MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON ELECTIONS, PROCEDURES, ETHICS, AND CONSTITUTIONAL AMENDMENTS

Seventy-Fifth Session
April 30, 2009

The Committee on Elections, Procedures, Ethics, and Constitutional Amendments was called to order by Chair Ellen Koivisto at 3:49 p.m. on Thursday, April 30, 2009, in Room 3142 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/75th2009/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblywoman Ellen Koivisto, Chair
Assemblyman Harry Mortenson, Chair
Assemblyman Ty Cobb
Assemblyman Marcus Conklin
Assemblywoman Heidi S. Gansert
Assemblyman John Hambrick
Assemblyman William C. Horne
Assemblyman Ruben J. Kihuen
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom
Assemblyman James A. Settelmeyer
Assemblywoman Debbie Smith

COMMITTEE MEMBERS ABSENT:

Assemblyman Harvey J. Munford (excused)

GUEST LEGISLATORS PRESENT:

Senator William J. Raggio, Washoe County Senatorial District No. 3

STAFF MEMBERS PRESENT:

Kevin C. Powers, Senior Principal Deputy Legal Counsel
Patrick Guinan, Committee Policy Analyst
Judie Fisher, Committee Manager
Terry Horgan, Committee Secretary
Cheryl McClellan, Committee Assistant

OTHERS PRESENT:

Patricia Cafferata, Executive Director, Commission on Ethics
Julie Tousa, President, Nevada Center for Public Ethics, Las Vegas, Nevada
Gerald Kops, Member, Board of Trustees, Nevada Center for Public Ethics, Las Vegas, Nevada
James Hardesty, Private Citizen; Chief Justice, Supreme Court; Chairman, Advisory Commission on the Administration of Justice
Bob Crowell, Past President, State Bar of Nevada, Carson City, Nevada
Bruce Beasley, President, State Bar of Nevada, Las Vegas, Nevada
Cam Ferenbach, Vice President, State Bar of Nevada, Las Vegas, Nevada
Lynn Chapman, State Vice President, Nevada Families, Sparks, Nevada
Janine Hansen, President, Nevada Eagle Forum, Elko, Nevada
Nanette Moffett, Private Citizen, Carson City, Nevada
Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada

Chair Koivisto:
[Roll was taken. Committee rules and protocol were explained.] We are going to hear Senate Bill 160 first today, and Kevin Powers is here to present the bill.

Senate Bill 160: Makes various changes to comport with the constitutional doctrines of separation of powers and legislative privilege and immunity. (BDR 3-1164)

Kevin C. Powers, Senior Principal Deputy Legal Counsel:

I am with the Legal Division of the Legislative Counsel Bureau (LCB). As you know, the Legal Division is nonpartisan legal staff. We do not support or

oppose any particular piece of legislation; however, we do provide the Legislature with legal advice on the scope, impact, and consequences of legislation. That is why I am before you today to discuss Senate Bill 160. Before you are two documents: The first document is Senate Bill 160; the version that was passed by the Senate and introduced into this Committee. In addition, there is a mock-up of proposed Amendment 4617 to Senate Bill 160 (Exhibit C). The mock-up includes all the original provisions of S.B. 160, plus additional provisions—some recommended by this office with regard to conforming certain statutory law with constitutional principles, and some provisions recommended by the Nevada Commission on Ethics to clarify and enhance the Nevada Ethics in Government Law, *Nevada Revised Statutes* (NRS) Chapter 281A.

If you look on the first page of the mock-up, there is a drafter's note listing the three objectives of the mock-up. The first objective is to retain the original provisions of S.B. 160. Those provisions are intended to conform existing statutory law to the constitutional doctrines of legislative privilege and immunity and separation of powers. This mock-up is not intended to change those original provisions.

The second objective of the mock-up is to conform existing statutory law to another set of constitutional doctrines involving removal of state officers through impeachment, and removal of state legislators from office through expulsion by their own Houses pursuant to Article 4, Section 6 of the *Nevada Constitution*.

The third objective is to add provisions to S.B. 160 intended to clarify and enhance the Ethics in Government Law, as I mentioned.

I am primarily going to discuss the first two objectives, because those are conforming existing statutory law to constitutional doctrines and principles. Therefore, it is not necessarily a policy decision, but an attempt to make the statutes as clear as possible when it comes to those constitutional provisions. We want those statutes to reflect those constitutional doctrines so that the public is aware of the constitutional doctrines when they read the statutes. If the statutes are inconsistent with the *Constitution*, those inconsistent provisions cannot be enforced, and it can be confusing to the public if they see statutes that somehow are different from the controlling constitutional provisions.

Turning to the first objective with regard to separation of powers and legislative privilege and immunity, under the separation of powers doctrine we have three branches of government—the legislative, the executive, and the judicial. To preserve and facilitate that separation of powers, the doctrine of official

immunity was developed in order to allow freedom for each branch of government to perform its core constitutional functions without interference from the other branches of government. For example, judges enjoy judicial immunity when they are deciding cases, and they cannot be punished or held liable for how they decide those cases. Likewise, state legislators when they are performing their core constitutional function of voting on legislation, cannot be punished by another branch of government or held liable for damages for how they vote on legislation, because that is a core legislative function.

I want to emphasize that legislative privilege and immunity is not a new, novel, or unique concept in the law. Legislative privilege and immunity was first codified in the English Bill of Rights in 1689. The purpose of it was to prevent the Crown from suppressing legislators. During the period of Parliamentary struggles of the 16th and 17th Centuries, the Crown would often intimidate legislators through criminal and civil proceedings, and thereby try to control the legislative branch of government.

That concept of legislative privilege and immunity was carried forth to the Colonial Legislatures and adopted into the *United States Constitution*. It is also reflected in all the state constitutions. So for the past 300-plus years, both case law and history and parliamentary precedent have formed the basis of the constitutional doctrines of legislative privilege and immunity.

Legislative privilege and immunity is not an unlimited doctrine. It does have limits; it only protects those activities that fall within the sphere of legitimate legislative activity. That is a narrow set of activities that legislators perform. It is their core functions; most importantly, it is the processing of legislation—voting on legislation, committee proceedings, debating legislation, and entering into negotiations with principal parties. Those are the core legislative functions that legislators perform, and legislative privilege and immunity protects legislators from being punished by the other branches of government when they are performing those functions.

Because it is limited to those core legislative functions, this means that legislative privilege and immunity does not provide blanket immunity from the ethics law for legislators. When their conduct falls outside of the core legislative functions, legislators would still be subject to the ethics law for those types of ethical violations—for example, improper use of governmental property, time, or resources for a personal purpose. That is not a core legislative function, and legislators would be subject to the ethics law for that type of activity. Filing inaccurate or false financial disclosure statements or campaign expense reports is not protected by legislative immunity. Accepting improper

compensation for performing public duties, for instance taking some sort of bribe, is not protected legislative activity, and legislators would be subject to the ethics law and, of course, criminal law as well. What the original provisions of S.B. 160 did was codify in statute that principle of legislative privilege and immunity and separation of powers I just talked about. That was the only intent behind the provisions of the original S.B. 160.

