



**STATE OF NEVADA
COMMISSION ON ETHICS**

<http://ethics.nv.gov>

NOTICE OF PUBLIC MEETING

NAME OF ORGANIZATION: NEVADA COMMISSION ON ETHICS
DATE & TIME OF MEETING: Tuesday, July 25, 2017 at 1:30 p.m.
PLACE OF MEETING: This meeting will be held at the following location:

**Nevada Commission on Ethics
704 W. Nye Lane, Suite 204
Carson City, NV 89703**

(Members of the Commission may appear telephonically)

AGENDA

NOTES:

- Two or more agenda items may be combined for consideration.
- At any time, an agenda item may be taken out of order, removed, or delayed.
- Public comment will be accepted at the beginning of the open session and again before the conclusion of the open session of the meeting. Comment and/or testimony by the public may be limited to three (3) minutes. No action may be taken on any matter referred to in remarks made as public comment. Members of the public may also submit written public comment to the Commission at NCOE@ethics.nv.gov.

	1. Call to Order, Roll Call.
	2. Public Comment. Comment and/or testimony by any member of the public will be limited to three (3) minutes. No action will be taken under this agenda item.
For Possible Action	3. Authorization for Commission Counsel to represent and defend the interests of the Ethics Commission of the State of Nevada in all legal proceedings related to the litigation identified as "Gerald R. Antinoro, Petitioner, vs. Nevada Commission on Ethics" et al., Case No. 17OC001381B, filed in the First Judicial District Court of Nevada. Without limitation, the Commission provides authorization for Commission Counsel to file all notices, motions, pleadings and any other documents in any court having jurisdiction over the identified litigation, including appellate review. This agenda item provides authority to represent the Commission in legal proceedings and does not pertain to the Commission's discussion or consideration of administrative action against any person pursuant to NRS 241.033. In accordance with the provisions of NRS 241.015 and 281A.440, the Commission may go into a closed session to receive information from legal counsel and deliberate toward a decision on a matter involving pending or potential litigation. (This item is not an admission of wrongdoing for the purposes of any civil action, criminal prosecution or injunctive relief.)

<p>For Possible Action</p>	<p>4. Authorization for Commission Counsel to continue to represent and defend the interests of the Ethics Commission of the State of Nevada in all legal proceedings related to the litigation identified as “Nevada Commission on Ethics, Appellant, vs. Ira Hansen, Assemblyman and Jim Wheeler, Assemblyman, Respondents”, Case No. 69100, filed in the Nevada Supreme Court, including rehearing and En Banc proceedings pertaining to the recent decision of “The Commission on Ethics of the State of Nevada v. Hansen et al, 133 Nev. Op. 39, issued June 29, 2017. Without limitation, the Commission provides authorization for Commission Counsel to file all notices, motions, pleadings, petitions and any other documents in any court having jurisdiction over the identified litigation, including any appellate review. This agenda item provides authority to the Commission Counsel to represent the Commission in legal proceedings and does not pertain to any Commission discussion or consideration of administrative action against any person pursuant to NRS 241.033. In accordance with the provisions of NRS 241.015 and 281A.440, the Commission may go into a closed session to receive information from legal counsel and deliberate toward a decision on a matter involving pending or potential litigation. (This item is not an admission of wrongdoing for the purposes of any civil action, criminal prosecution or injunctive relief.)</p>
<p>For Possible Action</p>	<p>5. Discussion and approval of the purpose and content of proposed permanent regulations of the Nevada Commission on Ethics for the Nevada Administrative Code (“NAC”) Chapter 281A which are consistent with the amendatory provisions of NRS Chapter 281A enacted by Senate Bill 84 of the 79th Legislative Session (2017) and any amendments to NAC Chapter 281A previously adopted by the Commission pursuant to temporary regulation T003-16 that remain consistent with NRS Chapter 281A and Senate Bill 84. This matter may include direction to the Executive Director to draft and prepare such proposed regulations and properly notice a public workshop and public hearing for the proposed permanent regulations in accordance with NRS Chapter 233B, the Nevada Administrative Procedures Act. Proposed regulations will include updated procedures regarding requests for advisory opinions and ethics complaints filed with the Commission.</p>
	<p>6. Public Comment. Comment and/or testimony by any member of the public may be limited to three (3) minutes. No action will be taken under this agenda item.</p>
	<p>7. Adjournment.</p>

Open Meeting Law Exemption

A meeting or hearing held by the Commission pursuant to NRS 281A.440 to receive information or evidence regarding the conduct of a public officer or employee, and deliberations of the Commission regarding such a public officer or employee, are exempt from the provisions of NRS Chapter 241, Nevada’s Open Meeting Law. As a result, these agenda items, or any portion of them, may be heard in closed session.

NOTES:

- ❖ The Commission is pleased to make reasonable accommodations for any member of the public who has a disability and wishes to attend the meeting. If special arrangements for the meeting are necessary, please notify the Nevada Commission on Ethics, in writing at 704 W. Nye Lane, Ste. 204, Carson City, Nevada 89703; via email at ncoe@ethics.nv.gov or call 775-687-5469 as far in advance as possible.
- ❖ To request an advance copy of the supporting materials for any open session of this meeting, contact Executive Director Yvonne M. Nevarez-Goodson, Esq. at ncoe@ethics.nv.gov or call 775-687-5469.

- ❖ This Agenda and supporting materials are posted and are available not later than the 3rd working day before the meeting at the Commission's office, 704 W. Nye Lane, Ste. 204, Carson City, Nevada, or on the Commission's website at www.ethics.nv.gov. A copy also will be available at the meeting location on the meeting day.

This Notice of Public Meeting and Agenda was posted in compliance with NRS 241.020 before 9:00 a.m. on the third working day before the meeting at the following locations:

- Nevada Commission on Ethics, 704 W. Nye Lane, Suite 204, Carson City
- Nevada Commission on Ethics' website: <http://ethics.nv.gov>
- Nevada Public Notice Website: <http://notice.nv.gov>
- State Library & Archives Building, 100 North Stewart Street, Carson City
- Blasdel Building, 209 E. Musser Street, Carson City
- Washoe County Administration Building, 1001 East 9th Street, Reno
- Grant Sawyer State Office Building, 555 E. Washington Ave., Las Vegas

133 Nev., Advance Opinion 39

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.

No. 69100

FILED

JUN 29 2017

EMILY BETH A. BROWN
CLERK OF THE SUPREME COURT
BY: *[Signature]*
CHIEF DEPUTY CLERK

Motion to dismiss an appeal of a petition for judicial review.
First Judicial District Court, Carson City; James E. Wilson, Judge.

Appeal dismissed.

State of Nevada Commission on Ethics and Tracy L. Chase, Carson City,
for Appellant.

Legislative Counsel Bureau Legal Division and Brenda J. Erdoes,
Legislative Counsel, Kevin C. Powers, Chief Litigation Counsel, and
Eileen G. O'Grady, Chief Deputy Legislative Counsel, Carson City,
for Respondents.

BEFORE PICKERING, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

Assemblymen Ira Hansen and Jim Wheeler seek dismissal of this appeal, arguing that the notice of appeal is void because it was not authorized by the client, the Nevada Commission on Ethics, a public body. Because we determine that an attorney for a public body must have authorization from the client in a public meeting prior to filing a notice of appeal, the notice of appeal is defective and we lack jurisdiction to further consider this appeal.

FACTS AND PROCEDURAL HISTORY

In November 2013, respondent Assemblyman Ira Hansen received four citations from a Nevada Department of Wildlife employee for allegedly violating NRS 503.580, which prohibits certain animal traps from being set within 200 feet of public roads or highways. While the dispute was pending, respondent Assemblyman Jim Wheeler requested, and the Legislative Counsel Bureau (LCB) provided, a written legal opinion analyzing whether box traps and snare traps constitute traps prohibited under NRS 503.580.

