

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-third Session
May 12, 2005**

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 8:20 a.m. on Thursday, May 12, 2005, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. [Exhibit A](#) is the Agenda. [Exhibit B](#) is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chair
Senator Maurice E. Washington, Vice Chair
Senator Mike McGinness
Senator Dennis Nolan
Senator Valerie Wiener
Senator Terry Care
Senator Steven A. Horsford

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Gale Maynard, Committee Secretary

OTHERS PRESENT:

Louis Ling, General Counsel, State Board of Pharmacy
John R. Bailey, Attorney, Bailey Merrill, Professional Corporation
Steve Gibson, Attorney
Robb Miller, Caladon Health Solutions
Randal Munn, Special Assistant Attorney General, Office of the Attorney General
James D. Salo, Special Assistant to Executive Director, Colorado River Commission of Nevada
Stan Miller, Claims Manager, Litigation Division, Office of the Attorney General
David Goldwater, Caladon Health Solutions

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Samuel P. McMullen
Rick R. Hsu, Chairman, Commission on Ethics

CHAIR AMODEI:

I will open the meeting of the Senate Committee on Judiciary. This will be an informational hearing on pharmacy issues and related litigation.

LOUIS LING (General Counsel, State Board of Pharmacy):

With me today is John Bailey, my private attorney, representing me in a lawsuit which has been a subject of discussion in a prior Senate Committee on Judiciary hearing, and he will be presenting remarks later. I am here to state our position for the Committee.

Keith W. Macdonald, Executive Secretary, State Board of Pharmacy, and I are career public servants. When Mr. Macdonald retires at the end of September, he will have served the State for 26 years and the State Board of Pharmacy for 15 of those years. I have been a State lawyer since 1991 and represent the State of Nevada. As many may know, this is my seventh Legislative Session. I have represented high-profile agencies such as the Office of Labor Commissioner, Commission on Ethics, State Board of Pharmacy and other agencies such as the Board for the Regulation of Liquefied Petroleum Gas and the Nevada Junior Livestock Show Board. These are all agencies I have represented throughout my career in public service.

There seemed to be some confusion at the last meeting; I am not a deputy attorney general. I am the in-house general counsel for the State Board of Pharmacy, and I was given that position about three years ago.

This case, you have been asked to look into is a State worker's worst nightmare. We received information which indicated one of our licensed pharmaceutical wholesalers may have engaged in questionable behavior. This company has millions of dollars in revenue per year. We were asking questions of Cardinal Health, a company with billions of dollars in revenue, whereas we have only a \$1.2 million per year budget.

As a State employee, you go into these cases with some hesitation, and we knew this one was a difficult case. As the investigation proceeded, we were sued in an effort to stop us or slow down the process. In a normal course, the agency gets sued and I, as their attorney, represent them as the general

counsel. There is no expenditure of public funds other than paying for the attorney. This case turned into a nightmare because I and Mr. Macdonald were sued personally. It was made clear we were to bear the legal expenses on our own and not have the benefit of representation from the State. They are trying to pick my attorney and have made two motions to the federal courts to have Mr. Bailey removed from this case. Let me explain how we got here.

CHAIR AMODEI:

This issue is not before the Committee to establish who is right or wrong in the context of the litigation. This Committee has no business imposing itself in any judicial function regarding civil litigation. We only have jurisdiction over the administrative procedures. Whatever the Pharmacy Board decides to do is their business. That is their job; that is what they are supposed to do.

If adverse action was taken, was it done in accordance with the provision of *Nevada Revised Statute* (NRS) 233B? Did we afford due process and if we have, what rules apply when we hire outside counsel? We want to know it is uniform for all employees across the State and followed in some way. If you think the focus is on Louis Ling or Keith Macdonald, it is not. It has to do with due process procedure and application.

There are two issues why this is before the Committee. First, if something happened, have you gone through the due process procedures? If you have, then present what you have. Second, for purposes of outside counseling in these instances, here are the rules, and this is why we think we have complied.

MR. LING:

Allow me to address the second point, first. Before the Committee is a handout of a timeline ([Exhibit C](#)) along with a binder, "Senate Judiciary Hearing May 12" ([Exhibit D](#), original is on file at the Research Library). When we were sued, I followed the same procedures I have advised many of my clients to follow. Under NRS 41, you go before the Office of the Attorney General and ask them to represent you. We did just that. As you can see by the timeline on March 13, the Attorney General's Office determined we were acting in the scope of our employment, and they undertook our representation. For a number of

months, the Attorney General represented Mr. Macdonald and me. At the same time, the plaintiffs were trying to drive a wedge between Mr. Macdonald and me, and it was obvious we were going to need separate counseling.

Mr. Bailey represents me; Mr. Macdonald is still represented by the Attorney General's Office.

CHAIR AMODEI:

Is it accurate for me to summarize that NRS 41 governs issues such as this, and it is your testimony we have proceeded in accordance with NRS 41?

MR. LING:

Yes, Mr. Chair, it is. Regarding the first issue of NRS 233B, when the lawsuit was filed it was at the preliminary investigative stage; there were no administrative procedures at that point. We were investigating some allegations to see if there were any violations. We have not invoked NRS 233B because we have not been able to finish the investigation due to the lawsuit and other things. The question of whether we have followed the Nevada Administrative Procedure Act has not occurred. We have not finished the investigation yet.

CHAIR AMODEI:

You have not gotten to the NRS 233B process; you have not finished the investigation; can you describe for me how you get to the point where you decide, "We need to investigate this"? How do things get into your system at the Board of Pharmacy where you decide to do something on a preliminary basis? What are your procedures for deciding if there is an issue and proceeding in a disciplinary manner?

MR. LING:

Most of our complaints come through citizens or patients affected by the licensees we license. Sometimes, we get anonymous information or tips. That is what happened in this case. We received a number of anonymous faxes and did not look into them right away. Finally, after three or four months of receiving these anonymous faxes, a red flag went up and suggested we look into it. We started asking people involved in these transactions to provide us with records. We have made no determinations whether any laws have been violated. We are in the preliminary stage of asking questions. When the lawsuit came out, it put a stop to our investigation, and we have not moved further with the inquiry.

The decision to investigate is made by Mr. Macdonald and me. When information comes in, we decide if a situation warrants investigation, as we did in this case.

CHAIR AMODEI:

When you open an investigation, who does the footwork?

MR. LING:

We have two investigative officers in our Las Vegas office and one investigator in our Reno office.

CHAIR AMODEI:

Do they work with you if there is something to investigate?

MR. LING:

Depending on what needs to be done, I supervise and assign our investigative team. I will either assign them the task of getting records and interviewing people or sometimes, as in this preliminary case, I make the initial inquiries because I saw a possibility of violations. We never got beyond that. I never got to deal out assignments to my investigative staff because of the lawsuit.

CHAIR AMODEI:

Before a formal preliminary investigation is done, what actions do you take? Do you inform people they are under investigation? Do they know they are under investigation?

MR. LING:

A statute requires us to keep our investigations and the materials we generate confidential until we have a determination to proceed with administrative action. Once we decide to go forward, everything in our files becomes public knowledge. If we decide not to go forward, the information we have gathered becomes confidential. We do not reveal any information to anyone unless it is to the people who have to know. Businesses and people presently under investigation still have their licenses and are operating as usual. If they were to ask about an investigation, that information is confidential until we make a decision. In the case we have been discussing, there has been no decision to go forward. The only decision made was a probable cause. I determined if the facts were correct, it appeared there were violations of the law.

CHAIR AMODEI:

Do you advise anyone outside the commission of your probable cause determination?