Chair Koivisto:
I would like to say that you did a great job putting this mock-up together with the drafter's notes. It makes it very easy for us to follow, and we appreciate that.

Kevin Powers:
The second objective of the mock-up is to conform existing statutory law to those constitutional provisions governing removal of state officers through impeachment pursuant to Article 7 of the *Nevada Constitution*, and removal of state legislators through expulsion by their own legislative Houses pursuant to Article 4, Section 6, of the *Nevada Constitution*.

When the *Constitution* grants an exclusive power to one branch of government, no other branch of government may exercise that power, and the Legislature may not provide another means for exercising that power. What that means is that state officers in the executive branch, who are subject to impeachment for misconduct in office, can only be removed through impeachment. They cannot be removed through statutory removal proceedings. Likewise, state legislators, because they are only subject to expulsion under Article 4, Section 6, of the *Nevada Constitution*, cannot be removed from office for misconduct through statutory removal proceedings. In addition, because the expulsion procedure for Article 4, Section 6, is exclusive to each House, state legislators cannot be removed from office through impeachment. So impeachment is for state executive-branch officers and expulsion under Article 4, Section 6, is for state legislators. Those are the two, exclusive methods.

Unfortunately, some of the existing statutes are not explicit in this regard. There are several statutory removal proceedings for local county, city, and township officers. In the past, there have been some questions whether those statutory-removal proceedings apply to state executive-branch officers, judicial officers, and state legislators, but they do not under the constitutional provisions I talked about. So in the second component of the mock-up, this bill amends those statutory provisions to conform to those constitutional doctrines.

Assemblyman Hambrick:
Does the Legislature have provisions for impeachment of the judicial branch and the Supreme Court? I realize that at the district court level there are recalls, but what would be the procedure to remove a state Supreme Court Justice?

Kevin Powers:
There are three different procedures in the *Constitution* for removing state Supreme Court Justices. First is impeachment under Article 7, Section 2. Then there is Article 7, Section 3, which provides a specific removal procedure for members of the Supreme Court and district court judges where a two-thirds vote by each House of the Legislature may remove a justice or judge from office, even if it does not rise to the level of an impeachable offense. The third method is under Article 6, Section 21, of the *Nevada Constitution*. The Commission on Judicial Discipline has the power to remove a judge or justice from office for improper conduct under those provisions.

Assemblyman Segerblom:
Right now, the Supreme Court is considering an issue concerning Senator Hardy and whether the Ethics Commission applies to him. That decision has not come down yet, has it?

Kevin Powers:
That is correct. There was an oral argument in the case on April 20.

Assemblyman Segerblom:
Will that decision have an impact on what we are doing here?

Kevin Powers:
I do not believe so. One of the reasons is that the Supreme Court is interpreting the ethics statutes as they applied to legislators in the 2007 Legislative Session. Of course, that decision will have a constitutional impact going forward. It will help further define the constitutional doctrine of legislative privilege and immunity in this state. However, in the 2003 case, *Guinn v. Legislature*, the Nevada Supreme Court stated specifically that under separation of powers, legislators could not be punished for the way they vote on legislation. We think that the doctrine of separation of powers is already well established as a constitutional doctrine in this state and across the country, and that all this legislation would do, on a going-forward basis, is codify those principles in the NRS. So I do not believe the case will have a direct impact on this legislation.

Assemblyman Segerblom:
With respect to ethics laws themselves, or the Ethics Commission, will they have to change their rules based on what we are doing here?

Kevin Powers:
In the future, when the Ethics Commission gets a complaint against a legislator they will have to look at the allegations in the complaint, and determine whether the allegations involve core constitutional functions, like voting, disclosure, and abstention. I think it should be easily done by the Ethics Commission. When they see that those allegations are involved, they would have to dismiss the complaint because they do not have jurisdiction over those types of core legislative functions.

In addition, this bill makes clear that in interpreting legislative privilege and immunity, the Commission on Ethics and any other agency of state government should refer to the wealth of case law available that involves interpretation of legislative privilege and immunity under the *U.S. Constitution*. In section 1, it states that the decisions of the United States Supreme Court, in interpreting legislative privilege and immunity, should be considered as persuasive authority when interpreting legislative privilege and immunity in Nevada. They actually provide the parameters for the Commission on Ethics to determine what a core legislative function is or is not.

Assemblyman Segerblom:
Would that not make it harder for them to determine what is or is not a legislative issue? It seems as though we are giving them jurisdiction over whether they can hear something that may be our prerogative.

Kevin Powers:
I do not think we are necessarily giving them jurisdiction. Because these are all fact-specific inquiries, there has to be some initial case-by-case determination. Somebody may file a complaint against a legislator that involves both core legislative functions and non-core legislative functions. The Ethics Commission has to be able to go forward on those non-core legislative functions and subject legislators to the ethics law, so there has to be that initial determination. Because there is judicial review involved, if members of the Legislature believe that the Ethics Commission has exceeded its jurisdiction, that issue can be taken to court for a determination. Because these are fact-specific inquiries, I do not think there is a way to make that determination on the face of the statute. There has to be some initial review by the Ethics Commission.

That covers the specific, main objectives. Another objective was to clarify and enhance the Nevada Ethics in Government Law, including provisions requested by the Commission on Ethics and contained in S.B. 160. The Senate believes all these provisions should be dealt with in one piece of legislation—S.B. 160. Because a lot of these provisions are being requested by the Commission on Ethics, I will ask Patricia Cafferata, the Executive Director, to come before the Committee. As we walk through the bill, she can address specific provisions that contain policy matters.

Patricia Cafferata, Executive Director, Commission on Ethics:
We are in support of this bill because this bill has all our housekeeping provisions in it, specifically pages 4 through 36. There are two substantive changes I want to point out. The first is on the bottom of page 14 at lines 18 through 28, and at the top of page 15, lines 1 through 4. That language creates a two-year statute of limitations for the Ethics Commission to consider complaints against public officers. As it stands now, there is no statute of limitations against any public official if he is in office. The example I like to use is me. I am subject to the ethics laws. The way the statute is now, someone could file an ethics complaint against me for something I did when I was in the Legislature in 1981. You could file an ethics complaint against me when I was State Treasurer in the early 1980s. You could file an ethics complaint against me for any time I was District Attorney of Lincoln, Lander, and Esmeralda Counties. The Commission and everyone else thought it was a good idea to have an ethics-complaint limitation for people in office. The Ethics Commission picked a two- to four-year range. The way the bill was drafted, two years was the time selected, so that would be a substantive change.