On March 5, 2014, Fred Voltz filed an ethics complaint, termed a Request for Opinion (RFO), against each assemblyman with appellant the State of Nevada Commission on Ethics (the Commission). The RFO alleged that the assemblymen used their official positions to benefit personal interests. Voltz claimed that Hansen sought to use the LCB opinion to assist him in the defense of his criminal case.

After the Commission's general counsel reviewed the RFOs, the assemblymen sought dismissal by the Commission. The Commission

denied the motion to dismiss on March 3, 2015. . On April 2, 2015, the assemblymen filed a petition for judicial review in the district court.

Finding that the Nevada Assembly had sole jurisdiction to consider ethical questions concerning the assemblymen's acts, the district court granted the assemblymen's petition for judicial review on October 1, 2015, ordering the Commission to dismiss the RFOs. The assemblymen served the Commission with written notice of entry of the district court's order on October 26, 2015.

On the advice of the Commission's legal counsel, the chair and the executive director, *without consulting the Commission*, authorized the filing of a notice of appeal of the district court order directing the Commission to dismiss the RFOs. Three days later, on October 29, 2015, a notice of appeal was filed with this court on behalf of the Commission. The Commission did not hold a meeting prior to filing the notice of appeal.

On December 1, 2015, the assemblymen filed an open meeting law complaint against the Commission in the district court. The complaint alleged that the Commission violated the open meeting law when the Commission filed a notice of appeal without first making its decision, or taking action, to appeal the district court's order in a public meeting. The complaint sought to have the Commission's action of filing an appeal declared void because it was taken in violation of Nevada's open meeting law.

The Commission then held an open meeting on December 16, 2015, seeking to ratify and approve the action taken by the Commission's counsel in filing the appeal. The Commission voted unanimously in favor of appealing the district court's order granting the petition for judicial review and ordering the Commission to dismiss the RFOs. Alleging the

notice of appeal is defective, the assemblymen now move to dismiss this appeal.

DISCUSSION

The assemblymen fundamentally argue that the Commission's notice of appeal is defective because it was filed without proper authorization from the client. The Commission argues that the notice of appeal is valid because its chair and executive director provided counsel the authority to file the notice of appeal. The Commission further argues that it cured any initial failure to provide authority to its counsel when it later authorized an appeal in an open meeting. We conclude that the Commission's contentions lack merit and grant the motion to dismiss this appeal.

The right to appeal rests with the client

"The right to appeal is a substantial legal right," and "[i]t is the client, not the attorney, who determines whether an appeal shall be taken." 7A C.J.S. *Attorney & Client* § 301 (2015); see also Restatement (Third) of the Law Governing Lawyers § 22(1) (Am. Law Inst. 2000) (stating that the client decides "whether to appeal in a civil proceeding"). Further, the attorney must have such authority *prior* to filing a notice of appeal, because "there is no implied authority in the event of a judgment adverse to the client, to prosecute review proceedings by appeal and to bind the client for costs and expenses incidental thereto." *In re Judicial Settlement of the Account of Proceedings of McGinty*, 492 N.Y.S.2d 349, 352 (N.Y. Sur. Ct. 1985). "A client may not validly authorize a lawyer to make the decision[] [whether to appeal] when other law . . . requires the client's personal participation or approval." 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

The Commission argues that the decision to file a notice of appeal does not require an "action" by the public body. See NRS 241.015(3)(a)(1). In support of its argument, the Commission suggests that the decision to appeal is similar to the decision to file a motion by counsel. We view these litigation decisions differently on two grounds.

First, "action," as applicable to public bodies, is defined as a decision, commitment, or vote "made by a majority of the members present . . . during a meeting of a public body." NRS 241.015(1). In order for a public body to make a decision, there must be a meeting. NRS 241.015(1). Although "the public body may gather to confer with legal counsel at times other than the time noticed for a normal meeting," Adam Paul Laxalt, *Nevada Open Meeting Law Manual* § 4.11 (12th ed. 2016), http://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Governmental_Affairs/OML_Portal/2016-01-25_OML_12TH_AGOMANUAL.pdf, when the public body confers with its counsel, its "deliberations may not result in any action A decision to settle a case or make or accept an offer of judgment would be an action, which is prohibited in any type of closed meeting." 2005-04 Att'y Gen. Open Meeting Law Op. 4 (2005).

While NRS 241.015(3)(b)(2) allows public bodies to hold attorney-client conferences behind closed doors, we agree with our sister state that any "legal advice" exception to the open meeting law cannot be extended "to include a final decision to appeal" because such a decision "transcends 'discussion or consultation' and entails a 'commitment' of public funds." *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing*

Bd., 20 P.3d 1148, 1151 (Ariz. Ct. App. 2000). Since filing an appeal involves the commitment of public funds, we hold that the decision to file a notice of appeal requires an “action” by the public body. Just as a public body would need to meet in an open meeting to determine other material steps in the litigation process, such as initiating a lawsuit or agreeing to a settlement, it must also authorize an appeal of an adverse determination in an open meeting.¹

Second, “[w]hether to appeal is an issue much like whether to settle.” Restatement (Third) of the Law Governing Lawyers § 22 cmt. d (Am. Law Inst. 2000). This distinction comes into focus when considering the expenditure of public funds in both the decision to settle and the decision to file an appeal. See *Johnson*, 20 P.3d at 1151.

Here, the notice of appeal was filed without any authorization from the Commission. It is the Commission as a whole that is the client—not the executive director, nor the Commission chair. We therefore conclude that the Commission’s notice of appeal is defective, and we lack

¹The Commission argues that it is unreasonable for its counsel to be expected to gain approval of a quorum, in an open meeting, in order to defend the Commission, especially considering the time constraints involved in filing an appeal. However, public bodies need only give three working days’ notice prior to holding a meeting. NRS 241.020(2). Acknowledging that such a requirement could create frustration for public bodies in receiving legal advice, this court previously explained that “[a]ny detriment suffered by the public body in this regard must be assumed to have been weighed by the [L]egislature in adopting this legislation.” *McKay v. Bd. of Cty. Comm’rs of Douglas Cty.*, 103 Nev. 490, 496, 746 P.2d 124, 127 (1987).

jurisdiction to consider it. *See Guerin v. Guerin*, 116 Nev. 210, 214, 993 P.2d 1256, 1258 (2000).²

The American Bar Association Model Rules of Professional Conduct indicate that “[u]nder various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority . . . to decide upon settlement or whether to appeal from an adverse judgment.” Model Rules of Professional Conduct preamble and scope 18 (2015). The dissent’s analysis presupposes that the authority to file a notice of appeal is (1) delegable and (2) was delegated in this case. The dissent also cites *City of San Antonio v. Aguilar*, 670 S.W.2d 681 (Tex. App. 1984), rejecting a Texas Open Meeting Act appeal filed by a city attorney based on the city attorney’s separate authority under the city’s ordinances. Here, whether the authority to file a notice of appeal is delegable is not germane to our analysis because the record does not show and 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. *See* NRS Chapter 281A; NAC Chapter 281A.

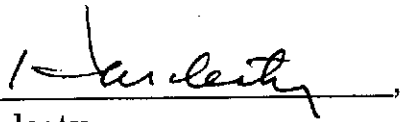
²The underlying premise for the dissent is that the open meeting law does not apply because there was no meeting. But that argument ignores the fact that actions by a public body must be taken by the body in an open meeting conducted in accordance with the open meeting law. When the action taken by the public body requires an open meeting, failure to hold an open meeting itself is a violation. NRS 241.015. There is no question in this case that there was no meeting.