MR. LING:

No. We do not talk to the board members at all. Because of the due process, we do not want board members involved in the initial stages until the board staff has made a determination to go forward on a case. The members sit as judges once the case is brought forward.

CHAIR AMODEI:

There was an indication of letters sent in the last hearing?

MR. LING:

Information represented to this Committee was not correct. In the course of the preliminary investigation, we were asked to provide public records to identify some wholesalers to Cardinal Health, of whom we were asking questions. They asked, "Who in the State of Nevada is engaged in secondary source wholesaling?" Mr. Macdonald knew those businesses because they had already identified themselves to him as a wholesalers association was being formed in Nevada. He then wrote a memo to Cardinal Health listing the names of those wholesalers. It was a public records request.

What happened thereafter is part of the lawsuit. Cardinal Health then took action outside our control. Mr. Macdonald and I knew nothing about this until many weeks later. The memo you refer to was a public records request.

SENATOR CARE:

You received these anonymous faxes, and I understand they have stopped.

MR. LING:

Yes, they have.

SENATOR CARE:

Was this the first time you or the Board received anonymous faxes regarding anything under the Board's purview?

MR. LING:

No. We occasionally get anonymous faxes and phone calls tipping us off on doctors, pharmacies and wholesalers. We rarely take action on those. If someone is not willing to put their name to it, we view it as not reliable.

SENATOR CARE:

Anonymous tips can come from anywhere, and they are not always reliable. How do you make the determination with a series of faxes which ones you are going to pursue?

MR. LING:

Generally, we judge those matters by asking whether it a threat to the public. There are times when someone will report something to us without their name attached because of repercussions. If we can verify it is true by making some phone calls, we will get involved.

In the prior case I spoke about, we had a series of faxes not making any sense. I requested my secretary put these faxes in the individual licensing files because I had no idea why we were receiving them. The one fax that made us take more notice could not have been forged, and we had no answers. We made a phone call to Cardinal Health for some kind of resolve, and that is when this whole thing got started.

At the point we received the last fax, we were thinking that if it were true, we were looking at potential illegal behavior, but we had no way of knowing unless we asked questions.

SENATOR CARE:

How do you determine a threat to the public? It may not always be wholesalers, it could be doctors.

MR. LING:

Sometimes the anonymous information coming in is in the nature of doctors going through divorces, and the spouse will call to get the doctor in trouble. At that point, we check the source and use the resources we have to investigate the allegations and make a determination. In the case of other behavior, we have had allegations of a doctor buying drugs from a foreign country and putting it in people's bodies. If this is true, it is a big problem. Doctors using and

injecting people with foreign source drugs is a significant concern. We took that case seriously and investigated due to the potential harm to the public.

It is always on a fact to circumstance basis and depends on what we are reviewing. We do not get a lot of anonymous tips. Most people are willing to fill out the complaint form we send them.

SENATOR CARE:

In reference to the memo Mr. Macdonald sent Cardinal Health to satisfy the public records request, was it a summary of what the records contained?

MR. LING:

The memo written to Cardinal Health basically said, "Pursuant to your request, the following wholesalers may be engaged in secondary-source role, alternative-source wholesale business." Following that was a list of businesses in the State of Nevada. That was the entire memo; it was just identification. As stated before, these businesses had already formed an association and were negotiating over regulation through us and their counsel, Mr. Gibson. We knew who these persons were because we had several meetings with them in their offices to try and work out the regulations.

Those businesses involved in secondary source wholesaling identify themselves as that. We were not saying anything not already in the public record. We do not have a licensed classification for secondary source wholesalers; they are all licensed as wholesalers. Based on their representation to us, we knew what kind of business in which they were involved.

When we got the request, we sent out the information. There was nothing in the request in terms of directives or what to do with the information. This company was licensed and in good standing at that time, and there was nothing in the memo to indicate otherwise.

SENATOR CARE:

Due to the pending litigation, I gather you do not want to elaborate any further about the allegations of the letters to other entities that requested this same information.

MR. LING:

I remember they called the memo that Mr. Macdonald wrote and sent out the "black list," and how they did not get their due process. We were nowhere near due process; we were just asking questions at this point.

We still have not gotten to the point where we can determine if disciplinary action is warranted. There may never be any action in this case. We do not have enough information, and because of the lawsuit, we are not going to get that information for a while.

SENATOR CARE:

In a case where there is no litigation, is there a framework in time where you make a decision on disciplinary action? Or to the licensee, is there any formal notification that the investigation is complete?

MR. LING:

The answer is yes to both questions. Most cases are consumer complaints regarding pharmacies. We are proud of the fact we can go from a consumer complaint to resolution whether it is dismissal of an investigation or going forward with disciplinary action in about 90 days. Everyone involved in that situation knows they are under investigation because our investigators are contacting them directly.

In the case of wholesalers, there would be notification, but you are talking about cases that sometimes result in 10 to 20 boxes of documents. This takes longer to process and put the evidence together. Often, we do not directly notify the wholesaler under investigation. In some of our cases, our experience has been that records start to disappear, are falsified and end up in dumpsters or people's garages. We do not want them to have that opportunity, so we do not tell them we are coming. We just show up and ask for the records.

Generally speaking, we try to get information outside the wholesaler first before going to the wholesaler. We know if there are violations and whether it is worth bothering. That is what we were trying to do in this case. If what I was seeing were true, there could be violations of the law, and that is why we went forward on this.

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SENATOR NOLAN:

You said you have investigators do preliminary investigations; is that correct?

MR. LING:

Yes, that is correct.

SENATOR NOLAN:

When you first received these series of faxes, did they come directly to your office or were they going to the investigators?

MR. LING:

The faxes were coming through our general office without cover sheets or identifying headers on the top of the pages; we had no idea from where they were coming. Again, this was an indication someone was sending us a message because they had gone to some pain to remain anonymous.

SENATOR NOLAN:

Have you maintained the faxes as part of your records?

MR. LING:

Yes. They were all placed in the appropriate licensing file.

SENATOR NOLAN:

In your earlier testimony, you said by receiving these faxes, it had not gotten to the point of charging for any violations. Is it typical for you to be involved in the investigation in the preliminary stage? People are sending random faxes and not disclosing their identity. At what point do you become involved? It could be a whistleblower or someone trying to do harm to a competitor.

MR. LING:

In the way the process is set up, I am responsible for the assignment of the investigators and determining if a case merits review. The most common complaints we get are: my drugs costs too much or I am fighting with my insurance company. When we get those complaints, we do not have jurisdiction over prices or insurance issues. I will instruct our board coordinator to write them a letter stating this is not our case; sometimes, I write those letters myself.

I make the initial determination whether it is worth investigating in almost every case. From there, we determine which investigator would appropriately handle the situation.

SENATOR NOLAN:

Over what period of time were these faxes sent?

MR. LING:

It was about a five- to six-month period which started in the fall of 2002.

SENATOR NOLAN:

After receiving these faxes, you determined you needed some answers. Did you assign this to an investigator, or did you take the investigation on yourself?

MR. LING:

I took this particular case on myself. I made the initial phone call to Cardinal Health and thought I would be talking to another attorney. I just wanted to have them explain a fax I received documenting a transaction that did not make sense to us; we just wanted to know what happened.

For the next six weeks, Cardinal Health was great. They had a paralegal assigned pulling and sending supportive documents to me to determine if it violated Nevada law. The previous faxes we had received did not raise any alarm bells. Then we received the last fax that made me think if that fax was true, we had a problem. That is when I pulled out the other faxes from the licensee's files for a comparison.

SENATOR NOLAN:

Based upon your call to Cardinal Health, did they assign a paralegal to work on your request for six weeks?