Kevin Powers:
To be certain the record is clear, that is one possible interpretation of the existing ethics law—that there is no express statute of limitations. It is true that there is no express statute of limitations on the face of the ethics law; however, there is a general rule. When an administrative body can impose a civil penalty, as the Commission on Ethics can, it is presumed that the Legislature intended to apply a general statute of limitations most closely analogous to the case. We believe the existing statute of limitations in NRS Chapter 11 involving a penalty or forfeiture, which is two years, currently applies. We also believe this is an improvement to the ethics law, because it puts the two-year statute of limitations expressly into the ethics law, making it clear for the public officers and public employees.

Patricia Cafferata:
The other substantive change is on pages 32 and 33 of the mock-up and concerns acknowledgment forms. Elected officials currently file their acknowledgment forms with the Secretary of State, and appointed officials file their acknowledgment forms with the Ethics Commission. Under this bill, everyone would file their acknowledgment forms with the Ethics Commission and the Secretary of State would receive all the financial disclosure statements. There is no deadline for filing these acknowledgment forms unless you currently file a financial disclosure statement. Even though all public officers are required to file acknowledgment statements, the statute has them tied to financial disclosure statements, so there is no deadline or penalty for not filing. This sets a filing date of 30 days from appointment or election to public office. We think that is an improvement. Those are the two substantive changes in the bill; the rest of it is basically housekeeping.

Assemblyman Hambrick:
I am pleased to see the two-year statute of limitations for filing complaints on page 15. For those who have had complaints filed against them, is there a reasonable expectation that they would see an end date to the investigations? Certain investigations have had protracted time frames—some, rightfully so. Some complaints have been convoluted, but some could have been completed a little more timely.

Patricia Cafferata:
In other sections of the bill there are statutory deadlines for the Commission on Ethics to complete certain parts of the investigation. We have to complete the investigation and make a recommendation to a panel within 60 days—although that has been changed to 70 days in this bill. Part of the reason for that is that people who are the subjects of the complaints, the public officers, need more time to put together their defenses. The ten-day period in the law now is not sufficient time, so this proposed legislation extends the time to file their responses to 30 days. We still have to complete the first part of the investigation and get it to a panel within 70 days. We then have 15 days to write the opinion and 60 days to have the hearing. It is all in the statute, but there are some changes to the deadlines in this bill.

Kevin Powers:
There are specific statutory deadlines, but the public officer or public employee is offered the opportunity to waive those statutory limits if he wants more time to prepare a defense. Some of the cases you may be thinking of were situations where the public officer or public employee decided to take more time

to put together a defense, and therefore extended the proceedings longer than they otherwise would be under the statutory deadlines.

Assemblyman Hambrick:
I have the feeling most elected officials would like the short side of the process rather than the long side.

Patricia Cafferata:
It is important to get these things done in a timely manner. I know that has not happened in the past, but we have not missed any deadlines since I have been Executive Director.

Assemblyman Ohrenschall:
Assuming the bill becomes law, what do you think would qualify as a non-core legislative duty, in which case the Ethics Commission would have jurisdiction instead of the respective House of the Assemblyman or Senator?

Chair Koivisto:
Probably campaigning.

Kevin Powers:
That is correct, Madam Chair. There are a whole lot of other things that do not fall within those core legislative functions. There is a body of case law from the U.S. Supreme Court that provides pretty definite guidelines about what is or is not a core legislative function. As I mentioned, core legislative functions are those that a legislator truly performs in a constitutional sense—voting on legislation and debating legislation, for instance. When the Legislature performs certain specific constitutional duties, such as conducting an impeachment trial, they would be performing a core legislative function. Legislative committees may issue subpoenas, and those would be core legislative functions so you cannot go after individual legislators who engage in those types of activities. The U.S. Supreme Court has made clear that there are many activities that fall outside those core legislative functions. For example, under existing ethics law NRS 281A.400, legislators may not use state property, equipment, or personnel for their own private purposes. If a legislator did something like that, it would expose him to the ethics law. Often we use an example that happened recently to former state Senator Sandra Tiffany when she was in office. She entered into a settlement agreement with the Commission on Ethics, agreeing that she had violated that particular provision of the ethics law dealing with improper use of governmental property for a personal purpose. That kind of conduct was not protected by legislative immunity. We still believe she violated those provisions, and therefore was subject to the Ethics Commission's jurisdiction.

There are provisions in the ethics law that prohibit bidding on or entering into certain governmental contracts. That is not a core legislative function. Legislators would have to follow those types of requirements in the ethics law. There are provisions in the ethics law that deal with misuse of office. Misuse of office could involve taking a bribe, using your legislative credibility to try to get someone a state job, or trying to improperly influence the executive branch in some way. All those are non-core legislative functions and, therefore, as a legislator you would be subject to the ethics law if you violated any of those types of ethics provisions.

The U.S. Supreme Court has said it is legitimate for legislators to talk to officers in the executive branch when trying to convince them what a proper interpretation of the law is. That is a proper function of a legislator, but it is not a core legislative function. It is not like voting or passing legislation, so the U.S. Supreme Court has said it is not protected by legislative immunity. So it is proper for legislators to try to influence or convince members of the executive branch to perform their duties in a certain way, as long as they do not take it to an improper level. If, for example, a legislator was trying to bribe a member of the executive branch, that would be improper legislative conduct subject to the ethics law.

The factual scenarios are very broad. On a case-by-case basis, I am sure there are many activities that would fall within the jurisdiction of the Ethics Commission. I certainly cannot conceive of them all, so I am trying right now to give you a general idea. We believe a good portion of the ethics law still can be applied to state legislators.

Patricia Cafferata:
We have issued opinions concerning use of letterhead, and those were advisory opinions. Sandra Tiffany was using her position as a state Senator to call different agencies in other states for unclaimed property, implying that she was looking for answers to policy questions, or something like that. She was really promoting her business, and that is why she settled. It would be your misuse of office, government property, or a subordinate—for instance, directing a secretary to do something that benefitted you personally. That brings to mind the case of Kathy Augustine. Although she was not a legislator at the time, she was using a subordinate for campaign purposes. It is those kinds of things and not the voting.

Assemblyman Segerblom:
In Senator Hardy's case, the allegation is that his outside job conflicts with his voting. Is that a core issue?

Kevin Powers:
In Senator Hardy's case, all the remaining allegations involved his voting on legislation and whether he disclosed certain information during the legislative process—while voting on legislation, while in front of a committee, or while he was on the floor of the Senate. That is all part of processing legislation, which is all part of core legislative activities.