Although the Commission, as the client, subsequently authorized its attorney to file a notice of appeal, that authorization was not in effect at the time the notice of appeal was filed. When the Commission subsequently authorized the notice of appeal in an open meeting on December 16, 2015, more than 30 days had passed since the Commission was served with written notice of the district court's order. To the extent the Commission argues that the subsequent authorization cures any open meeting law violation, we note that NRS 241.0365(5) provides that any action taken to correct an open meeting law violation is only effective prospectively. Therefore, even if the Commission's legal counsel had filed a new notice of appeal after receiving authorization from the client, the appeal would have been dismissed as untimely. *See* NRAP 4(a)(1).³

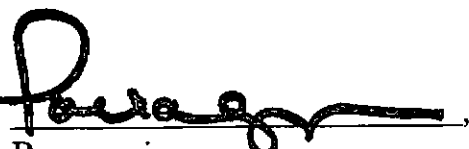
Because the notice of appeal was filed without Commission authorization, we conclude the notice of appeal is defective, and thus, this

³The dissent bases its conclusion, in part, on ordinary rules of ratification. However, it concedes that under the open meeting law, any attempted ratification by a public body is only effective prospectively.

court lacks jurisdiction to consider the Commission's appeal. Accordingly, we grant the motion to dismiss the appeal.⁴


Hardesty, J.

I concur:


Parraguirre, J.

⁴The Commission also argues that the LCB lacks the ability to represent a legislator's private interests. Because the RFOs were submitted against the assemblymen in their official capacity, the LCB is representing the assemblymen in their official capacity, something it is authorized to do, including being able to "prosecute, defend, or intervene in any action or proceeding before any court." NRS 218F.720(1); NRS 218F.720(6)(c)(2) (defining "Legislature" as including "any current or former . . . member . . . of the Legislature"). The Commission further argues that assemblymen are not authorized to file an open meeting law case pursuant to NRS 241.037. Because the motion to dismiss concerns the validity of the notice of appeal filed without an open meeting, we do not address the assemblymen's authority to file an open meeting law complaint under NRS 241.037.

PICKERING, J., dissenting:

The lawyer who represented the Commission on Ethics in district court filed a timely and proper notice of appeal. Yet, the majority dismisses the appeal for want of jurisdiction. It does so on the bases that (1) after losing in district court, the Commission had to meet and specifically authorize this appeal; and (2) while the Commission eventually did meet and ratify this appeal, its ratification is ineffective because it came too late, after the 30 days NRAP 4(a)(1) allows a party to file a notice of appeal had passed. Both holdings are incorrect and rest on a misconception of Nevada's Open Meeting Act, which applies when a quorum of a public body meets to deliberate or take action, not when it doesn't.

The Commission's executive director and its chair specifically authorized the Commission's counsel to file a notice of appeal, and the Commission thereafter met and ratified it. This was sufficient authorization for the appeal. I would deny the motion to dismiss, order the parties to complete their briefs, and resolve this appeal on the merits.

I.

Some background provides helpful context for understanding this procedural dispute. The Commission received two ethics complaints, deemed "requests for opinions" or RFOs, against the respondents, Assemblymen Hansen and Wheeler. The complaints grew out of misdemeanor charges the Nevada Department of Wildlife initiated against Hansen under NRS 503.580, for placing snare traps near a roadway. As a member of the Nevada Legislature, Hansen can request legal opinions from the Legislative Counsel Bureau (LCB), a prerogative the public does not share. *See* NRS 218F.710(2). He did so, asking the LCB for its opinion on whether NRS 503.580, which prohibits placing steel traps within 200

feet of a public roadway, applies to box traps and snare traps. Legislative Counsel cautioned that it might look like a conflict of interest for Hansen to request the opinion and suggested he ask a colleague to make the request. Hansen turned to his fellow legislator, Wheeler. At Wheeler's request, Legislative Counsel issued a written opinion that NRS 503.580 doesn't apply to snare traps.

The ethics complaints, or RFOs, allege that the Assemblymen used their official positions, and government resources, to benefit Hansen's personal interests in defeating the misdemeanor charges against him, when Hanson should have hired his own private lawyer. *See* NRS 281A.020; NRS 281A.400; NRS 281A.420; NRS 281A.440. As required by NAC 281A.405, Commission counsel and its executive director reviewed the RFOs and advised the Commission they believed it had jurisdiction to proceed. Citing legislative immunity, the Assemblymen filed a prehearing motion to dismiss with the Commission. Although the Commission denied the Assemblymen's motion, it ordered its executive director to investigate the Assemblymen's legislative immunity claim.

Dissatisfied, the Assemblymen filed a petition for judicial review or, in the alternative, writ relief in district court, seeking an order terminating the Commission's proceedings against them. Appearing through its in-house counsel, the Commission objected that judicial review was premature because the Commission had yet to resolve the RFOs. The Commission and the Assemblymen submitted a stipulation and order to the district court in which (1) the Assemblymen agreed to waive confidentiality, *see* NRS 281A.440(8); and (2) both sides agreed to stay the Commission proceedings until the judicial proceedings—including any appeals—ran their course. After briefing and argument, the district court

entered a written order in which it rejected the Commission's prematurity objection, sustained the Assemblymen's legislative immunity claim, and directed that "the Commission terminate its proceedings."

Under NRAP 4(a)(1), the Commission had 30 days to file a notice of appeal. At the direction of the Commission's executive director and its chair, Commission counsel timely did so. After letting the 30-day appeal period run, the Assemblymen filed a second suit in district court, in which they challenged the validity of the notice of appeal under the Nevada Open Meeting Act, NRS Chapter 241 (NOMA), because the Commission did not conduct a public meeting to authorize this appeal before filing it. In response, the Commission noticed and convened an open public meeting and ratified the notice of appeal.

The Assemblymen then filed the motion to dismiss now before the court. They argue that, because NOMA invalidates the Commission's original notice of appeal, NRS 241.036, and limits the ratification vote to prospective effect only, NRS 241.0365(5), and because the time for filing a proper notice of appeal has expired, dismissal is required. In the alternative, the Assemblymen ask for a stay of this appeal while they pursue their NOMA suit in district court.

II.

A.

The difficulty with the Assemblymen's argument—and the majority's analysis—is that Nevada's Open Meeting Act does not apply to the decision the Commission's counsel, its executive director, and its chair made to file the notice of appeal. The eight-member Commission is, to be sure, a "public body" for purposes of NOMA. NRS 241.015(4); *see* NRS 281A.200(1) ("The Commission on Ethics, consisting of eight members, is hereby created."). So, if enough members of the Commission to constitute

a quorum had met privately and taken action as a group, NRS 241.036 and NRS 241.0365(5) would apply, and the Assemblymen would prevail because, under NRS 241.036 “[t]he action of any public body taken in violation of any provision of [NOMA] is void,” and, under NRS 241.0365(5), “[a]ny action taken by a public body to correct an alleged violation of [NOMA] by the public body is [only] effective prospectively.”

But “action,” for purposes of NOMA, is a strictly defined term of art. Insofar as relevant here, NOMA defines “action” to mean a “decision,” “commitment or promise made,” or “an affirmative vote” taken, by “a majority of the members present, whether in person or by means of electronic communication, *during a meeting of a public body.*” NRS 241.015(1)(a), (b), (c) (emphasis added). For purposes of NOMA, “meeting” also carries its own definition: “The gathering of members of a public body *at which a quorum is present*, whether in person or by means of electronic communication, to deliberate toward a decision or to take action on any matter over which the public body has supervision, control, jurisdiction or advisory power.” NRS 241.015(3)(a)(1) (emphasis added). Neither the Commission’s counsel nor its executive director is a member of the Commission, and its chair met only with them. The decision to appeal thus did not implicate NOMA, because there was no quorum of the Commission’s members, and, with no quorum, there was no meeting at which an action was taken.

