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## Comm'n on Ethics of Nev. v. Hansen, 133 Nev. Adv. Op. 39 (Jun. 29, 2017)

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## ADMINISTRATIVE LAW: OPEN MEETING LAW

### **Summary**

An attorney for a public body, such as the Nevada Commission on Ethics, must obtain authorization from the client in a public meeting before filing an appeal of a district court decision. Failure to obtain authorization results in a defective, invalid notice of appeal.

### **Background**

The Nevada Department of Wildlife (“NDW”) issued four citations to Assemblyman Ira Hansen, alleging he violated NRS 503.580, which prohibits certain animal traps within 200 feet of public roads. Assemblyman Hansen sought opinions from the Legislative Counsel Bureau (LCB) to determine whether NRS 503.580 applied to box traps and snare traps.

A private citizen filed an ethics complaint, called a Request for Opinion (RFO), with the State of Nevada Commission on Ethics (the “Commission”) against both Assemblyman Hansen and Wheeler. The RFO alleged that Assemblyman Hansen utilized the LCB to defend a personal legal matter. The assemblymen filed a district court petition for judicial review after the Commission denied their motion to dismiss the RFOs.

The district court granted the petition for judicial review and ordered the Commission to dismiss the RFOs. The Commission’s Executive Director and Chair decided to appeal the court order and filed a notice of appeal without consulting the Commission. In response, the assemblymen filed an open meeting law complaint against the Commission alleging that the appeal was defective because the Commission had not held a public meeting to discuss the appeal, as required by NRS 241.015(1)(a).<sup>2</sup> Approximately two weeks later, the Commission held an open meeting and the members of the Commission unanimously approved the appeal. The assemblymen sought review arguing that the notice of appeal was defective.

### **Discussion**

#### *The right to appeal rests with the client*

The Court recognized that the client holds the legal right to file an appeal and the client must decide to file an appeal *prior* to its filing.<sup>3</sup> Additionally, a client may not delegate the decision to its attorney when the law “requires the client's personal participation or approval.”<sup>4</sup>

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<sup>1</sup> By Wesley LeMay Jr.

<sup>2</sup> NEV. REV. STAT. § 241.015(1)(a) (2017) states that “Action [taken by the public body] means a decision made by a majority of the members present, whether in person or by means of electronic communication, during a meeting of a public body.”

<sup>3</sup> 7A C.J.S. *Attorney & Client* § 301 (2015). *See also* In Re Judicial Settlement of the Account of Proceedings of McGinty, 492 N.Y.S.2d 349, 352 (N.Y. Sur. Ct. 1985) (holding that the right to appeal rests with the client because they are the ones that will be bound by the decision, including possible adverse outcomes or order to pay fees and costs).

<sup>4</sup> Restatement (Third) of the Law Governing Lawyers §22(2) (Am. Law Inst. 2000).

*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*

In order for a public body, like the Commission, to take valid legal action, they must hold an open meeting where a majority of members approve the action. The Commission argued that filing an appeal is not an official act of the commission; rather it is like filing a motion—a task that attorneys undertake on their own. The Court rejected the Commission's rationale for two reasons.

First, NRS 241.015(1) makes clear that any final action taken by a public body has to be approved by a majority of its members in an open hearing.<sup>5</sup> In this case, the Commission's Chair and Executive Director made the decision to appeal without approval from the majority, which rendered their appeal invalid. The chair and Executive Director may meet and strategize with their counsel, but these discussions alone cannot lead to a direct action, including the decision to file the appeal.<sup>6</sup>

Second, the Commission must hold a public meeting and obtain authorization to file an appeal because public funds will be tied up in the legal action and there is a chance of an adverse finding against the Commission. The open meeting allows the members of the public body to vote on the merits of those risks.<sup>7</sup> Since the client in this case is the Commission as a whole, the right to file the appeal lies with the Commission, not just the chair and Executive Director. Here, the chair and executive director asked counsel to file the notice of appeal before the Commission could vote on it. As a result, the Court held that the notice of appeal was defective and granted the motion to dismiss.

The Court also addressed the fact that the Commission later unanimously voted to approve the appeal. The Commission argued that since the appeal was later approved, there was no public meeting law violation. However, the authorization to file the appeal did not exist until the Commission voted to approve. This vote occurred more than thirty days after the Commission was served with written notice of the district court's order. Therefore, if counsel had filed another notice of appeal after the vote had been taken, it would have been deemed untimely, and thus, invalid.

## **Conclusion**

The Court granted the Assemblymen's motion to dismiss and held that the notice of appeal was defective.

PICKERING, J., dissenting:

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<sup>5</sup> NEV. REV. STAT. § 241.015(1) (2017).

<sup>6</sup> Johnson v. Tempe Elementary School Dist. No. 3 Governing Bd., 199 Ariz. 567, 570, 20 P.3d 1148, 1151 (Ariz. Ct. App. 2000).

<sup>7</sup> *Id.* at 570, 20 P.3d at 1151.

Justice Pickering dissented on the basis that the majority misinterpreted Nevada's Open Meeting Act. Justice Pickering states that legal counsel for the Commission could, under the advice of the Chair and Executive Director, file notice of the appeal. And, even if that were improper, a majority of members ratified the decision at a later open public hearing, so the notice was not invalid.