I want to emphasize that voting and abstention are not immune from scrutiny. They are only immune from scrutiny by the other branches of government. Under Article 4, Section 6, each House of the Legislature has the power to punish its own members for this type of core legislative activity. We are not arguing that legislators are not subject to any scrutiny with regard to voting, abstention, or disclosure of conflicts; however, they are just subject to scrutiny by their own Houses. At the beginning of the session, each House enacted Standing Rules. Senate Standing Rule 23 and Assembly Standing Rule 23 set out the specific provisions regarding voting, abstention, and disclosure. They also set up ethics committees, so someone from the public could file a complaint against a legislator saying that he had a conflict of interest that disqualified him from voting. Those complaints are handled by each House within its own internal process as envisioned by the framers of the *Constitution*. Getting back to your question, we believe Senator Hardy's conduct was all about that core legislative process and that the Commission on Ethics could not proceed against him on that core legislative activity. However he was not immune, because his own House could consider allegations and take whatever action it deemed appropriate if they found some sort of violation.

Assemblyman Segerblom:
You are saying writing a letter for a constituent to a state agency on that constituent's behalf is not a core activity? It seems to me that is our job; at least during the interim between sessions.

Kevin Powers:
That is correct. That would not be core legislative activity. The U.S. Supreme Court has said that legislative immunity, and any official immunity whether judicial or executive branch, is a powerful force because it does create some protection for core constitutional functions. So the U.S. Supreme Court has said that it should be limited as much as reasonably possible to those truly core functions of the Legislature. Your writing a letter as a legislator to an executive branch agency is a perfectly legitimate activity. It is part of what you do as a legislator, and so are constituent relations. But the U.S. Supreme Court has said that that is not a core constitutional function protected by legislative immunity. Therefore, you would be subject to the standard laws that apply to

everyone else. The U.S. Supreme Court is saying that legislators are citizens and they are not above the law; but when they have to perform their core constitutional functions, they need that protection so they can exercise their judgment with independence and not fear repercussions afterwards by other branches of government. But the U.S. Supreme Court has wanted to keep that as narrow as possible.

A good example of this is some U.S. Supreme Court cases dealing with libel or defamation. Some of the cases involved U.S. Senators who had committee staff prepare reports. Those reports were read in committee and on the floor of the U.S. Senate or House of Representatives. Those reports contained defamatory matter—things that would be considered libel or slander under the normal principles of law. The U.S. Supreme Court said that those legislators were protected from civil actions for liability for defamation when that defamation was released within the committee and on the floor of the House. But when that defamation was republished by those legislators outside of those committee and House proceedings, they were subject to defamation actions. I believe one of the legislators went back to his district, held a press conference, and read the defamatory matter from the report. The U.S. Supreme Court said that legislator would be liable for civil damages for that defamation because he took it from the protected sphere to the non-protected sphere.

Patricia Cafferata:
Within the law, you can do that now, but there is a requirement that you file a disclosure statement with the Ethics Commission. I think all legislators are advised by their staff at the beginning that if you have represented a client in front of a state agency, you must file a disclosure of representation form with the Commission on Ethics by January 15 of that year. It is assumed that public officers do that.

Chair Koivisto:
Are there other questions from the Committee? [There was no response.]

Kevin Powers:
We can work section-by-section through the mock-up.

Chair Koivisto:
Has the Committee had a chance to look at the mock-up? Would you like to have Kevin go through it section by section? I read the mock-up and am very pleased with it. You did a great job.

Assemblyman Conklin:
Conceptually, I do not have a problem with the bill; but I would like a walk-through if it is your intent to move the bill today.

Chair Koivisto:
Go ahead, Kevin.

Kevin Powers:
We have already covered the principles behind section 1 involving separation of powers and legislative privilege and immunity, so I do not think we need to go over those again.

Section 2 amends the statutory privileges chapter in NRS that deals with testimonial and evidentiary privileges. The U.S. Supreme Court has recognized that legislative immunity has a testimonial and evidential privilege. This codifies those principles directly into the evidentiary and testimonial privileges chapter in the NRS.

Sections 3 through 5 add some definitions to the ethics law, Chapter 281A of NRS. Right now, the ethics law talks about "member of a legislative branch" and it lumps local legislators in with state legislators. There is a distinct constitutional difference between state legislators and local legislators. So the bill defines "member of a local legislative body" and "state legislator" so that constitutional distinction is reflected in the ethics law. Section 4 defines "member of a local legislative body," and section 5 defines a "state legislator" for that purpose.

Section 4.4 clarifies the definition of "opinion." It is standard practice now that an opinion of the Commission is a final opinion issued after an adjudicatory proceeding, but it is also a settlement agreement. If the public officer or employee enters into a settlement agreement with the Commission on Ethics, that is their final opinion in the matter as well, so the definition of opinion is included in section 4.4 just to add clarification to the ethics statutes.

Section 4.6 defines "political subdivision." It takes an existing definition from the ethics law and makes it chapter-wide. Then that same change is made throughout the ethics law, so there is a consistent definition of political subdivision throughout the chapter.

Section 5.4 makes it clear that a former public officer or employee can be brought before the Ethics Commission for conduct that occurred while he was a public officer or public employee as long as the statute of limitations does not

bar prosecution by the Ethics Commission. Wherever "public officer" and "public employee" are included in the chapter, it means a former public officer or public employee for those actions he committed as either a public officer or public employee.

Section 5.6 deals with three types of privileges and immunities. One is a constitutional privilege and immunity, which we talked about extensively at the beginning of the hearing. The second type of privilege or immunity is the statutory privilege or immunity. That is completely controlled by the Legislature. It creates them and sets the parameters. The final privilege or immunity is a common-law privilege or immunity. That is created through judicial decisions and by the courts, but common law privileges and immunities may be abrogated by statute. So the Legislature here has created a statutory scheme with regards to the ethics law. This provision clarifies that this statutory scheme takes precedence over common-law privileges and immunities, but the public officer or employee retains any constitutional or statutory privileges.

Patricia Cafferata:
Section 5.8 is a substantial change we asked for. This is the revolving-door statute. Right now under the law, the revolving door applies to employers and not to public officials or employees. The Commission on Ethics has no jurisdiction over employers; we only have jurisdiction over public officers or employees, so this takes the existing statute and adds it into the ethics laws. We did not change any of the verbiage except that now the public officer is subject to our jurisdiction and not the employer.

Assemblyman Conklin:
Is this designed to be a cooling-off period?

Patricia Cafferata:
Yes; it is one year, and is currently in the law.

Assemblyman Conklin:
Oh, it is in statute now and will be within your jurisdiction as a result of this change.

Patricia Cafferata:
Correct; that is the only change.

Kevin Powers:
Section 6 is part of the original bill and codifies the constitutional principles of separation of powers and legislative privilege and immunity. Sections 7.2

through 8.2 modify some of the definitions that exist in the ethics law. Section 7.2 takes the existing definition of "business entity," which is in one section of the ethics law, and brings it into the chapter-wide definition, so once again we have gone throughout the statutes and made certain that the term "business entity" is used consistently throughout the ethics law.