The decision in *Dewey v. Redevelopment Agency of Reno*, 119 Nev. 87, 64 P.3d 1070 (2003) (en banc), is on point (and binding on this three-judge panel of the court). *Dewey* held that NOMA did not apply to a meeting between less than a quorum of a public body and staff. *Id.* at 88-89, 63 P.3d at 1071. As *Dewey* recognizes, by limiting NOMA to

“meetings,” and defining “meeting” to require a “quorum,” the Nevada Legislature joined “a majority of states in adopting a quorum standard as the test for applying the Open Meeting Law to gatherings of the members of public bodies.” *Id.* at 95, 63 P.3d at 1075. Under the quorum standard, “a quorum is necessary to apply the Open Meeting Law to a given situation.” *Id.*; see Patricia E. Salkin, 1 *American Law of Zoning* § 3A:6 (5th ed. 2016) (noting that “most states require a quorum to be present for Open Meetings Laws to apply to a meeting”) (citing *Dewey* and collecting cases). Absent a showing that less than a quorum of members has met serially with the “specific intent” of evading NOMA by avoiding a quorum, see NRS 241.015(3)(a)(2)¹—nothing suggests that here—NOMA “only prohibits collective deliberations or actions where a quorum is present.” *Dewey*, 119 Nev. at 95, 64 P.3d at 1075.

A quorum of the Commission did not meet and decide to file the notice of appeal; the decision was made by the Commission’s counsel and the executives to whom she answers. The Commission’s chair, who participated in the decision, was the only Commission member involved, and a single member of an eight-member body does not constitute a quorum. Under *Dewey*, without a quorum, NOMA and its invalidating statutes, NRS 241.036 and NRS 241.0365(5), do not apply.² See *City of*

¹NRS 241.015(3)(a)(2) was not considered in *Dewey* because it did not become a part of NOMA until 2001. 2001 Nev. Stats., ch. 378, at 1836.

²Even if NOMA applied, the Assemblymen’s remedy would lie in the district court action they filed after the Commission filed its notice of appeal, not in a motion to this court to dismiss the Commission’s appeal. See NRS 241.037(2) (“Any person denied a right conferred by this chapter may sue in the district court of the district in which the public body
continued on next page . . .”)

San Antonio v. Aguilar, 670 S.W.2d 681, 686 (Tex. App. 1984) (rejecting open meeting law challenge to notice of appeal filed by city attorney after consultation with city manager: “The Open Meetings Act does not apply where definitionally there was no ‘meeting’”); *State Bank of Burleigh Cty. Tr. Co. v. City of Bismarck*, 316 N.W.2d 85, 88-89 (N.D. 1982) (rejecting open meeting law challenge to notice of appeal because a public meeting was not required to authorize its filing); see also *Mohr v. Murphy Elem. Sch. Dist. 21 of Maricopa Cty.*, 2010 WL 1842262 *2 (D. Ariz. 2010) (the “complaint fails to state a violation of the open meeting law . . . because it contains no allegation that legal action was taken outside of a public meeting by a *quorum* of Board members”) (citing *Dewey*, 119 Nev. 87, 64 P.3d 1070), *aff’d mem.*, 449 Fed. App’x. 650 (9th Cir. 2011).

The majority relies on *Johnson v. Tempe Elementary School District No. 3 Governing Board*, 20 P.3d 1148, 1151 (Ariz. Ct. App. 2000), but their reliance is misplaced. In *Johnson*, a majority of the members of the public body met privately to authorize an appeal when, by the terms of Arizona’s open meeting law, the meeting needed to be open, which invalidated the vote to authorize the appeal. Had there not been a “meeting” at all—the situation here—the open meeting statute would not have applied. See *Boyd v. Mary E. Dill Sch. Dist. No. 51*, 631 P.2d 577,

. . . *continued*

ordinarily holds its meetings . . . to have an action taken by the public body declared void.”). It is not clear to me the second suit is timely, given the stipulated stay of Commission proceedings in district court, which specifically contemplates an appeal and was filed more than 60 days before the Assemblymen filed their second suit. See NRS 241.037(3)(b).

579-80 (Ariz. Ct. App. 1981) (affirming dismissal of open meeting law claim where the alleged legal action was taken by less than a quorum of the board), *cited in Mohr*, 2010 WL 1842262 at *2.

B.

This leaves the argument, raised by the Assemblymen for the first time in reply, *but see Phillips v. Mercer*, 94 Nev. 279, 283, 579 P.2d 174, 176 (1978) (court will not consider an issue first raised in reply), 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. The decision to appeal is important enough that, if the client and lawyer cannot agree, the client's decision controls. *See* Restatement (Third) of the Law Governing Lawyers § 22 (Am. Law Inst. 2000), *cited in* majority opinion at 4. But that does not translate into a rule that only a client entity's governing board can authorize an appeal, as the majority suggests the Restatement supports. *See id.* § 96 cmt. d ("Who within an organization or among related organizations is authorized to direct the activities of a lawyer representing an organization is a question of organizational law beyond the scope of this Restatement."). Surely a lawyer who has represented an entity client in district court can accept the client representative's instruction to file a notice of appeal without demanding a board of directors' vote authorizing the appeal to proceed. *See Cty. Council v. Dutcher*, 780 A.2d 1137, 1145 (Md. 2001) (reversing order dismissing appeal as unauthorized and noting that "[i]n a governmental attorney-client relationship . . . it is not uncommon to find an established policy giving the government attorney standing instructions and authority to take all actions necessary to protect the government client's appellate interests until such time as the client may adequately consider the matter").

A lawyer representing a client before a tribunal is presumed to have actual authority to do so. See Restatement (Third) of the Law Governing Lawyers § 25 (Am. Law Inst. 2000). The corollary to this rule is that an objecting party “bears the burden of persuading the tribunal that a lawyer’s appearance was without actual authority.” *Id.* cmt. c. Here, the Assemblymen’s NOMA-based motion to dismiss fails to meet that burden. See *Cty. Council*, 780 A.2d at 1143 (observing that an “appellate court, upon its own motion or even that of opposing counsel, will not inquire ordinarily into the authority of the attorney to file the appeal”); *City of Bismarck*, 316 N.W.2d at 88 (“In the absence of a showing that the governing body intends otherwise, we see no reason to limit the authority of the city attorney to the conduct of law business at the trial level only.”); *Hopkins Cty. Bd. of Educ. v. Hopkins Cty.*, 242 S.W.2d 742, 743 (Ky. App. 1951) (because “[t]he authority given appellants’ attorneys to prosecute this lawsuit would ordinarily include carrying it through to a final determination [on appeal] . . . it was not necessary that special authority, by resolution or otherwise, need have been given appellants’ attorneys to prosecute this appeal”); *City of San Antonio*, 670 S.W.2d at 685 (“Since the appellees do not present any evidence to rebut the presumption of authority in this case, we find that the city attorney had authority to pursue this appeal.”).

C.

But even accepting, *arguendo*, that the Commission’s chair, executive director, and in-house counsel did not have authority to appeal on their own, without approval of the Commission itself, the motion to dismiss still should be denied, because the Commission properly ratified the appeal in an open meeting convened for that purpose.