MR. LING:

What we received was an invoice, and we requested Cardinal Health to explain what we were reviewing. Cardinal Health went into their system to find the supporting documents to the invoice as to what actually happened, because the invoice we had in our hands did not make sense. The paralegal assigned through Cardinal Health would send me information, and I would ask if there was anything else or I would ask for help in another field. We ultimately ended up with documents that helped explain what we were finding.

CHAIR AMODEI:

If there is anyone here who thinks these representations by outside counsel issues are in any way, shape or form related to the use of some boards or commissions of outside counsel not in the Attorney General's Office, it would be news to me. We are talking in a litigation context. If anyone thinks a sub-current here is trying to impact those boards, commissions or clients of the Attorney General that use outside counsel, that is not the objective. It is along the line of NRS 41 applications.

JOHN R. BAILEY (Attorney, Bailey Merrill, Professional Corporation):

Mr. Chair, I have some prepared remarks based on what happened May 3 ([Exhibit E](#)) and understand we are focusing on NRS 41.

CHAIR AMODEI:

Your written testimony will become part of the records for this legislative day.

STEVE GIBSON (Attorney):

I am here to address whether or not there was due process under NRS 233B. Mr. Ling's account this morning was remarkable. His procedures were nowhere near due process. We have the first issue of why we sued Mr. Ling in terms of the due-process issue. Under Title 42 United States Code section 1983, when a private citizen under cover of state law deprives another citizen of a right or interest, you are entitled to sue that person. Moreover under federal law, Mr. Ling indicated the Board had no knowledge of his activities, and it was all done through communication with Mr. Macdonald. It was not Board-sanctioned activity nor was it Board-authorized activity in terms of his communication with Cardinal Health. That is why, under federal law, Mr. Ling and Mr. Macdonald are being sued under individual capacity.

In reference to Senator Nolan's query with respect to a phone call made to Cardinal Health, all of a sudden, Cardinal Health wants a public disclosure record. Is this Mr. Ling's position now with respect to secondary source wholesalers that identified themselves as such? I would like you to turn your attention to a document handed out at the last meeting at Tab 2, "Documentation with Respect to Informational Hearings Regarding Pharmaceutical Wholesalers' Action Against Ling/Macdonald" ([Exhibit F](#), original submitted in Senate Committee on Judiciary minutes dated May 3, 2005, as [Exhibit F](#), original is on file at the Research Library).

CHAIR AMODEI:

I can appreciate there is a dispute. The issue for this Committee is if we did not want an Executive Branch agency or board engaging in any conduct that may impact somebody's status as a licensee and we were to change NRS 233B to move the definition of contested case or expand on it, give me a recommendation of how we would do that?

MR. GIBSON:

My recommendation in relation to that is Mr. Ling's activities are clearly outside the scope of the statute as drafted.

CHAIR AMODEI:

I understand that is your issue. This Committee is the keeper of NRS 233B. If we believe everything you said, how do we fix it and send a clear message to employees of the State of Nevada that they should not do this?

MR. GIBSON:

The way to fix it is to make sure the State does not become involved in indemnifying with a blank check toward activities of its employees outside the scope of due process and to make sure the employee brings due process before the board before going on their own. The structure can be strengthened by public policy determinations.

Mr. Bailey is here today on our tax dollars because this State has decided that, based upon Mr. Ling's position as employee despite the fact he acted outside his scope of employment, the State ought to indemnify him and pay for his defense.

Mr. Ling tried to imply we drove a wedge between him and Mr. Macdonald. I do not believe this to be the case. With respect to choosing his counsel, his present counsel, Mr. Bailey, was with the law firm of Lionel Sawyer and Collins, who represented Mr. Miller's company, Caladon Health Solutions. Regarding a transaction with a company called Frontier, it was later brought up in the motion for summary judgment by Mr. Bailey's firm when Mr. Merrill, Mr. Bailey's partner, was part of the representation of Caladon Health Solutions at Lionel Sawyer and Collins with respect to these issues.

Mr. Chair, our issue today is to make two basic points. First, no due process was engaged by Mr. Ling in his conduct; therefore, he did not conform to the

requirements of Nevada statute. Second, before this Committee is a public policy question that should be before the Board: Should the State fund the defense with a blank check for Mr. Ling based on his conduct that adversely affects the citizens of this State?

Again, Mr. Ling indicated a public records request made by Cardinal Health under these circumstances. There was never a request relevant to a public record. He and Mr. Macdonald's indication of a secondary source status was a manufactured memo they both approved and, in their own words, indicated to Cardinal Health that the people and companies on this black list should be the subject of due diligence and concern. In their past experience, these types of companies behaved unlawfully. This is not a public records request; it is an indictment without due process and is now indemnified by the State in terms of the defense.

CHAIR AMODEI:

This is not the Judicial Branch of government and neither side is going to win the argument and get a verdict here today. From your testimony, your answer to my question is that the statutes are fine, and you think Mr. Ling and Mr. Macdonald broke them.

MR. GIBSON:

Yes, that is correct. Can the statutes be strengthened? Yes they can, and that would avoid the decisions made by the State to justify a defense on behalf of Mr. Ling.

CHAIR AMODEI:

If you, Mr. Bailey, Mr. Ling or anyone else have any recommendations on NRS 233B and NRS 41, we would appreciate receiving them before next Tuesday. Are chapters 41 and 233B of NRS in good shape, or do we need to look at them again?

MR. BAILEY:

It must be frustrating for this Committee and others to ask how we are going to change NRS 233B. And to hear Mr. Gibson's response arguing the merits of a lawsuit that Senior U.S. District Judge, Lloyd D. George will decide, I understand the Committee's point. Although, our position is the statute works fine. However, we will, take another look.

MR. GIBSON:

I want to clarify for public record the long discussion Mr. Ling had of the facts of this case. I did not want Mr. Ling's representation to stand with respect to some critical issues to the extent a public policy is present as to whether the State should support Mr. Ling.

CHAIR AMODEI:

Our record is aimed at looking at the potential legislative changes regarding these two chapters.

ROBB MILLER (Caladon Health Solutions):

I would like to rebut some things spoken in testimony by Mr. Ling in writing.

CHAIR AMODEI:

You may submit your testimony in writing. It is fair to note that some provisions have not been visited in a while, and we are open-minded in taking a look at them.

SENATOR CARE:

Let us go back to the hearing of May 3. Hearing for the first time we had a deputy attorney general represented by private counsel in this federal litigation struck me as unusual. I want to know, how did we get here? I would like to see anything Mr. Gibson submits be copied to Mr. Bailey and see all responses. Clearly we need to look into NRS 41 and NRS 233B more closely.

CHAIR AMODEI:

We are closing the pharmacy-related litigation and opening the one on representation by outside counsel involving the Colorado River Commission of Nevada. With respect to the NRS 41, there is nothing we can address. My basis for having you come back is in reference to NRS 41 and the procedures for hiring outside counsel. As we finish the testimony on this chapter, we may want a Committee bill draft request next Session. Senators McGinness, Horsford and Wiener are going to be here and should think about this. I look at these provisions, and it has been almost 20 years since some of them have been discussed.

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Mr. Salo, I appreciate you coming before the Committee and submitting the information about outside counsel and litigation with the Nevada Power Company. Your information will be made part of our records for this legislative day ([Exhibit G](#)).

Is there anyone who can give me an overview of our procedures? I assume the authority for this is NRS 41. If there are additional authorities, please feel free to let us know.

RANDAL MUNN (Special Assistant Attorney General, Office of the Attorney General):

We have been authorized to determine what boards or commissions have a right to employ their own counsel. I have provided the Committee information by our legal researchers ([Exhibit H](#), original is on file at the Research Library). *Nevada Revised Statute* 41 has been provided verbatim at the end of page 16 of [Exhibit H](#).