Section 7.4 again relates to separation of powers and legislative privilege and immunity making that clear in the law. Section 8.1 superficially changes the definition of "panel." Right now, there are two parts to ethics proceedings. There is an investigatory stage and an adjudicatory stage. When an ethics complaint is filed, the executive director conducts an investigation and presents those recommendations to a two-member panel, which is the investigatory panel. That panel determines whether there is just and sufficient cause to refer the matter to the full Commission for an adjudicatory proceeding and, potentially, a final opinion. During that investigatory stage, we wanted to make clear with this change that the panel would be performing an investigatory and not an adjudicatory function. Some people get confused by that, so we hope this change will make it clear that this is an investigation, and only when it goes to the full Commission will there be a hearing on the merits.

Assemblyman Segerblom:
Can the people who are on the investigatory panel also serve on the adjudicatory panel?

Patricia Cafferata:
No; they are excluded by law, and that is unchanged.

Kevin Powers:
Yes; that is an existing statutory provision in the ethics law. The two members who serve on the investigatory panel cannot serve on the full Commission when it hears the merits of the allegations. Essentially, there is an eight-member Commission. Two members serve on the investigatory panel, so if the allegation goes forward, the merits of that allegation are only going to be heard by six members of the Commission.

The definitions of public employee and public officer are modified so that the terms are being used consistently. However, there is one substantive change in Section 8.2—the definition of public officer. Right now, members of boards of trustees for general improvement districts (GIDs) are removed from the definition of public officer. This change by the Ethics Commission would make those members of the boards of trustees for general improvement districts public officers for purposes of the ethics law.

Patricia Cafferata:
When the legislation was drafted and the GIDs were excluded, no one realized that all the members of GIDs were elected. All elected officers are subject to the ethics laws. This was confusing, because in one place in the law they were not subject and in another place they were. This change makes it consistent; they are elected and subject to our jurisdiction.

Kevin Powers:
The next sections I will address are sections 8.25, 8.35, and 8.45. Right now, Members of the Commission on Ethics, the Executive Director, and the Commission's Counsel have lobbying restrictions imposed on them that prohibit them from engaging in lobbying activities for compensation before local governments and state legislators. The Commission interpreted those lobbying restrictions to be contained within the definition of "legislative function" that was in Chapter 281A.110. For clarity's sake, we removed those provisions from the definition in Chapter 281A.110 and put them in each substantive section with regard to Members of the Commission, Executive Director, and Commission Counsel, so those lobbying restrictions are clear on the face of the statute and they do not have to refer back to that definition. We have done this in a way to carry forward the same policy that is currently being applied by Members of the Commission with regard to lobbying.

As we move through some of the next sections, these are some of the technical corrections with the definitions. For example, Section 8.3 changes the definition of "panel" to "investigatory panel" and uses that term throughout.

Patricia Cafferata:
That is on page 12, lines 5 and 6, and is another substantive change. It refers to the experience or qualifications of the Executive Director of the Commission. The commissioners hired two executive directors in the last couple of years, including me. They found that a lot of people with law enforcement backgrounds applied, but the commissioners did not believe law enforcement personnel brought the right set of qualifications to the position. It became more like a police operation rather than an administrative procedure. As a result, they wanted to change the qualifications for the position. Investigations would still be part of the position, but they felt that the members of law enforcement did not offer the right qualifications for the position. That is a substantial change.

Kevin Powers:
Section 8.4 adds "investigatory panel" so that the term is being used consistently throughout. I already spoke about Section 8.45 and the lobbying restrictions. There is an internal reference change in Section 8.5. Section 8.55

is the statute of limitations, and that has already been discussed. Section 8.6 is another internal reference change. Section 8.65 uses the term "business entity" consistently throughout. On page 17 are technical changes based on use of the term "State Legislator." Although it looks as though there are a lot of changes in subsections 1, 2, and 3, in Section 8.7, these are non-substantive changes. As I mentioned, the ethics law currently uses the terms "member of the Legislative Branch" and "member of the executive branch." We have come up with more specific and exact terms, so we are using "State Legislator" and "member of a local legislative body" and then a "public officer" in the executive department. This is not intended as a substantive change in subsections 1, 2, and 3. Subsection 4 is the disclosure statement previously mentioned. When a state legislator or public officer represents clients for compensation before executive branch agencies, each year he has to file a disclosure form. This just clarifies the method by which he has to file the disclosure form and what is considered to be a timely filing of that disclosure form.

Section 9 was included in the original bill and deals with separation of powers and legislative privilege and immunity. We have discussed that extensively. Section 9.5 deals with the disclosure and abstention provisions as they will apply to other public officers. I want to emphasize on the record that what you see in subsections 1 and 2 of Section 9.5 are not new provisions. The existing disclosure provisions from subsection 4 are being moved to the front of the statute in subsections 1 and 2. The Commission on Ethics requested that because when a public officer is determining whether he has a conflict of interest, the first determination to be made is whether or not he has something to disclose. The individual determines whether he has a conflict of interest. Then, he must determine whether he has to disclose that conflict of interest. After disclosure, the next step is determining whether the individual has to abstain. The statute now will be structured so that disclosure is first and abstention is next, following that logical procedure.

Assemblyman Conklin:
Abstention in the law has long been a concern for me. People should disclose fully; I have absolutely no problem with that. But when a person abstains, a certain number of individuals go unrepresented. To do the job we have been elected to do, we sometimes are caught in a difficult position. For the most part, almost all our elected positions, with the exception of our state constitutional officers, are ordinary people with lives and jobs they keep while doing their elected work. Abstention becomes a problem for that reason, because some conflicts cannot be avoided. When you were making this request, did you give any thought to crafting abstention in such a way that a person cannot abstain, but that there is full disclosure? That way, the public

has the opportunity to decide for themselves if the person is making a self-interested judgment or doing what is in the best interests of the public. I know that is a very tough issue.

Patricia Cafferata:
There is no easy answer. The seminal case on that is the Woodbury case and it speaks about a case-by-case analysis. The first statement in that case is that you are elected or appointed to vote or work; and that must be your first priority. Certainly, at a minimum, it is better to disclose, whether you legally have to or not. You only have to disclose if it is going to benefit you, or if you have a relationship with someone who will benefit. However, when you discuss abstention—that is a tough call. You have to decide whether it is really going to benefit you. If it is going to benefit you; you should not vote. If it is going to benefit your brother-in-law; you should not vote. At the Legislature, that is probably not as big a problem as it would be on a three- or five-person county commission, because you can wind up with disqualifications or absences and then things do not move. If you or someone you have a significant relationship with is going to benefit, then you should not vote. It is that simple.