"A lawyer's act is considered to be that of a client in proceedings before a tribunal . . . when . . . the client ratifies the act." Restatement (Third) of the Law Governing Lawyers § 26. Here, the Commission unanimously ratified the decision to take this appeal, albeit after the 30-day time for appeal expired. If NOMA applied, the notice of appeal would be ineffective because such ratification would only have prospective effect. See NRS 241.0365(5). But, as has been shown, NOMA did not apply to the decision to file the notice of appeal because there was no quorum and no meeting. See *supra* § II.A. Normal ratification principles therefore control, under which a client can ratify an appeal after the time for appeal has passed, so long as the lawyer timely filed the imperfectly authorized notice of appeal. *Linn Cty. v. Kindred*, 373 N.W.2d 147, 149 (Iowa Ct. App. 1985), noted in Restatement (Third) of the Law Governing Lawyers, *supra*, § 26 cmt. e; see *Dutcher*, 780 A.2d at 1145 ("The District Council's subsequent ratification of this appeal . . . , four days after the expiration of the statutory 30 day appeal period, does not defeat the timeliness of the filed appeal."); *City of Tulsa v. Okla. State Pension & Ret. Bd.*, 674 P.2d 10, 13 (Okla. 1983) (reversing court of appeals order dismissing an appeal as unauthorized and untimely because the public entity did not ratify the notice of appeal the city attorney filed until the time for appeal had passed; even "[i]rregular and void acts may be ratified or confirmed at a subsequent meeting, provided it is a valid or legal meeting"). The Commission properly ratified the appeal; it should be allowed to proceed.

For these reasons, I respectfully dissent.

 Pickering , J.
Pickering

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COMMISSION
ON ETHICS

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7 Attorneys for Petitioner
8 GERALD R. ANTINORO

6 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

7 **IN AND FOR CARSON CITY**

9 GERALD R. ANTINORO,

Petitioner,

CASE NO.

10 vs.

DEPT. NO.

11 NEVADA COMMISSION ON ETHICS; KRIS
12 THOMPSON; DOES I-V, inclusive; and ROE
13 ENTITIES VI-X, inclusive,

Respondents.

16 **GERALD ANTINORO'S PETITION FOR JUDICIAL REVIEW**

18 COMES NOW Petitioner, GERALD ANTINORO, by and through his attorneys of
19 record, Thorndal Armstrong Delk Balkenbush & Eisinger, and pursuant to NRS 233B.130,
20 hereby petitions this Court to review the decision of Nevada Commission on Ethics, wherein it
21 was determined that Antinoro violated NRS 281A.400(7).

23 **PARTIES, BASIS OF THE PETITION, AND THE RECORD**

- 24 1. Petitioner, GERALD R. ANTINORO (hereinafter "Antinoro") was elected as the
25 Sheriff of Storey County, Nevada in 2010 and has served in said capacity since that
26 date.
27
28

- 1 2. On June 2, 2016, Kris Thompson filed a filed the third-party request for opinion with
2 the NEVADA COMMISSION ON ETHICS alleging that Sheriff Antinoro violated
3 various provisions of NRS 281A.
- 4 3. On June 8, 2017, Respondent, NEVADA COMMISSION ON ETHICS (hereinafter
5 “Commission”) issued an Opinion (RFO No. 16-54C) finding that Sheriff Antinoro
6 had willfully violated NRS 281.400(7) and imposed a civil penalty against Sheriff
7 Antinoro in of \$1,000.00. *See*, Exhibit 1, Opinion.
- 8 4. The facts surrounding the incident in this case were stipulated to by the parties on
9 December 15, 2016, and are contained in the record.
- 10 5. The elements established in NRS 281A.400(7), including the significant personal
11 benefit element, which are necessary to prove that Sheriff Antinoro violated NRS
12 281A.400(7), cannot be satisfied in this case.
- 13 6. Pursuant to NRS 281A.480(8), the imposition of a civil penalty pursuant to Chapter
14 281A is final decision for the purposes of judicial review.

CLAIM FOR RELIEF
(Petition for Judicial Review, Declaratory Relief)

- 15 7. Sheriff Antinoro repeats and re-alleges each and every allegation set forth in
16 Paragraphs 1-6 as if set forth herein in full.
- 17 8. The Opinion (RFO No. 16-54C) determining that Sheriff Antinoro violated NRS
18 281A.400(7) and imposing a civil penalty against Sheriff Antinoro was arbitrary,
19 capricious and characterized by an abuse of discretion because it (1) was not
20 supported by substantial evidence; (2) was not in compliance with the requirements
21 established in NRS 281A.400(7); and (3) was a violation of Sheriff Antinoro’s First
22 Amendment right to free speech.

1 9. The Commission used NRS 281A.400(7) in such a way as to prohibit Sheriff
2 Antinoro's First Amendment right to freedom of speech and there was no showing in
3 RFO No. 16-54C that NRS 281A.400(7), as applied to Sheriff Antinoro in this case,
4 is narrowly tailored to serve a compelling government interest.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, SHERIFF ANTINORO prays:

- 7
- 8 1. That the Opinion determining that Sheriff Antinoro violated NRS 281A.400(7), and
 - 9 imposing a civil penalty against him, be set aside;
 - 10 2. That NRS 281A.400(7) be deemed unconstitutional on its face and as applied to
 - 11 Sheriff Antinoro; and,
 - 12 3. For such relief as the Court deems just and proper.
- 13

14 **AFFIRMATION**

15 Pursuant to NRS 239B.030

16 The undersigned hereby affirms that this document does not contain the social security
17 number of any person.

18 DATED this 7th day of July, 2017.

19
20 THORNDAL ARMSTRONG
21 DELK BALKENBUSH & EISINGER

22 By: 

23 Katherine F. Parks, Esq.
24 State Bar No. 6227
25 6590 S. McCarran Blvd., Suite B
26 Reno, Nevada 89509
27 (775) 786-2882

28 Attorneys for Petitioner
GERALD R. ANTINORO

CERTIFICATE OF SERVICE

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Pursuant to NRCP 5(b), I certify that I am an employee of THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, and that on this date I caused the foregoing **GERALD ANTINORO'S PETITION FOR JUDICIAL REVIEW** to be served on all parties to this action by:

- placing an original or true copy thereof in a sealed, postage prepaid, envelope in the United States mail at Reno, Nevada.
- personal delivery
- facsimile (fax)
- Federal Express/UPS or other overnight delivery

fully addressed as follows:

Yvonne M. Nevarez-Goodson, Esq.
Executive Director Nevada Commission on Ethics
704 W. Nye Lane, Suite 204
Carson City, NV 89703
Respondent

Adam Paul Laxalt, Attorney General
100 North Carson Street
Carson City, NV 89701

Rick R. Hsu, Esq.
Maupin Cox Legoy, Attorneys at Law
P.O. Box 30000
Reno, NV 89520
Attorney for Respondent
Kris Thompson

DATED this 7 day of July, 2017.



An employee of THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER

EXHIBIT "1"

EXHIBIT "1"



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Third-Party Request
for Opinion Concerning the Conduct of
Gerald Antinoro, Sheriff, Storey
County, State of Nevada,

Request for Opinion No. 16-54C

Subject. /

OPINION

I. INTRODUCTION AND PROCEDURAL HISTORY

Pursuant to NRS 281A.440(2)(b), a *Third-Party Request for Opinion* ("RFO") was filed with the Nevada Commission on Ethics ("Commission") on June 2, 2016, alleging that Gerald Antinoro, ("Antinoro"), Storey County Sheriff, violated various provisions of the Ethics in Government Law set forth in Chapter 281A of the Nevada Revised Statutes ("Ethics Law").