The employment of outside counsel happens occasionally, but not regularly. Presently, we have ten contracts for employment of outside counseling under NRS 41.

There are a variety of situations when an individual finds himself in a circumstance where the resources of our office are not capable of handling the case, whether it be expertise or literal availability of deputies to perform the service. It could also be a circumstance where there is a conflict, and there is a need to have separate counsel to represent another individual defended in the case. A State representative is involved to represent the entity or the agency, but maybe not an employee.

As you are aware, the cases can get intense as to who is in the wrong. These are the circumstances in which we would require special counsel. The process seems to work. The employees are required by statute to give written requests to the Attorney General for defense, and there is a time frame for which they are required to do this. Once the request has been made, our office has to evaluate whether they have acted in their course and scope, should we defend, do we have the resources, and if we have the expertise to do it right.

A decision is made by the solicitor general and the senior management when they get together to either defend or suggest a special outside counsel. If we employ special counsel, the statutes are designed to protect the State where there is a contract between the outside counsel and the Attorney General, and they will be accountable to the Attorney General. The counsel is usually specially deputized to represent the State employee or former employee. In the process, the billing comes through our office that we have to review. Sometimes, there are reimbursements to our office for the cost of defense. All these matters seem to work, but sometimes a case requires some quick action. We are then forced into a situation where outside counsel is engaged orally, and things are happening because it is a time sensitive case. We have to pull the documents and get them to the State Board of Examiners.

Often, we have resorted to using the delegating authority of John P. Comeaux, Chief, Budget Division, ex officio Clerk, State Board of Examiners, to approve a contract before it goes to the full board so the individuals are not working without one. We then take an amendment to the full board to expand it to the amount of compensation to employ their full services.

Under the last section of NRS 41, NRS 41.03435 in [Exhibit H](#) states that the Attorney General can use outside counsel when it is impracticable, uneconomical or could constitute a conflict of interest to do otherwise. If there is a problem, it would be the language.

We use outside counsel when we feel we do not have the expertise and consider the case impracticable. Whether or not this will be subject to challenge, we leave it up to fate. We need to provide adequate defense for individuals, and if it is a complicated matter, we look for counsel.

CHAIR AMODEI:

Mr. Salo's case has raised some questions. [Exhibit H](#) at the top of page 17 says, "The official attorney has determined that the act or omission on which the action is based appears to be within the course and scope of public duty or employment" I am not intimately familiar with the pleading, but one of the defenses for the Commission was that these employees and their trading conduct was outside the course and scope of their employment. This does not mean there were not other things in there, but we have a defense by the agency which alleges employees were outside the course and scope and a decision to provide a defense in accordance with the statute.

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JAMES D. SALO (Special Assistant to Executive Director, Colorado River Commission of Nevada):

In the context of the litigation to which you allude, I am also deputized as a special deputy attorney general for that purpose.

CHAIR AMODEI:

I understand the litigation is over.

MR. SALO:

The litigation is not over, it is still pending. I will elaborate, because what you have stated may be misleading, and I think it is important. The status of the lawsuit is such that we have not filed an answer yet. No defense has formally been presented on behalf of the Colorado River Commission of Nevada (CRC) or any of the defendants in those lawsuits. A motion to dismiss was filed and it was granted by the federal judge and authorized Nevada Power Company (NPC) to file an amended complaint within a specified number of days; they have not done that. This was the formal status of the litigation. We at the CRC or any of its employees named never presented a defense much less the defense you identified.

Without going much further, but speaking personally, I am not aware any of the defendants planned on presenting a defense of saying anyone was acting outside their scope of employment. It is on the contrary. The complaint alleges they were acting within their course and scope of employment. I believe it is the posture of the defendants also.

CHAIR AMODEI:

I am speaking of the tapes that have statements. You and I have discussed this on the record at the Public Lands Committee meetings. You have said, "The machine is working good and they rendered accurate representations of things that were said." I am not going to recount, but with some of those statements, if they were in the course and scope of employment ... "I love shoving it to Nevada Power Company."

MR. SALO:

Mr. Chair, those statements are not actionable nor are they a basis in the claim for the lawsuit. Whatever an employee may have said on a tape recording is reprehensible and perhaps inappropriate, which I agree. Those statements were

outside of the expected role they were to perform, but those statements alone did not cause the damage asserted by the NPC. In any event, the lawsuit is still pending.

CHAIR AMODEI:

Let us turn our attention back to the NRS 41. When these determinations are made, was there a written determination about course and scope? As I look through NRS 41, it says, "The official attorney has to make a determination." It only says a determination has to be made. Can that be standardized? It also has language that suggests those determinations are not admissible for any purpose in litigation. If the Attorney General makes a determination that someone is in the course and scope or even outside the course and scope, he then cannot turn around and point to their own determination as evidence of whether they were or were not. We have a statute that says it is not admissible for purposes of litigation. Therefore, it is just used to decide on providing a defense.

When we do this, I am looking for some kind of standardized procedure or framework as to when we make these decisions it is not one decision for the Commission on Ethics, one for the Pharmacy Board or another for some other agency. Mr. Munn, I am not opposed to flexibility you have laid out in your exhibit, because who knows what the content is of future litigation. We do not want the employee to be left out to dry. However, the procedure by which we decide to provide a defense to our employees should be standardized in the event there is a request for outside counsel. I have not looked at the minutes by the State Board of Examiners from the Colorado River Commission or the Pharmacy Board. I am interested at what level of inquiry and discussion in terms of basic factors a decision is made to decide that Mr. Salo is a good person, and we are going to provide counsel.

MR. SALO:

I would like to briefly describe the procedure the CRC follows regardless if it is under NRS 41. Whenever we retain outside counsel, the first thing is to determine the need, discuss with the Attorney General's Office and get their verbal approval to go forward. We then proceed to obtain outside counsel and draft a contract signed by our deputy attorney general. It is then reviewed by the Attorney General's Office before going to our full Commission for approval.

CHAIR AMODEI:

You have a bill drafter doing contracts?

MR. SALO:

He is a former bill drafter. The deputy attorney general has been our counsel for over 20 years. Once the contract has been drafted, cleared through staff and the Attorney General's Office, it goes to our full board for consideration and approval. At that point, it goes to the State Board of Examiners for their approval.

There are two reasons why we go to the Attorney General's Office. First, they have the responsibility of providing legal counsel. Second, the reality is that the Attorney General sits on the State Board of Examiners. The last thing we want is a surprise when it shows up on the agenda. We want him to have knowledge of this and respond to any questions they may have.

These are the basic steps we go through. It takes 30 to 90 days from the date we determine a need for outside counsel to the approval by the State Board of Examiners. These procedures tie into the comment made by Mr. Munn that sometimes we have to make other arrangements in the short run. If we are sued and have to answer within 20 days, we do not have the luxury of waiting 90 days to hire an attorney. On a short-term basis, those mechanics are worked out through the State Board of Examiners' secretary Mr. Comeaux.

I would like to make a few more points, particularly on the pharmacy discussion. Our situation did not involve the NRS 233B. There were no licensing issues, and no contested case issues were involved with the NPC.

MR. SALO:

In our view, all agreements are consistent with the NRS 228.110 which is cited on the cover page of Mr. Munn's memo, [Exhibit H](#). They are approved by the Attorney General's Office and overseen and managed by our assigned deputy attorney general or one of the assigned attorneys general in our office. It is formally approved by our board before they go to the State Board of Examiners, where after their review, it becomes effective. We have an existing budget authority. If we do not have the funds, we go to the Interim Finance Committee to get authorization and allocation of funds.