Assemblyman Conklin:
If that were the standard, I can think of several instances in which we would have no law. There are areas of law that affect each and every member on this panel, and you cannot vote without a quorum. It is the dilemma of a citizen Legislature or of any citizen body. I would agree to that standard in a professional environment where it is the full-time job of elected representatives. They have a choice to avoid conflicts, but in this case your choice to avoid conflicts is to have no income and do this four months every other year for no pay. That is not practical.

Patricia Cafferata:
It is a part-time job for just about every elected official in the State of Nevada. It does not matter whether you are a county commissioner or in the Legislature. Except for the constitutional officers, county clerks, registrars, and people like that, most elected officials are part-time, so it is always a concern. Unless you change state law, my advice is to abstain.

Kevin Powers:
One other change being made is in Section 9.5 of the mock-up where you see language bracketed out in subsection 3 beginning on page 23. There is a standard of abstention for members of county and city planning commissions in a county whose population is 400,000 or more. Deleting that language

removes those separate standards, and places the same standard on all public officers who are subject to this statute.

There is one change in Section 11, beginning at the bottom of page 25 and continuing to the top of page 26. This was a change requested by the Commission on Ethics. Right now, there are limitations on what kind of contracts a public officer or public employee can enter into with regard to agencies other than the one the public officer works for. Right now, in order for a public officer or public employee to enter into one, the contracting process has to be controlled by the rules of open, competitive bidding. So that public officer or public employee stands in the same place as any other member of the public. If those processes are controlled by the rules of open, competitive bidding and the public officer meets the same requirements, he can enter into that type of contract. He can make a bid and enter into the contract.

In the competitive bidding chapter, there are two exceptions: when no one enters a bid or if an emergency contract is necessary. This provides that when those circumstances occur and no one makes a bid, a public officer or public employee is not precluded from making a bid. If an emergency contract is necessary where the same rules of open, competitive bidding do not apply, the public officer or public employee is also not precluded from participating in that process. These exceptions already exist in the open, competitive bidding process, and are recognized here in the ethics law.

Mr. Hambrick mentioned the procedure for going through the ethics-complaint process. That procedure is set forth in NRS 281A.440 and is Section 12 of the mock-up. There are some technical and more substantive changes being made. Subsection 1 provides that when a public officer or public employee requests an advisory opinion, the Commission on Ethics has 45 days to provide that advisory opinion. This provides that the public officer or employee may waive that time limit, which is typical throughout this statute. If there is a time limit, the public officer or employee, of his own volition, may waive that time limit.

Assemblyman Hambrick:
I have seen individual members of both Houses of this Legislature get legal opinions from LCB, from the Attorney General's Office, and now I read here that a legal opinion could come from the Commission on Ethics. At some point, will there be a preference of legal opinions? To the person on the street, there are a myriad of legal opinions so the public gets confused at the number of legal opinions and which one has precedent. How do we distinguish among them?

Kevin Powers:
With regard to opinions from the Attorney General's Office or LCB, those are advisory only because they involve interpretations of the law. Under the separation of powers, the final power or authority to interpret the law rests with the judicial branch of government. Courts are the final arbiter of the meaning of the law, so when the LCB or the Attorney General gives an opinion, they are providing their advice to that particular individual, but that individual must take it that way. That accord could come down on a different decision. If there is any conflict between an opinion between LCB or the Attorney General in a legal setting, it must be resolved by a court of law. Those opinions are advisory or, at best, persuasive based on the reasoning and the citation of authority contained in them.

With regard to the ethics law, there are specific statutory provisions that the Commission on Ethics is given the power to administer, interpret, and enforce. Their initial interpretation of the ethics law is binding on that public officer or public employee, unless the public officer or employee takes the Ethics Commission to court and the court comes to a different conclusion. Once again, the ultimate interpreter of the law is the courts, but initially in the administrative process, it is the Ethics Commission when it comes to those ethics statutes.

Patricia Cafferata:
We give ethics opinions to people who ask for them, and we give those opinions based on the facts you give us. We do not do any independent investigation, but our opinion is binding on the public officer once we have been asked. For instance, Assemblyman Segerblom cannot ask for an opinion on Assemblyman Hambrick's conduct; only Assemblyman Hambrick can ask for an opinion on his own conduct, but it is binding on him.

Assemblyman Hambrick:
I will accept that; it is nice to know. If I as a legislator go to LCB and ask for a legal opinion on a given matter, and at some point I am before your Commission, is the fact that I depended upon LCB's legal opinion a defense? Will you accept that?

Patricia Cafferata:
There are some qualifications. If you rely on a legal opinion and you did not ask us for an opinion, that is a complete defense. We cannot find you in willful violation; but we might find you in unwillful violation.

Kevin Powers:
For the record, those provisions can be found on page 32 of the mock-up. There is a set of three circumstances that must be met where the legal opinion of your own counsel is a complete defense to a violation of the ethics laws.

Patricia Cafferata:
And it is not in violation of one of our previous opinions.

Kevin Powers:
Turning to page 27 of the mock-up, there is a change in subsection 3. Currently under the Ethics Commission's regulations, when a third-party ethics complaint is filed against a public officer or employee, that individual is given only 10 days to put together a response. This change puts in statute that the individual is given 30 days to put together an initial response. In addition, the subsection provides that in that initial response, because we would still be in the investigatory stage, no defense is waived by failing to include it in that initial response. The initial response involves providing relevant information to the Executive Director during the investigatory stage. Her recommendation is then given to the two-member investigatory panel, and they determine when there is just and sufficient cause. That is not the adjudicatory process where you raise defenses and objections. This language says the individual has 30 days to put together an original response, and the individual does not have to raise every conceivable defense and objection during that initial investigation.

We believe this will give public officers and public employees more time to retain private counsel. Private counsel has an obligation to raise every conceivable defense and objection in an initial response unless authorized otherwise. During the investigatory process, this will allow counsel and the public officer or public employee to focus on the information relevant to the investigation. If the process goes beyond the investigatory stage to the adjudicatory stage, that is the appropriate place to raise those defenses and objections in law because the full Commission would be deciding the matter. The two-member investigatory panel does not have the authority to determine those legal issues upfront.

Subsection 4 on page 27 deals with a change mentioned earlier. Originally in the law, the Executive Director had 60 days to come up with a recommendation. This language changes that time to 70 days to reflect the additional time given to the public officer or public employee to respond to the initial complaint. Subsections 5 and 6 contain terminology changes based on definitions of the investigatory panel we discussed earlier.

Going to page 28, currently the Commission has to hold a hearing after the investigatory panel finds just and sufficient cause. The original statute gives the Commission 30 days to hold a hearing on the merits, unless the public officer or employee waives that 30-day time limit. This changes it to 60 days. We believe this change will help the Commission comport better with due process, provide more time to put the hearing together, and deal with any preliminary motions or objections the public officer or public employee makes. It is still a very tight deadline—60 days to hold a hearing is a very tight deadline—and the public officer or public employee retains the ability to waive that time limit.