On or about June 17, 2016, the Commission served Antinoro via certified mail with a *Notice to Subject* advising him of the allegations set forth in the RFO implicating NRS 281A.400(2) (using public position to grant an unwarranted advantage to himself or others), NRS 281A.400(7) (improperly using government resources) and NRS 281A.520 (causing a government entity to incur an expense in support of a candidate).

On July 26, 2016, Antinoro, by and through his attorney, Katherine F. Parks, Esq., with Thorndal Armstrong Delk Balkenbush & Eisinger, provided a response to the allegations.

On August 2, 2016, the Commission served Antinoro with a *Notice of Additional Issues and Facts* via process server, which identified relevant issues and facts beyond those presented in the original RFO concerning Antinoro appearing in a video endorsement wearing his uniform. On August 16, 2016, Antinoro waived the statutory time limits for a hearing in this matter pursuant to NRS 281A.440(6) and submitted a response to the additional allegations on September 6, 2016.

On October 26, 2016, the Commission's Investigatory Panel issued its *Panel Determination* finding just and sufficient cause for the Commission to hold a hearing and render an opinion in this matter based on credible evidence that alleged Antinoro used official letterhead to make a private political endorsement in violation of NRS 281A.400(7).¹ However, under NAC 281A.435, the Panel concluded that the facts did not establish credible evidence to substantiate just and sufficient cause for the Commission

¹ Commissioners Groover and Gruenewald served on the Investigatory Panel and are precluded by NRS 281A.220(4) from participation in further matters after issuance of the Panel Determination. Accordingly, the necessary quorum to act upon this matter and the number of votes necessary is reduced as though these members were not members of the Commission under NAC 281A.200. All other Commissioners are eligible to participate in the consideration of this matter.

to consider the alleged violations of NRS 281A.400(2), NRS 281A.400(7) (regarding use of badge and uniform), and NRS 281A.520. Therefore, those allegations were dismissed.

On November 3, 2016, a *Notice of Hearing and Scheduling Order* was issued outlining a schedule for discovery and dispositive motions and setting the matter for hearing for February 15, 2017.

Parties filed *Stipulated Facts* on and subsequently agreed to continue the February hearing to a later date. A *First-Amended Notice of Hearing and Scheduling Order* was issued by the Commission on January 5, 2017 approving the continuance and setting the hearing for April 19, 2017, for consideration of any stipulated agreements or dispositive motions.

On March 1, 2017, the Executive Director filed a *Motion for Summary Judgment*. Antinoro filed an *Opposition to the Motion for Summary Judgment and a Cross-Motion for Summary Judgment* on March 15, 2017. The Executive Director filed a *Reply to the Opposition and an Opposition to the Cross-Motion for Summary Judgment* on March 21, 2017 followed by Antinoro's *Reply to the Opposition to the Cross-Motion for Summary Judgment* on March 27, 2017, collectively referred to as "Motions."

On April 19, 2017, the Commission considered oral argument, the Motions and record on file to issue its determination granting the Executive Director's Motion for Summary Judgment and denying Antinoro's Motion for Summary Judgment. The Commission ordered that the parties submit briefs on willfulness of the violation under the requirements of NRS 281A.475 and whether any penalties or fines should be imposed by the Commission pursuant to the provisions of NRS 281A.480. See *Order on Motions for Summary Judgment* dated May 3, 2017. Accordingly, a *Notice of Hearing and Scheduling Order Regarding Briefing* was issued on March 3, 2017, reflecting the stipulation of the parties to submit briefs and for the Commission to consider submitted briefs without oral argument.

On May 15, 2017, the Commission held a hearing to consider the briefs. At the conclusion of the May hearing and, after fully considering the record in accordance with the requirements of the law including, without limitation, the mitigating factors set forth in NRS 281A.475, the Commission deliberated and announced its decision on the record that, based upon a preponderance of evidence, Subject Antinoro engaged in one willful violation of NRS 281A.400(7). A penalty in the amount of \$1,000.00 was imposed on Antinoro. In addition, the Commission provided the Executive Director authority to coordinate a schedule for payment of the fine, which schedule must not exceed six (6) months. The Commission now renders this written opinion setting forth its formal findings of fact and conclusions of law in compliance with NRS 233B.125.

II. FINDINGS OF FACT

The Commission granted summary judgment against Antinoro because there are no material issues of fact remaining in dispute and summary judgment was warranted as a matter of law. Antinoro's conduct is deemed to constitute one willful violation of NRS 281A.400(7), as more particularly set forth in this opinion, which determination of willfulness considered the mitigating factors set forth in NRS 281A.475, and resulted in a fine imposed in the amount of \$1,000. In rendering this opinion, the Commission determines the following facts to be established under the preponderance of evidence standard set forth in NRS 281A.480:

1. Antinoro is the elected Sheriff of Storey County, a public officer as defined in NRS 281A.160.
2. Storey County is a political subdivision as defined in NRS 281A.145.
3. The Storey County Sheriff's Office is a local agency as defined in NRS 281A.119.
4. During the relevant time period, Nevada State Assemblywoman Michelle Fiore ("Fiore") was a United States Congressional candidate for Nevada's Third Congressional District in Clark County.
5. On May 27, 2016, Fiore contacted Sheriff Antinoro by phone to request his endorsement of her candidacy for U.S. Congress.
6. Sheriff Antinoro prepared a three-paragraph statement endorsing Fiore's candidacy, dated May 27, 2016, on his personal computer at his home during his lunch hour.
7. The statement endorsing Fiore's candidacy was typed on the official Storey County Sheriff's Office letterhead and emailed to Fiore from Sheriff Antinoro's personal computer and email account.
8. The official letterhead of the Storey County Sheriff's Office utilized by Sheriff Antinoro included the header displaying the official logo and the footer containing address and contact information.
9. On May 27, 2016, Sheriff Antinoro's private endorsement, with the exception of the footer containing the address and contact information, appeared in a YouTube video that was tweeted on Fiore's Twitter account, @VoteFiore.
10. The YouTube video containing Sheriff Antinoro's private endorsement was also posted on Fiore's Facebook page on May 27, 2016.
11. Sheriff Antinoro did not produce the YouTube video or supply any of the other images used in the video. Fiore did not contact Sheriff Antinoro to inform him about the endorsement video.
12. Fiore was defeated in her campaign for U.S. Congress in the primary election held on June 15, 2016.
13. Policy Number 213 of the Storey County Administrative Policies and Procedures ("Storey County Policies") addresses political activity by employees:

213: Political Activity

Employees are expressly forbidden to use any employer resources, including but not limited to: interoffice mail, email, telephone, fax machines, the Internet, or copy machines to engage in any political activity outside the approved scope of the employees' official duties.

....

Employees who are seeking, or who have been elected or appointed to public office, shall not conduct any business related to these activities while on duty. This includes all the items listed in the previous section, (i.e., political activity).

14. The Storey County Policies contain the following definition of "employee:"

Employee: A person employed in a budgeted position on a full- or part-time basis. For purposes of those section of these policies covering discipline, layoff, and dispute resolution, the term employee excludes elected officials, department heads and casual workers.

15. The Storey County Sheriff's Office has a policy regarding Employee Speech, Expression and Social Networking that addresses endorsements:

1060.4.1 UNAUTHORIZED ENDORSEMENTS, ADVERTISEMENTS,
AND ACTIVITIES

While employees are not restricted from engaging in the following activities as private citizens or as authorized members of a recognized bargaining unit or deputy associations, employees may not represent the Storey County Sheriff's Office or identify themselves in any way that could be reasonably perceived as representing the Storey County Sheriff's Office in order to do any of the following, unless specifically authorized by the Sheriff:

(a) Endorse, support, oppose or contradict any political campaign or initiative.