We retain outside counsel under four situations: (1) As mentioned in Mr. Munn's packet on page 3, NRS 538.206 subsection 2 allows us to hire bond counsel. (2) The next situation is NRS 41. (3) Next is representation of the State of Nevada and the CRC outside the jurisdiction of the State of Nevada. If you look at the first page of Mr. Munn's packet, NRS 228.110 talks in terms of the counselor or the attorney at law to represent the State of Nevada within the State. We read that to mean when there is representation outside of the State, there is no prohibition in retaining outside counsel. We frequently need to participate in federal regulatory proceedings before the Federal Energy Regulatory Commission in Washington, D.C. We retain D.C.-based counsel for that purpose. (4) Occasionally we retain outside counsel not to represent the State, but to advise and consult with us because we do not have the internal expertise.

Some years ago, one of our largest and private power customers went into bankruptcy. We retained a local attorney in Las Vegas to advise us on bankruptcy matters. He did not represent the State, he did not appear in court, and he did not sign pleadings. He only advised us on bankruptcy matters. These are the four categories for which outside counsel is retained.

CHAIR AMODEI:

Do I detect by your recitation of your procedure that your client would have no objection if NRS 41 were amended to provide a specific procedure? Or something along the lines you have recounted for what the commission actually does, so we have buy-off by the governing board of the requesting entity and formal coordination with the Attorney General's Office before we go to the Board of Examiners. At least there would be an administrative or record of how we are making these decisions as opposed to having a statute saying someone will determine this.

MR. SALO:

Subject to seeing the actual language, we would have no problem with what you have described. I would suggest the existing statute does what you want. The statute Mr. Munn relayed requires the affected employee to make a request for representation within a relatively short period of time.

CHAIR AMODEI:

I agree, but the requisite statute provides nothing in writing in terms of the actual decision if someone is in course and scope or to recount any facts regarding impractical or nonexpertise. I do not mind the discretion, but we ought to exercise that within a framework that provides some consistency.

MR. MUNN:

The question of course and scope is a delicate one because of the experiences our offices have had over the years with regard to how the courts have treated that subject. The courts have found state employees who have behaved badly, almost criminally, within their course and scope. Unless it is obvious the employee was outside their course and scope, we are going to find them in their course and scope, and we are going to find them counsel until a court tells us otherwise. The way the statutes are designed, if we refuse to provide counsel and determine by the court they are within course and scope, we are going to have to pay for their defense anyway.

CHAIR AMODEI:

I do not disagree with you, but the NRS 41.0342 suggests anything you do, say or think in making a determination is inadmissible. Therefore, we ought to establish some level of procedure to where if you want to find everyone in course and scope and provide counsel, that is fine, but let us have it written somewhere in the record. People start showing up. They do not come to your office, they come to this Committee and this Legislature to say, "How come my tax dollars are defending people who I think are not doing things properly." What we are looking for as a different branch is we have to provide a procedure that has been complied with and requires them to think about things in the context of inadmissibility; therefore, we have responded to your issue.

We are not asking you to ignore your job, but with all due respect, do not show up like the judges do and say, "Do not take away our discretion" when you have a roomful of people screaming about how they disliked what happened to them in court. Your job is different than the one at the Legislature. We are trying to be in a position to say that we have established something in the level of a framework that allows you to gain a level of knowledge about why the decision was made to provide counsel at State expense.

MR. MUNN:

Whatever decision is made, it needs to be quick. There is not a lot of time before answers are due on the need to engage counsel. I do not find it offensive to obtain a procedure to determine course and scope. The question is how elaborate do we need to be? Do we need to bring that person in and cross-examine them to find out if they were acting within their course and scope? Usually we get a phone call with pleading and we make a decision.

CHAIR AMODEI:

It is no one's intent to cause you to committee this; however, it is to provide some sort of record since it is inadmissible for the purposes of the base litigation.

SENATOR CARE:

For the record, my senior partner, Stanley C. Hunterton is employed by the NPC in the pending litigation. Are you aware of any instances, within the issue of course and scope, where the Attorney General's Office has not represented anyone?

MR. MUNN:

The only incident I am aware of is a circumstance of some prison guards who assaulted an inmate, where we refused to tender defense. They eventually won a lawsuit and got their attorney fees paid for by the State.

SENATOR CARE:

You mean they won the lawsuit?

MR. MUNN:

They won the lawsuit against the State for their attorneys' fees.

SENATOR CARE:

That was a separate litigation apart from the case?

MR. MUNN:

Yes, it was separate from the actual case.

SENATOR CARE:

About how long ago was that case heard?

MR. MUNN:

It has been within ten years. This subject of tendering defense comes up often. I was talking to a deputy about it the other day.

SENATOR CARE:

You said earlier you have had some employees of certain agencies engage in criminal conduct who were found to be within the course and scope of employment. Was there a judiciary determination?

STAN MILLER (Claims Manager, Litigation Division, Office of the Attorney General):

In 1997 there was a case, *State Department of Human Resources v. Jimenez*, where a juvenile probation officer sexually assaulted one of the juveniles at the facility. We made the argument that it was outside course and scope. This went to the Nevada Supreme Court and they came back with a ruling that found he was within course and scope. It was clearly a criminal activity, and had we not defended this gentleman, I think we would have been liable for only the attorney fees in that case. Since that time, the Nevada Supreme Court has withdrawn their opinion, although it is not published, but at the time of judgment, it was their opinion.

SENATOR CARE:

Although the opinion has been withdrawn by the court, what was the rationale behind the decision? Was it because the officer was on the time clock?

MR. MILLER:

The rationale given was because the officer had control over the juvenile; therefore, he was within course and scope.

SENATOR CARE:

No matter what the officer did?

MR. MILLER:

Yes.

CHAIR AMODEI:

Should the amendment be to remove course and scope from the NRS 41?

MR. SALO:

For the benefit of the record, it is my general understanding the idea of representation of employees accused of wrongdoing is a broad standard that applies to most employment situations, both private and public. Chapter 41 of NRS codifies the general obligation of an employer to step in and represent his employee when he is sued for doing his job. The issue just addressed on the course and scope of employment is a difficult one. However, one advantage from the State's perspective, if the Attorney General's Office errs on the side of providing a defense, they maintain some level of management and oversight of the outside counsel during the trial and the billing. If you deny coverage and the employee under the statute comes back later and recovers, you may have lost your ability to manage the costs.

DAVID GOLDWATER (Caladon Health Solutions):

I am representing Robb Miller of Caladon Health Solutions. I want to point out a material change that has occurred over the past two years. The material change will exacerbate what is going on in relation to hiring outside counsel.

Since the time constraint amendment has been put into the Nevada State Constitution, the Legislators have had to modify the manner in which we do business. The Legislature used to have extensive budget coverage over board and commission budgets. When issues would arise in the past, the Legislature would call the budget committees, and they would review these cases. The Executive Branch had some check and balance, and the Legislature would pay attention. Unfortunately, those commissioned budgets are bundled together, submitted and not heard but deemed almost accepted after review by the Board of Examiners. You have the Executive Branch performing the review over Executive Branch agencies to provide a defense that is defending the Executive Branch.

During my observation in dealing with Mr. Miller and the Board of Pharmacy case, there is absolutely no incentive for an Executive Branch that has hired outside counsel to dispose of the case. In fact, the opposite is true. Now you are on State dollar, with no check on the budget or where the money has come from, the attrition defense is more pervasive. If you have a 1-percent chance of winning, why not take that 1 percent to wear down the other side, rather than act responsibly.

That is why these cases are getting exacerbated, why we are having rough agents, and why these things are occurring. There are no checks and balances. We suggest an update to NRS 41 or NRS 233B that would place legislative oversight, either a budgetary or policy check for course and scope, so the Executive Branch agencies know someone is looking and paying attention.