Page 30 involves Section 13 which amends NRS 281A.480, and which is the penalty provision of the ethics law. Most of the remaining portions of the bill deal with issues of impeachment and expulsion I mentioned at the beginning of the hearing. What we are doing with subsection 4 is clarifying in the law where the Commission should send its opinion when it finds a willful violation of the ethics law. Under subsection 4 on page 31, if the Commission finds that a state legislator has committed one or more willful violations of the ethics law, they refer that to the appropriate House. If the legislator is a Senator, it is sent to the Majority Leader of the Senate. If the legislator is an Assemblyman, it is sent to the Speaker of the Assembly. If that person is the subject of the opinion or requested the opinion, it is sent to the Speaker Pro Tem or the President Pro Tem. What the individual bodies do with the opinion is up to the discretion of the individual bodies and the Standing Rules of each House. This is just a referral of the opinion to the appropriate Body to do with as they see fit. After that, paragraph (b) on page 31 is the same, but involves a willful violation found against a state officer who is removable from office only through impeachment. If the Commission finds a willful violation by that type of state officer, the opinion is referred to the Majority Leader of the Senate and the Speaker of the Assembly, because the impeachment proceedings are controlled by the Houses of the Legislature. Once each House gets that opinion from the Commission on Ethics, they control what they do with it.

Paragraph (c) deals with local officers: If one or more willful violation is committed by a local officer, the Commission may take a complaint to the district courts for removal of that officer under the statutory removal proceedings. If, in its opinion, the Commission finds three or more willful violations, they are required to file a complaint in the district court for removal of that local officer. That is consistent with existing law. All this is doing is trying to make that as clear and specific as possible.

Section 14 involves NRS 281A.500. That has been discussed already with regard to the acknowledgment that all public officers and public employees

must file, acknowledging that they have read and understood the ethical standards. New requirements in subsection 1 have already been discussed. Language in subsection 2 specifies the methods for filing the acknowledgment form and is consistent with the methods we discussed earlier with regard to disclosure forms dealing with representation before executive branch agencies. This sets forth the method and how to timely file the acknowledgment form.

Subsection 4 makes it clear that a willful refusal to execute and file the acknowledgment form is a willful violation of the Chapter. It is also nonfeasance in office under subparagraph (b) and could subject the local officer to removal from office. Subparagraph (b) is consistent with existing law, but uses more specific language. It is not changing existing law. Subsection 5 of that section makes clear that "general election" refers to the general statewide election held in NRS 293.060.

Section 16 has technical changes to terminology and makes them consistent throughout the ethics law. That takes us to Sections 18 through 24, the remaining sections of the mock-up. We have already discussed the changes being made in Sections 18 through 24—they are being made to comport statutory law with the constitutional provisions governing impeachment of state officers in the executive branch and removal of state legislators under the *Constitution*.

Section 25 repeals some of the sections we discussed earlier, to change terminology and move those provisions dealing with the cooling-off period into the ethics law. That concludes the section-by-section overview.

Chair Koivisto:
Do we have any further questions by the Committee?

Assemblyman Segerblom:
Going back to the Hardy case; Ms. Cafferata, do you agree that the allegations against Senator Hardy involve core legislative functions?

Patricia Cafferata:
I am not exactly sure what definition of core legislative functions Kevin is using, but it certainly involves disclosure and abstention, and that is what legislators do.

Assemblyman Segerblom:
Do you agree that the Commission does not have jurisdiction, or is that what the Supreme Court is deciding?

Patricia Cafferata:
That is what the Supreme Court is deciding. I do not agree. The Ethics Commission agrees that we did have jurisdiction.

Assemblyman Segerblom:
Kevin?

Kevin Powers:
I do not want to re-litigate or re-argue the case here, but in their pleadings, the Ethics Commission did agree that the conduct Senator Hardy was alleged to have committed was within the sphere of legitimate legislative activities. The Ethics Commission disagreed with regard to whether or not there was an institutional waiver of legislative immunity by enacting the ethics law. So there was an agreement that it was about core legislative functions; there was disagreement over other constitutional issues, and those will be resolved by the Nevada Supreme Court.

Assemblyman Ohrenschall:
On page 35, lines 5 and 6, why are you omitting that definition of political subdivision? Is it defined somewhere else?

Kevin Powers:
We are taking that existing definition of political subdivision and moving it to the beginning of the chapter, so it is a chapter-wide definition and so the term is defined consistently throughout the ethics law.

Patricia Cafferata:
It is currently in different sections of Chapter 281A, and that was one of the things we wanted to make consistent.

Assemblyman Conklin:
Chapter 14 now reads that a public officer has to sign an acknowledgment of ethical standards when he first runs for office, but not again. That is current statute, right? [Kevin Powers nodded in agreement.] Then, am I wrong that now you have to sign one each time you run? Is that the intent?

Patricia Cafferata:
Currently the law is very confusing. It now says you must sign an acknowledgment when you file your financial disclosure statement.

Assemblyman Conklin:
The first time.

Patricia Cafferata:
No, because you file them every year. The law is not clear, however.

Assemblyman Conklin:
In its current form, the law says that every public officer shall acknowledge that he has received, read, and understands the statutory ethical standards. The acknowledgement must be on a form prescribed by the Commission and must accompany the first statement of financial disclosure that the public officer is required to file. That is when you file for office.

Kevin Powers:
I would agree, Mr. Conklin. That is our interpretation of the existing statute—that you file it once when you file your first statement of financial disclosure. What the section does is have you file it January 15, following the general election, and then each January 15 thereafter while you are in office. This will require public officers and public employees, including legislators, to file this acknowledgment form once each year at the same time financial disclosure statements and campaign and expense reports are filed.

Assemblyman Conklin:
Ms. Cafferata, is there a particular reason you need annual copies of the same form? Is it the two-year statute of limitation?

Patricia Cafferata:
You were asking about filing financial disclosure statements as an elected person, and we do not get those. I suppose the argument is that if you filed one when you were elected or appointed to office, and then four years later you filed another one, the ethics laws could have changed. So it would be helpful if you read the new laws and filed an acknowledgement that you knew what the new law was. To my knowledge, no one uses them except the Ethics Commission. If someone files a third-party complaint against you, not knowing the law is not a defense, but if we have this form stating that you read the ethics laws, it is harder to make that argument.

Assemblyman Conklin:
I am not opposed to it, and I certainly think people should read up on the ethics laws because they do change, but it seems overkill to have to file them every year. Maybe there is a better way to distribute that information.

Assemblywoman Gansert:
Will the new documents be provided when we file? How do we receive them? The language says that we are acknowledging that we have received, read, and understood them. Will they be available every time someone files for an office?