...

Additionally, when it can reasonably be construed that an employee, acting in his/her individual capacity or through an outside group or organization (e.g., bargaining group), is affiliated with this office, the employee shall give a specific disclaiming statement that any such speech or expression is not representative of the Storey County Sheriff's Office.

16. Antinoro issued a private message endorsing a political candidate by use of the official letterhead of the Storey County Sheriff's Office.

17. The official letterhead of the Storey County Sheriff's Office is government property.

18. Antinoro's conduct in using the official letterhead of the Storey County Sheriff's Office as the mechanism to provide a private political endorsement did not comply with the policies established by Storey County or the Storey County Sheriff's Office.

19. The endorsement provided to Fiore did not contain a disclaiming statement that the endorsement was not representative of the Storey County Sheriff's Office.

20. Antinoro has a significant personal interest in endorsing a political candidate, which private interest is of such importance as to be protected as free speech by the *First Amendment of the U.S. Constitution*.

21. The record did not demonstrate that Antinoro's conduct constituted a permitted limited use of governmental property for a personal benefit as permitted by NRS 281A.400(7)(a).

22. Antinoro's conduct violated NRS 281A.400(7), which prohibits the use of government property to benefit a significant personal interest of the public officer or employee.

III. STATEMENT OF THE ISSUE AND RELEVANT STATUTES

A. ISSUE

The issue is whether Antinoro's conduct in utilizing government property to benefit a significant personal interest constitutes a willful violation of NRS 281A.400(7). The Nevada Legislature has expressly declared that public office is a public trust to be held for the sole benefit of the people. The Ethics Law governs the conduct of public officers and employees and requires that public officers and employees must avoid conflicts between their private interests and those of the general public they serve. See NRS 281A.020(1).

B. RELEVANT STATUTES

1. Duty to Avoid Conflicts - NRS 281A.020(1) provides:

1. It is hereby declared to be the public policy of this State that:

(a) A public office is a public trust and shall be held for the sole benefit of the people.

(b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.

2. Improper use of Government Resources and Property - NRS 281A.400(7) provides:

Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit a significant personal or pecuniary interest of the public officer or employee. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer or employee who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

.....If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

///

3. Standards for Determining Willful Violation – NRS 281A.475 provides:

1. In determining whether a violation of this chapter is a willful violation and, if so, the amount of any civil penalty to be imposed on a public officer or employee or former public officer or employee pursuant to NRS 281A.480, the Commission shall consider [:], without limitation:

(a) The seriousness of the violation, including, without limitation, the nature, circumstances, extent and gravity of the violation;

(b) The number and history of previous warnings issued to or violations of the provisions of this chapter by the public officer or employee;

(c) The cost to the Commission to conduct the investigation and any hearing relating to the violation;

(d) Any mitigating factors, including, without limitation, any self-reporting, prompt correction of the violation, any attempts to rectify the violation before any complaint is filed and any cooperation by the public officer or employee in resolving the complaint;

(e) Any restitution or reimbursement paid to parties affected by the violation;

(f) The extent of any financial gain resulting from the violation; and

(g) Any other matter justice may require.

2. The factors set forth in this section are not exclusive or exhaustive, and the Commission may consider other factors in the disposition of the matter if they bear a reasonable relationship to the Commission's determination of the severity of the violation.

3. In applying the factors set forth in this section, the Commission shall treat comparable situations in a comparable manner and shall ensure that the disposition of the matter bears a reasonable relationship to the severity of the violation.

4. Definitions applicable to Willfulness Determination:

NRS 281A.105 "Intentionally" defined:

"Intentionally" means voluntarily or deliberately, rather than accidentally or inadvertently. The term does not require proof of bad faith, ill will, evil intent or malice.

NRS 281A.115 "Knowingly" defined:

"Knowingly" imports a knowledge that the facts exist which constitute the act or omission, and does not require knowledge of the prohibition against the act or omission. Knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent person upon inquiry.

NRS 281A.170 "Willful" defined:

"Willful violation" means a violation where the public officer or employee:

1. Acted intentionally and knowingly; or

2. Was in a situation where this chapter imposed a duty to act and the public officer or employee intentionally and knowingly failed to act in the manner required by this chapter,

↪ unless the Commission determines, after applying the factors set forth in NRS 281A.475, that the public officer's or employee's act or failure to act has not resulted in a sanctionable violation of this chapter.

5. Civil Penalties for Willful Violations – NRS 281A.480 provides in pertinent part:

1. In addition to any other penalties provided by law and in accordance with the provisions of NRS 281A.475, the Commission may impose on a public officer or employee or former public officer or employee civil penalties:

- (a) Not to exceed \$5,000 for a first willful violation of this chapter;
- (b) Not to exceed \$10,000 for a separate act or event that constitutes a second willful violation of this chapter; and
- (c) Not to exceed \$25,000 for a separate act or event that constitutes a third willful violation of this chapter.

9. A finding by the Commission that a public officer or employee has violated any provision of this chapter must be supported by a preponderance of the evidence unless a greater burden is otherwise prescribed by law.

IV. DECISION

A. WILLFUL VIOLATION OF NRS 281A.400(7) - IMPROPER USE OF GOVERNMENT RESOURCES AND PROPERTY

The Ethics Law is designed to preserve the public trust and ensure that public officers and employees maintain proper separation between their public duties and private interests. See NRS 281A.020. The Ethics Law contains a strict prohibition against a public officer or employee from using government time, property, equipment or other facility to benefit a significant personal or pecuniary interest of the public officer or employee. NRS 281A.400(7). Pursuant to NRS 281A.400(7)(a), a governmental agency may establish by policy a limited use exception to the strict prohibition, allowing the use or the use is necessary as a result of emergency circumstances provided that such use does not interfere with the performance of public duties, the cost or value is nominal and the use does not create an appearance of impropriety.

The official letterhead of a government constitutes government property. See *In re Hammargren*, Comm'n Op. No. 95-35C (1996); *In re Hettrick*, Comm'n Op. No. 01-10A (2001); and *In re Tiffany*, Comm'n Op. No. 05-21C (2007). The use of official letterhead demonstrates a wielding or exertion of the official authority of public office. It also creates the impression that the Sheriff's Office, as a law enforcement department, endorses the contents of the letter.² An endorsement on private letterhead does not carry the same weight as one issued on official letterhead. The message or speech is not regulated by the Ethics Law; however, the mechanism by which the message was delivered, or use of official letterhead, is the concern. Certainly, "all individuals enjoy a constitutional right to speak out on political concerns." *Hettrick at p. 2*. However, the Ethics Law prohibits the

² Storey County Sheriff Policy 1060.4.1 recognized the appearance of impropriety for its members when using public positions, property or resources to privately endorse any political campaign because such conduct is reasonably perceived as representing the Storey County Sheriff's Office. Consequently, the policy required that even private endorsements of political candidates required disclaimers.

use of governmental property, including its official letterhead, to benefit a significant personal interest, especially when such use creates an appearance of impropriety or the impression that the government sanctions the activity. *Id.*

Moreover, the right of a private citizen to endorse a candidate of his selection is of such significance as to be provided constitutional protection under the *First Amendment*. See *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S.Ct. 612, 632 (1976). Consequently, the private endorsement of a candidate is a significant personal interest for purposes of application of the Ethics Law.