MR. GIBSON:

This Committee has cut to the chase and reached a crystallized conclusion. No matter what the Executive Branch would see in terms of course and scope of an employment issue, they were going to indemnify. Therefore, no matter what NRS 233B or NRS 41 looks like, they have substantively made a decision based upon the judiciary, and they are going to indemnify because of the course-and-scope issues.

As Mr. Goldwater stated, you are our only hope. You are the only check left; because a policy determination was made to say everything is a criminal activity within the scope of employment, we are going to indemnify. Finally, to Senator Care's question in respect to the law, a Ninth Circuit Court of Appeals case, *Merritt v. Mackey*, deals with the interplay of immunity and scope of employment. I would be glad to provide a copy to the Committee. The decision in that case was that qualifying immunity was not appropriate. There is a Nevada Supreme Court case on this subject as well as a U.S. Supreme Court case.

It is a complex issue and comes down to what has been stated earlier. If you are going to indemnify, then people will come before the Committee and complain about the State money used to indemnify the defendant. It is because we have no choice. There is no other check or balance in the system.

SENATOR CARE:

I request that Mr. Gibson provide copies of the cases to which he referred.

SAMUEL P. McMULLEN:

I want to take this opportunity to broaden the agenda. As individuals who do a lot of work with regulatory agencies or occupational licensing boards, some attention ought to be paid to who represents whom on the issues in terms of those outside boards.

Nevada Revised Statute 110 states the Attorney General will provide all these services unless a law allows otherwise. Laws in some of the occupational licensing board sections states they can hire an attorney. I would like to specifically make the point about the opinions of the Attorney General, interpretations of the laws by which the entities act and policy decisions, particularly the drafting of regulations. If a client hires you to deliver, you get the goal of providing what they want. The provision of legal services is a high responsibility, but when you do it for a public board, you have the interest of the public all the time, and you are supposed to have balance. This clearly is the feeling of the deputy attorney general, and it is what they have to do.

The Attorney General will get the call about those legal policy issues. Consequently, you have to talk to someone like Brian E. Sandoval, Attorney General, or others who have served in that capacity about the calls they have received and the decisions and advice legally made to these boards. You find out it is important to say that outside counsel can be used for prosecution and other things. When you interpret the law for which they are structured and operate regulations for purposes of implementing the statute and other opinions or policy issues, those services ought to be retained by and kept in the Attorney General's Office. A number of us feel that way.

CHAIR AMODEI:

It is my intention to have the Committee request a bill draft for the 2007 Legislative Session. The concept of the draft would reflect Mr. McMullen's suggestion to keep the Attorney General's Office in-house and not with private board or contract counsel.

A report should be delivered to both judiciary committees of the Legislature every Session which recounts instances where the Board of Examiners have authorized the use of outside counsel, the cost, a copy of the record on which those decisions were made and the ultimate conclusions.

Finally, the bill draft will contain changes to NRS 41 which does not require decisions in writing. For instance, NRS 41.0344 does not require the chief legal officer or an attorney of a political subdivision to do anything in writing in exercising their discretion. We do not want to impinge on the discretion, but we want to know why the decision was made.

Nevada Revised Statute 41.03435 specifically talks about the Attorney General. We should establish some general criteria for consideration and inclusion in those writings which determine to concur or not concur in a request for outside counsel.

These concepts are generic enough and not directed at any board. These general guidelines will allow the Legislature to perform an oversight function and make sure when we have opinions of the Attorney General and those under the direction of that office, we have a record of the decisions and recommendations to employ outside counsel regardless of the capacity.

SENATOR CARE:

If not in the draft itself, but maybe in a memo to the Committee next Session, we need to define what it means as far as course and scope of employment. It seems we do not have a lot of guidance. There was a reference to one Nevada Supreme Court case that has not been published. Mr. Gibson made a reference to a Ninth Circuit Court of Appeals' case, but meant a U.S. Supreme Court case and what that means. I would like to see an attempt made to explain course and scope.

CHAIR AMODEI:

We will close the hearing on NRS 41 and open the hearing on due process procedures before the Commission on Ethics. The Committee has the materials Mr. Hsu and the Commission have provided. It will be made part of our records for this legislative day ([Exhibit I](#)).

I requested a look at this as a result of concern about due process and the appearance of objectivity in some matters. There is a video of a news broadcast, "Face to Face" with Stacy Jennings, Executive Director, Commission on Ethics, interviewed by Jon Ralston, March 10 ([Exhibit J](#), original is on file at the Research Library). While we are waiting for the video, is there a motion on the NRS 41 bill draft request we were discussing?

SENATOR MCGINNESS MOVED FOR THE SENATE COMMITTEE ON JUDICIARY TO REQUEST A BILL DRAFT REGARDING CHANGES TO NRS 41.

SENATOR NOLAN SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR HORSFORD WAS ABSENT FOR THE VOTE).

* * * * *

CHAIR AMODEI:

Good morning Mr. Hsu. My purpose for requesting the video viewing is not to question the laws on the books for the Ethics Commission. Our purpose and jurisdiction is due process. I have looked through the NRS 281 and the NRS 233B and reviewed your procedural context on the matters of determinations, impartiality and confidentiality. I was disturbed by an interview where opinions were issued by the chief investigator for the Commission on certain matters. Your statutes indicate these matters are confidential whether there has been a request for an opinion or a complaint received. I do not know if there was a request or a complaint received. I am concerned about a course of conduct by the primary person of the Ethics Commission giving interviews and opinions on matters which may or may not be before the Commission in the context of impartiality of the investigative process and the Commission's work.

I am interested in hearing your thoughts on this matter. I want to make it clear, before we proceed, that this is not about whose name may have been brought up in the interview. It could have been about anyone. Our concern for this Committee in matters of due process, administrative and criminal matters in the State of Nevada is that your Commission performs a quasi-judicial function. In performing that function and maintaining an appearance of objectivity, it would appear that activities such as the interview tend to shake the concept.

The interview precipitated our request to have a discussion regarding the subjects of objectivity and confidentiality of potential cases before your Commission in terms of the primary staff investigator who happens to be the executive director.

We are not looking to change the provisions. Procedurally, you have fulfilled your quasi-judiciary function. Let us understand the interest for this Committee is the desire for your Commission to be beyond reproach.

RICK R. HSU (Chairman, Commission on Ethics):

My understanding for appearing was to discuss procedural due process and give a presentation, [Exhibit I](#). It looks more like a question and answer session, and I will be more than happy to do that.

With respect to your concerns and the video, I am not clear if your perception is there are predisposed notions or opinions. A few comments may have gotten lost in the mix of the video. It is not the Commission's intent to interpret anything other than the NRS 281. Other statutes are implicated. If there was a violation, it could possibly be considered in the framework of NRS 281. A statute also talks about whether or not use of power is warranted, and previous decisions say if an act is not legal, it would not be warranted under our statutes.

If the Committee believes there has been a violation and damaging statements created a problem, it is a problem for me. We can address this issue a couple of ways. The executive director has a statutory duty to conduct training and educate the public about how the Ethics Commission laws work. Usually, there will be inquiries from the public about certain things. In this case, the response for the interview should have been, "I am not a commissioner." An entire Commission will ultimately decide certain violations. Without knowing the facts, this could be an issue and, it can be brought up if there were to be an investigation.

Unfortunately, the media have placed various spins on subjects, but they are a primary source of information in educating the public. Executive directors are statutorily charged with conducting certain training and responding to members of the public and the media. Did this tape go beyond that? I do not know how to address this issue. I can assure you that when we do this process, we have a three-pronged system. There is the initial complaint, the just and sufficient cause hearing, and if necessary, a hearing on the merits.

