's petition and ordered the Commission to dismiss the complaint.

At the advice of the Commissions legal counsel, without holding a Commission meeting, the chair and the director authorized the filing of a notice of appeal of the district court order. In response, the assemblymen filed an open meeting law complaint against the Commission. The complaint alleged that the Commission violated the Nevada open meeting law (NOMA) by filing a notice of appeal without first holding a public meeting.

The Commission then held an open meeting, seeking to ratify and approve the action taken by the counsel in filing the appeal. The Commission voted unanimously at the meeting in favor appealing the order.

The assemblymen moved to dismiss the appeal because the notice of appeal is void.

**Discussion**

On the one hand, the assemblymen argue that the notice of appeal is defective because it was filed without proper authorization form the client. On the other hand, the Commission argues that the notice of appeal is valid because the chair and director provided legal counsel the authority to file the notice of appeal. Further, the Commission later authorized the appeal by holding an open meeting.

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<sup>1</sup> By Landon Littlefield.

*The right to appeal rests with the client*

The client, not the attorney decides whether to appeal.<sup>2</sup> Further, the attorney must have the authority to appeal *prior* to filing a notice of appeal.<sup>3</sup>

*Like decisions to settle a case, public bodies must comply with Nevada’s open meeting law when authorizing legal counsel to file a notice of appeal*

The Commission argues that filing a notice of appeal does not require an “action” by the public body. Additionally, the Commission suggests that the decision to appeal is similar to the decision to file a motion by counsel. The court views these litigation decisions differently on two grounds.

First, an “action” is a decision or vote “made by a majority . . . during a meeting . . .”<sup>4</sup> As such, in order for a public body to make a decision, there must be a meeting. *Id.* the Court refused to extend any “legal advice” exception to NOMA because the decision to appeal “transcends discussion and entails a ‘commitment’ of public funds.”<sup>5</sup> The Court held that because filing an appeal involves the commitment of public funds, the decision to appeal requires an “action” by the public body.

Second, “[w]hether to appeal is an issue much like whether to settle.”<sup>6</sup> The court noted that the distinction comes into focus when considering the use of public funds in the decision to settle and the decision to file an appeal.

Here, there was no authorization from the Commission prior to filing the appeal. The Commission as a whole is the client—not the chair or the director. Thus, the Court concluded that the notice was defective.

In addressing the dissent, the Court points out that the dissent’s analysis presupposes that filing an appeal is (1) delegable and (2) was delegated here. However, here, whether there is authority to file an appeal is delegable is not germane because there is nothing in the record, statutes, or regulations concerning the Ethics Commission that provides for a grant or delegation of decision-making authority without action by the Commission as a whole.<sup>7</sup>

Although the Commission subsequently authorized the appeal, the authorization was not in effect at the time the appeal was filed. When the Commission did authorize the appeal, more than 30 days had passed since the commission was served with notice of the district court’s order. The Court notes that any action taken to correct a NOMA violation is only effective prospectively. Therefore, even if the Commission filed a new notice of appeal after receiving authorization, the appeal would have been dismissed as untimely.<sup>8</sup>

On these grounds, the Motion to dismiss the appeal was granted.

**Dissent**<sup>9</sup>

The Commission’s director and its chair specifically authorized counsel to file a notice of appeal. That Commission thereafter met and ratified the notice of appeal.

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<sup>2</sup> 7A C.J.S. *Attorney & Client* § 301 (2015).

<sup>3</sup> *In re Judicial Settlement of the Account of Proceedings of McGinty*, 492 N.Y.S.2d 349, 352 (N.Y. Sup. Ct. 1985).

<sup>4</sup> NEV. REV. STAT. §241.015(1).

<sup>5</sup> *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 20 P.3d 1148, 1151 (Ariz. Ct. App. 2000).

<sup>6</sup> Restatement (Third) of the Law Governing Lawyers § 22 cmt. d (Am. Law Inst. 2000).

<sup>7</sup> See NEV. REV. STAT. §281A; NEV. ADMIN. CODE §281A.

<sup>8</sup> See NRAP 4(a)(1).

<sup>9</sup> J. Pickering; with whom C.J. Douglas and J. Stiglich agree.

*I.*

The dissenting justices provide background information similar to above.<sup>10</sup>

*II.*

*A.*

NOMA does not apply to the decision that Commission’s counsel, its executive director, and its chair made to file the notice of appeal.

“Action,” for purposes of NOMA, is a strictly defined term of art. NOMA defines “action” as a “decision,” “commitment or promise made,” or “an affirmative vote” taken by a “majority of the members present . . . during a meeting of a public body.”<sup>11</sup> Also, NOMA defines “meeting” as “[t]he gathering of members of a public body at which a quorum is present . . . to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction, or advisory power.”<sup>12</sup> Since neither the counsel nor its executive director is a member of the Commission, there was no quorum of the Commission’s members and, with no quorum, there was no meeting at which an action was taken.

*B.*

If the client and the lawyer cannot agree on the decision to appeal, the client’s decision controls. However, that does not mean that only a client entity’s governing board can authorize an appeal, as the majority suggests. After all, a lawyer who has represented an entity client in district court can accept the client representative’s instructions to file a notice of appeal without demanding advance approval from the entity’s board of directors.<sup>13</sup>

To prevail in a challenge like the assemblymen bring, the assemblymen bear the burden of persuading the tribunal that a lawyer’s appearance was without actual authority.<sup>14</sup> Here, the NOMA-based motion fails to meet that burden. The record reveals that Commission’s counsel, with approval from the executive director, stipulated to stay the Commission proceedings until the assemblymen’s petition ran its course. From this information and the record as a whole, nothing suggests that counsel lacked the authority to file notice of the appeal.

*C.*

Even assuming the chair, director, and counsel did not have authority to appeal, the motion to dismiss should still be denied because the commission properly ratified the appeal in an open meeting. Because NOMA did not apply to the decision to appeal, normal ratification principles apply, under which a client can ratify an appeal after the time for appeal has passed.<sup>15</sup> Accordingly, the Commission should be allowed to proceed.

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<sup>10</sup> *See supra* Background.

<sup>11</sup> NEV. REV. STAT. §241.015(1)(a), (b), (c).

<sup>12</sup> *Id.* at (3)(a)(1).

<sup>13</sup> *See* *Cty. Council v. Dutcher*, 780 A.2d 1137, 1145 (Md. 2001).

<sup>14</sup> Restatement (Third) of the Law Governing Lawyer’s § 25 cmt. c.

<sup>15</sup> *Linn City v. Kindred*, 373 N.W.2d 147, 149 (Iowa Ct. App. 1985).