Prior to application of the mitigating factors set forth in NRS 281A.475, the Commission considered whether Antinoro's use of government property as the mechanism to provide a private political endorsement was intentional or knowingly. Pursuant to NRS 281A.170, a willful violation is premised upon conduct that was intentional and knowing, which terms are defined in NRS 281A.105 and NRS 281A.115. The legislative history enacting these provisions associated with the definition of a willful violation of NRS Chapter 281A requires the Commission to interpret the meanings of "intentional" and "knowing" consistent with Nevada case law. See Legislative Minutes of Assembly Committee on Elections, Procedures, Ethics and Constitutional Amendments, May 12, 2009, and Senate Committee on Judiciary, May 21, 2009, regarding Senate Bill 160 of the 75th Legislative Session of Nevada (2009).

For an act to be intentional, NRS 281A.105 requires that Antinoro acted "voluntarily and deliberately." See *In re Fine v. Nevada Commission on Judicial Discipline*, 116 Nev. 1001 (2000) ("the relevant inquiry regarding willful misconduct is an inquiry into the intentional nature of the actor's conduct."). Here, Antinoro purposefully utilized the official letterhead to provide a private endorsement. His conduct was not accidental or inadvertent. *Id.*³

The Ethics Law requires that Antinoro had knowledge of his actions. See NRS 281A.115 (definition of "knowingly"). It is properly noted that the provisions of NRS Chapter 281A do not require Antinoro to have actual knowledge that his conduct violated the Ethics Law but it does impose constructive knowledge on a public officer when other facts are present that should put an ordinarily prudent person upon inquiry. See *Garcia v. The Sixth Judicial District Court of Nevada*, 117 Nev. 697, 30 P.3d 1110 (2001) ("constructive knowledge fulfills a statutory requirement that an act be done 'knowingly.' State of mind need not be proved by positive or direct evidence but may be inferred from conduct and the facts and circumstances disclosed by the evidence."); and *State v. Rhodig*, 101 Nev. 608, 707 P.2d 549 (1985) ("... the law does not require knowledge that such an act or omission is unlawful.").

The record before the Commission established that Antinoro knew he was utilizing the official letterhead of the Storey County Sheriff as the mechanism to provide a private political endorsement. Further confirming the intentionality of the conduct is the parties' stipulation that Antinoro typed the endorsement "on the official Storey County Sheriff's office letterhead." See *Stipulated Facts*. Further, the use of official letterhead to endorse a political candidate was not permitted by established policy of the affected agencies, nor was it permitted under the limited use exception set forth in NRS 281A.400(7)(a) or other applicable law.⁴

³ The law does not require proof that the intentional behavior was engaged in bad faith or with malicious motive to be deemed willful. See *In re Matson*, Comm'n Op. No. 14-70C (2016).

⁴ The Commission did not find the advisory letter issued by the Office of Special Counsel discussing the application of the Federal Hatch Act to a partisan sheriff, permitting the use of title and badge to endorse

B. NRS 281A.475 - MITIGATING FACTORS AND CIVIL PENALTY

The Commission considered the mitigating factors set forth in NRS 281A.475 in conducting an analysis of willfulness and determination of the appropriateness of a civil penalty. Each factor may not necessarily be present or be provided equal weight. In synopsis, these factors are:

1. Seriousness of Violation
2. History of Warnings or Violations
3. Cost of Investigation and Hearings
4. Mitigating Factors (cooperation, self-reporting, correction of violation, etc.)
5. Restitution or Reimbursements paid to Affected Parties
6. Extent of Financial Gain
7. Other Matters as Justice Requires

In review of the mitigating factors contained in NRS 281A.475, the Commission reviewed the totality of the circumstances, which included taking into consideration Antinoro's cooperation in stipulating to a set of facts, the nature of the RFO did not require an expensive or lengthy investigation/hearing, there was no financial gain and the use of the official letterhead for a private endorsement was accomplished during a lunch hour on a personal computer.

The conduct at issue relates to utilizing government property to benefit a substantial personal interest. The seriousness of the violation is demonstrated by the intentional use of official government letterhead as the mechanism to provide a private political endorsement. Further confirming the gravity of the conduct is Antinoro's noncompliance with policies issued by the County and Sheriff's Office that expressly restricted use of public resources for political purposes including candidate endorsements.

Antinoro had not taken any steps to mitigate his conduct, such as reissuing the endorsement on private letterhead or requesting removal of the official letterhead from social media sites. Further, Antinoro had recently committed an ethics violation associated with the use of an official position in a political/election environment. *See in re Antinoro*, Comm'n Op. No. 14-59C. The totality of conduct is determined to be significant when measured against the public's trust and the public policy of the State of Nevada requiring public officers and employees to maintain a proper separation between the role of a public servant and a private citizen. NRS 281A.020(2).

Based on the foregoing, the Commission determines that Antinoro's conduct constituted a willful violation of NRS 281A.400(7) and imposes a civil penalty against Antinoro of \$1,000.

V. CONCLUSIONS OF LAW

1. At all times relevant to this matter, Antinoro was a "public officer," as defined by NRS 281A.160 and 281A.180.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an opinion in this matter.

political candidates, to be precedential or applicable to the circumstances presented. *See Order on Motions for Summary Judgment* issued May 3, 2017.

3. Antinoro, as a public officer, had a duty under the Ethics Law and its interpretive opinions to maintain proper separation between public duties and private interests. See NRS 281A.020.
4. Pursuant to NRS 281A.400(7), Antinoro, as a public officer, was prohibited from using government time, property, equipment or other facility to benefit a significant personal or pecuniary interest of the public officer or employee.
5. Summary Judgment was appropriately granted given the undisputed or uncontested facts of this matter, the applicable provisions of the Ethics Law, and the interpretive opinions of the Ethics Law.⁵
6. Pursuant to the provisions of the Ethics Law, Antinoro willfully violated NRS 281A.400(7) by using official letterhead (government property) as the mechanism to provide a private political endorsement.
7. In accordance with the authority of the Commission under NRS 281A.475 and NRS 281A.480, civil penalties are imposed and Antinoro must pay a civil penalty in the amount of \$1,000. Authorization is provided for the Executive Director and Subject Antinoro to enter into a payment schedule, with payment being completed within six (6) months after the date of this opinion.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.⁶

The following Commissioners participated in this Opinion:

Dated this 8th day of June, 2017.

NEVADA COMMISSION ON ETHICS

By: /s/ Cheryl A. Lau
Cheryl A. Lau, Esq.
Chair

By: /s/ Phillip K. O'Neill
Phillip K. O'Neill
Commissioner

By: /s/ Keith A. Weaver
Keith A. Weaver, Esq.
Vice-Chair

By: /s/ Amanda Yen
Amanda Yen, Esq.
Commissioner

By: /s/ Brian Duffrin
Brian Duffrin
Commissioner

By: /s/ Lynn Stewart
Lynn Stewart
Commissioner

⁵ See *Order on Motions for Summary Judgment* issued on May 3, 2017.

⁶ Findings of Fact and Conclusion of Law are set forth separately in this opinion as required by NRS 233B.125; however, they are deemed interchangeable for interpretive purposes. See *State, Dep't of Commerce v. Soeller*, 98 Nev. 579, 586, 656 P.2d 224, 228 (1982)(concluding that when "the conclusion itself gives notice of the facts on which the Commission relied ... we may imply the necessary factual findings, so long as the record provides substantial evidence to support the Commission's conclusion").

CERTIFICATE OF SERVICE

I certify that I am an employee of the Nevada Commission on Ethics and that on this day in Carson City, Nevada, I transmitted a true and correct copy of the **OPINION** in Request for Opinion No. 16-54C, via U.S. Certified Mail and electronic mail, to the Parties and the Requester, as an interested person, as follows:

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DATED: June 8, 2017


An employee, Nevada Commission on Ethics