The executive director's role in that process is to do the initial investigation and make a recommendation on whether there is just and sufficient cause. The second phase is the panel process; a two-person panel accepts, rejects or modifies the recommendation of the executive director. The panel has rejected several recommendations made by the executive director.

MR. HSU:

The minimum concept of due process is notice and the opportunity to respond. This concept is at all three levels. It is at the complaint level, the just and sufficient cause level and at the hearing on the merits level. We try to make sure there is some validity and assurance that any person brought up on ethics charges is given a fair and impartial hearing. I have drafted this public information policy and asked that the Commission sign off on it. The fact is you never know about sources of leaked information, and there are statutes about confidentiality. These statutes especially deal with the first two stages which are the complaint and the just and sufficient cause level. I wanted to ensure public information policy. It is the commissioners making the decisions.

During my five years on the Commission, everyone I have served with has an independent mind and is sharp. Although we have differing opinions, everyone always acted based on the evidence and in an impartial manner. I wanted to make sure we had a policy saying, "No comments. You cannot comment on a certain matter that is before the Ethics Commission until its conclusion." I also wanted to encourage all commissioners to express their opinions on how the decisions should be made in the deliberation of the actual hearing as opposed to afterwards. It is important the fairness be translated to not only the person charged, but to the public in general.

The Commission has its own policy for dealing with members who talk to the public or the media about a pending case. It is prohibited by the statutes, and I wanted to make sure all commissioners signed off on the public information policy.

A case that actually goes through the process to conclusion is done by the commissioners. The decision is not based on a recommendation of just and sufficient cause, which is only step two. There is no recommendation at the third level of a violation. Once there is a determination at the second level of just and sufficient cause, we start over and the two-member panel that served on the just and sufficient cause hearing is prohibited from participating by statute. This ensures no prior judgment or notion by the remainder of the commission.

CHAIR AMODEI:

I am sure we agree with most of what was said. Ms. Jennings is the one in the interview. The discussion here is policy and making sure our policies are correct.

The executive director fulfills an important function and is a person not independent from the Commission. This person drives the investigation and makes the initial recommendation, although the commissioners are free to do what they want. When the person making the just and sufficient cause finding, conducting the investigation and making recommendations, offers public opinions on scenarios which may presently or at a later date be before the Commission, the appearance of objectivity is not promoted. When the board's main representative is rendering hypothetical opinions, it does not promote the process you have described.

I am glad to see you made reference to NRS 233B in the event someone wanted to know the procedures governing the Commission on Ethics. I have looked through NRS 281 and, unless I have missed something, we have not specified the procedural rules for the Commission on Ethics. What is your procedural rule book on conducting business?

MR. HSU:

The rules of procedure are primarily found in the *Nevada Administrative Code* (NAC) 281 and cover complaint through conclusion. Our regulations also incorporate the *Nevada Rules of Civil Procedure* used in court.

Initially, a complaint gets processed, and jurisdiction is determined by our counsel and specified in our regulations. If there is a finding of another jurisdiction, it is not processed any further. If there is a finding of jurisdiction, our regulations provide for written notice to the public officer. *Nevada Administrative Code* 281.188 states: "... the Executive Director shall forthwith notify the public officer or public employee ... and provide the public officer or public employee an opportunity to respond to the allegations contained in the ethics complaint." There is a process of appointing a two-person panel as set forth in the NAC, and they cannot be of the same political party. This is intended to take out the politics of a decision at the just and sufficient cause level and ultimately the entire process.

During the initial complaint and the just and sufficient cause hearing, by statute and regulation, it is confidential. We have adopted the regulation that if anyone tries to obtain information about a complaint, we cannot confirm or deny it because of confidentiality issues. Our regulation, states just and sufficient cause cannot be found based on newspaper articles or media statements alone. You have to have some other credible evidence.

CHAIR AMODEI:

I am looking at the NRS 281.471, and it speaks of duty, inclusion of annotation, abstracts and opinions. Usually, there is legislative authorization to adopt regulations, and I do not see it in here. The chairman said the regulations establish our procedures, but where is the authorization for those to be done? Later, there is a reference to the NRS 233B which is the judicial review, but there is nothing in reference to procedures. Maybe the statute needs to provide the ability to adopt regulations for the process. An investigation gets started in two ways. In one case a person files a complaint and a request for an opinion is filed. In the other case, the Commission can make its own motion. How does the process for the latter get started?

MR. HSU:

It is a process undefined by the statutes. If the Legislature wants anything clarified, it would be that particular process. Clearly, that language in the statutes authorizes the Commission to initiate an investigation on its own motion. In doing that, what does it mean? What standard should be met to authorize the executive director to continue forward? How do you get to a Commission determination? What happens when you get to the final decision? If one particular commission makes a motion, is that commission excluded from serving on the final commission? There are a lot of questions.

The statutes are clear a complaint cannot be initiated based on anonymity. At times, people appear to be legitimate sources of information who do not want to go public due to employment situations, but the Commission will not initiate motions based on the appearance of credibility. You have to go beyond that step. Although the person may want to remain anonymous, he may have to appear under oath unless there is some other kind of corroborating evidence. This would be a threshold for the Commission to begin a complaint on its own motion. This has occurred a couple of times. Each time it has happened, there has been a lot of uncertainty, and I have felt uncomfortable. However, the statutes clearly say we can do it. The problem is how do we do it? How do we get from one step to another? It is not identified in our statutes, and it is not identified in our regulations.

SENATOR WIENER:

Does the Ethics Commission come under the administrative regulations that other agencies follow? When developing regulations, does the Ethics Commission submit them to the Legislative Commission for approval?

BRADLEY WILKINSON (Committee Counsel):
Yes, they go through the normal NRS 233B process.

SENATOR WIENER:
If the regulations being adopted are not based on statute, it might be something we may want to take a look at. The Legislative Branch may have to take a bigger role in ensuring the right things are done by the commissions.

CHAIR AMODEI:
We do not have jurisdiction over the NRS 281. We are not here to suggest what someone should or should not be doing. Our jurisdiction is procedural in a due process context. When Ms. Jennings asked about what we wanted to discuss, it is due process and a part of it was the appearance of objectivity.

This informational hearing is not to suggest you have done something wrong, but we have been doing it a certain way for some time. In a procedural context, look at whether it should be done by statute or regulation. As your operation continues to evolve, it does so that procedurally it is done beyond reproach.

MR. HSU:
In looking at the NRS 281.471, which vested the Commission with authority to adopt procedural regulations, are we going beyond the statutes by adopting the *Nevada Administrative Code*?

CHAIR AMODEI:
It is normal for you to have your own set of regulations. I am suggesting that if your primary procedures are going to come from regulation, the statute ought to say the Commission is authorized to adopt regulations in accordance with the requirements of the NRS 233B. Those regulations should specifically include a code of judicial conduct for the members that in no way impinges on the appearance of objectivity and impartiality in the Commission's operations on all levels. You brought up the issue of how the Commission conducts an investigation on its own motion. If someone files a complaint against me, I get notified and have an opportunity to respond. Do I get the same opportunity if the Commission does it on its own? If the Commission directs the executive director to open an inquiry on the Commission's own motion, you have made the equivalent of a probable cause determination and now it comes back to you for a violations determination. Is there a way we can posture that procedurally?

MR. HSU:

Maybe, I was not as articulate as I could have been. If the Commission initiates a complaint on its own motion, that complaint is treated as any other complaint filed by a third party; the confidentiality provisions apply and begin the investigation. This is the quandary. The statutes say you may initiate a complaint on your own motion, but they do not allow the executive director to begin an investigation until after a complaint is filed. In the past, although rare, if an issue had corroboration which did not require any active investigation by the executive director, we thought this would be a basis to initiate a complaint on its own motion. Is this a just and sufficient cause hearing before the procedure actually begins? This is where we are struggling. Rather, it should be an initial threshold the Commission or one or two commissioners feel is important enough to be processed through the normal channels of the investigation. We do not have clear guidance in that area. Perhaps the Legislature should give us some guidance on how to proceed or it may be better to remove the Commission's power to initiate a complaint on its own motion.

SENATOR CARE:

Removing the power would be my suggestion. Judges do not file lawsuits, they adjudicate them. My preference would be that you not have the power to do that. Let us briefly go back to December 2004 in dealing with Kathy Augustine, State Controller. As I remember during the testimony, I asked Ms. Jennings if she was aware of the fact that the information given to her by the Attorney General's Office was a criminal investigation, which is confidential under Nevada statutes. I do not recall the answer; however, it did not seem to me the thought had crossed her mind. The other question was: What would be the Commission's standard for accepting a criminal investigation as a complaint? I believe the response was, "It never happened before." Could you give me an idea how the Attorney General's Office approached the Commission and we ended up with the complaint? To my recollection, something was dropped off at the Ethics Commission office and treated as a complaint. Could you revisit that briefly, because it does involve procedural due process?

MR. HSU:

As I recall, a complaint was filed by the Attorney General and this was something that never happened before, at least during my term as chairman. There was already a lengthy investigation submitted to the executive director. Therefore, the director was charged with looking at the evidence uncovered and making a recommendation of just and sufficient cause. In addition to the

provisions the Attorney General alleged were violated, the executive director made an independent review as to whether any other sections of the NRS 281 could be incorporated in the just and sufficient cause hearing.

A just and sufficient hearing is a probable cause standard and not hard to reach. If the allegations and evidence are treated as true and in effect an ethics violation, it must go before the entire Commission for a resolution.

In the case you mentioned, there were a multitude of documents of investigations, interviews, transcripts and things of that nature. If all the information were true, then the just and sufficient cause standard had been met. I was on the panel and recommended there was just and sufficient cause for it to go before the entire Commission. Do you want me to go beyond this?

SENATOR CARE:
No, I do not.

MR. HSU:
The issue was treated as a complaint filed by a third party. Nothing in the statutes prohibits this and makes it clear any person can file an Ethics Commission complaint. The only restriction in filing a complaint, according to the statutes, is someone who is incarcerated.

SENATOR CARE:
When the chief deputy attorney general filed the complaint, was he acting in his personal capacity or representing the Attorney General's Office? What troubled me about the Augustine matter was that if we are talking about a third party filing a complaint, it could have involved the Federal Bureau of Investigation or a district attorney who had not been successful in prosecuting a case. If any of these entities were out to get someone, they could take those criminal allegations and turn them over to the Ethics Commission. I find this problematic and wonder if your Commission ever discussed this matter amongst its members?

MR. HSU:
The Commission never discussed the latter of your concerns. To answer the first part of your question, it was a complaint filed by the Attorney General. It was not an individual capacity complaint. Basically, the motive behind the complaint should not matter for purposes of the investigation and, ultimately,

the disposition of the complaint. Granted, in some of the complaints filed, there are ulterior motives. Regardless of the motive, if evidence uncovered falls within the just and sufficient cause violation, there has to be a determination and move to the next level.

SENATOR WASHINGTON:

Let me go back to your comments about the executive director's job to educate the public. Can you define what that means?

MR. HSU:

The NRS 281.4635, subsection 1, paragraph (e) speaks of the duties of the executive director, and it states, "Upon the request of any public officer or the employer of a public employee ... " the executive director shall "conduct training on the requirements of this chapter ..."

Something else in these statutes may talk about education, but from the standpoint of training, statutorily this is what the executive director is charged to do. Training of public officers, employees and the public in general is a good thing. During my five years, it has had an impact and less frivolous complaints are filed. We are seeing more complaints focused on the ethics and government laws.

If it is the desire of the Legislature to have some prohibition on talking to the media or members of the public, there has to be a line distinguished. It is difficult not to respond to members of the public and media. It is important to educate people on how our process works.

As an example, I took part in a just and sufficient cause hearing where the media reported the Commission found the person in violation. The report was wrong. The panel found just and sufficient cause only for the complaint to go before the entire Commission. This is part of the problem and a learning curve for various members of the media. It is important to have an educational component involved in our statutes.

SENATOR WASHINGTON:

There is a fine line of having a complaint alleged against the public officer when the two-member panel Commission has not designated either a positive or negative find. The education process is available specifying confidentiality.

Yet, it highlights the person's name and is used for political purposes either for or against a candidate's election bid. This is a concern. If the education process does not curtail this, then we have a problem.

MR. HSU:

With respect to confidentiality, if there is a complaint on file, our regulations say you can neither confirm nor deny any comments made about that particular case. People will ask about a particular circumstance under which there is not a complaint on file. Perhaps there should be some kind of education on how the process works and identify the possible issues.

There is a gag order on every level as soon as a complaint is filed. Unfortunately, there are particular circumstances where there has not been a complaint on file. I have received calls from the media where they would give me scenarios. I do not talk to them. Usually, I send it to our executive director, who is the primary person to deal with the media. A certain amount of discretion should be used with respect to complaints not filed.

SENATOR WASHINGTON:

Your intent indicates it is the goal of the administration to preserve the integrity of the process governing the Commission duties of interpreting and enforcing Nevada ethics and governmental law. The key word is to preserve the integrity of the process. The integrity is compromised if the training aspect of divulging confidential information is not emphasized, especially against the potential allegations.

MR. HSU:

My point is if a complaint is lodged, there is an absolute prohibition about discussing the complaint. In the policy I drafted on page 4 of [Exhibit I](#) under the Nevada Commission on Ethics Public Information Policy, there are appropriate ramifications.

This policy has not been adopted under the NAC, but the Commission has the ability to make policies to censure its own members in order to preserve the integrity of the process.

SENATOR WASHINGTON:

Hypothetical scenarios are fine as long as the person alleged to have acted unethically is not publicly named. I appreciate your efforts in maintaining integrity for the Commission. One concern I have is how do you deal with the executive director when they go off on their own without the approval of the Commission?

MR. HSU:

The executive director is the designated full-time staff member who runs the affairs of the Commission. The director serves at the pleasure of the Commission, and the commissioners can raise concerns about performance and conduct. Something done outside the scope of the director's field would be noted and possible removal of that position could occur.

SENATOR WIENER:

I heard several times during testimony that once a complaint has been filed, there is a gag order. Why would the rights of a person coming forward to the Ethics Commission not be protected if they were just making an inquiry of a potential problem?

MR. HSU:

The confusion stems from whether or not a public officer seeks an opinion. This, in and of itself, is a whole different situation. It is called a first-party opinion request, and it is up to the employee or public officer making the request to ask for confidentiality. If the person making the request does something in a manner that makes it not confidential, it becomes open to the public.

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CHAIR AMODEI:

A matter is coming before the Senate Committee on Legislative Operations and Elections that deals with the Commission. As a Committee, we will add this to the agenda to discuss if we want to do a general amendment that talk about specific authorizations of regulations. All of this will be procedural. If we make a move, you will be provided with a copy of the amendment. We will close the hearing on the Ethics Commission procedural matter. Seeing nothing further to come before the Senate Committee on Judiciary, we are adjourned at 11:02 a.m.

RESPECTFULLY SUBMITTED:

Gale Maynard,
Committee Secretary

APPROVED BY:

Senator Mark E. Amodei, Chair

DATE: _____