Patricia Cafferata:
I do not know what happens with elected people. Probably some county clerks hand you a packet of documents when you file for office. Sometimes they give you those acknowledgment forms and sometimes they do not. The Governor gives acknowledgment forms to gubernatorial appointees and those people file them with us.

Assemblywoman Gansert:
It says that each public officer—an elected person—and people who are appointed ...

Patricia Cafferata:
If you pass this bill, everyone will be filing with us.

Assemblywoman Gansert:
When we file at the Washoe County Registrar of Voters Office, they give us a packet.

Patricia Cafferata:
I do not believe the acknowledgment form is in that packet, at least in Washoe County, because I have spoken with people elected in Washoe County and they did not know about the form. If you pass this legislation, we will make certain the clerks and registrars of voters put that form in your packets.

Assemblywoman Gansert:
That is my concern; that we are supposed to be acknowledging something that may not have been provided to us. Some people, particularly someone new to elected office, may not even know these forms exist.

Patricia Cafferata:
We would make sure that the clerks include this form with their packets. The Governor does it already, but I do not believe all the clerks give those forms to elected officials.

Assemblywoman Gansert:
The Secretary of State sends us postcards as reminders, and that might be another thought. Someone should be tracking this to be certain the information is provided so we can acknowledge that it has been received.

Patricia Cafferata:
We could do that if we had the list of elected officials. Right now, we get the list of elected officials because we send notices on the financial disclosure statements. If all financial disclosure statements are filed with the Secretary of State, as another bill has proposed, we will not be getting those lists any more.

Chair Koivisto:
Having filed seven times in Clark County, Clark County does provide the acknowledgement forms. Are there other questions or concerns from the Committee? We have some people in Las Vegas who want to testify.

Julie Tousa, President, Nevada Center for Public Ethics, Las Vegas, Nevada:
We have some concerns with S.B. 160. Our concerns are with the original bill.

Chair Koivisto:
You should have a copy of the mock-up of the bill that we have been hearing.

Julie Tousa:
Yes, we have a copy of the mock-up, but our testimony relates to the original portions of S.B. 160.

Kevin Powers:
The mock-up before you includes all the original provisions from S.B. 160. There has been no change to those provisions, so I believe this testimony with regard to S.B. 160 will apply equally to the S.B. 160 provisions of the mock-up.

Julie Tousa:
Our primary concern is that S.B. 160 appears to undermine, rather than support, ethical behavior in the Legislature. I will describe our concerns. We believe adoption of S.B. 160 is unnecessary at this time, and may be counter productive. Our first concern with S.B. 160 is that the bill is being considered at the same time as the case brought by Senator Hardy challenging the constitutionality of the abstention, disclosure, and voting provision of the ethics law is pending before the Nevada Supreme Court.

The Supreme Court expedited consideration of the case and oral argument was on April 20, 2009. A decision will likely be rendered before the close of the

Legislative Session. Further legislation on the nature and scope of the separation of powers doctrine and legislative immunity, therefore, appears to be premature. If the Supreme Court determines that the challenged provision is unconstitutional, the need for legislation evaporates.

Chair Koivisto:
Ms. Tousa, we have your written testimony (Exhibit D). It would be very helpful if you could just hit the high points, because we can all read this.

Julie Tousa:
Overall we believe that S.B. 160 does not apply, and that it is very important that we wait until the Supreme Court makes its decision.

Our next concern involves monitoring of legislators' abstention, disclosure, and voting. We are concerned that S.B. 160 seems to be less about reinforcing separation of powers' arguments and more about ensuring public interests are not informed. The legislators' ethics committees, established by the Standing Rules of the Senate and Assembly to monitor abstention disclosure and voting, appear to be very poor substitutes for the current ethics law. From our review of the legislators' own ethics methods to monitor their members, everything is very vague. It is not specific and there are no timelines. It is not specific enough to know what would happen if an actual case were brought before the Assembly or the Senate.

Assemblyman Conklin:
Ms. Tousa, I read through your document. I received a copy via email and appreciate that. I think maybe there is some misunderstanding. I certainly respect the position of your organization and its desire to protect the integrity of all of the elected institutions of our state. Are you familiar with the Standing Rules of each House of this Body, the Joint Standing Rules, the order of procedures, and how we govern ourselves?

Julie Tousa:
The gentleman seated next to me, Gerald Kops, has read them more thoroughly than I, so I would like him to respond to that question.

Gerald Kops, Member, Board of Directors, Nevada Center for Public Ethics, Las Vegas, Nevada:
Thank you for allowing this public comment. When I became aware of the litigation proceeding to the Supreme Court regarding the challenge to the voting provisions of the ethics law, I began paying particular attention. The primary argument was that the law was unconstitutional, but that ethics issues would

be taken care of by Standing Rule 23 in both Houses. I have read both of the rules. It is pretty clear how the members of these committees are appointed, but strangely enough, members of the committee are non-legislators. That is very interesting from this perspective, because the primary challenge being made by Senator Hardy is that his legitimate legislative activity is entitled to be judged by his peers. Standing Rule 23 appoints people who are not legislators to judge the conduct of a legislator. It seems to me that Rule 23 has the same problems as Senator Hardy suggests is present in the current ethics law. That is one example.

I called the Chief Clerk of the Assembly and the Secretary of the Senate, because Rule 23 says that complaints are brought on forms to be provided by these offices. Guess what I found out? The forms are not ready to be forwarded to anyone who might have a complaint with regard to the ethics challenge. It seems to me that Rule 23 and the procedures that have been suggested are not ready for "prime time." If Rule 23 is going to be the mechanism for monitoring ethics complaints, there has to be some real careful work and study of that particular law by—I suspect—the Legislative Counsel Bureau. If LCB drafted the law, they drafted it so that your ethics will be monitored by people who are not legislators. That is very strange. Those are just a couple of reasons why it seems to me that Rule 23 is not ready to be used as a mechanism for judging or monitoring the ethics of legislators. I would appreciate the opportunity to amend or provide written material in answer to your question concerning why this particular law and the passage of it, is premature.

Chair Koivisto:
Certainly. If you have something in writing, the staff will fax it up to us.

Gerald Kops:
May I have an opportunity to comment on some of the comments made by legislative counsel? I have not had an opportunity to craft written response with regard to the statements he has made, but if I could orally alert the Committee to some issues that I have, I would appreciate it.

Chair Koivisto:
Sure, go ahead.

Gerald Kops:
I was intrigued by the opening remarks of the legislative counsel. In fact, he is nonpartisan. Counsel Powers is definitely nonpartisan, but he has and holds an apparently very sincere and strong view with regard to the meaning of the

ethics law in the *Nevada Constitution*. It is very interesting that in 1977 the Legislature passed the ethics law which included the voting provisions that are now under challenge. They have been in the law for 32 years. Who crafted the original law and all the amendments through 2007—the Legislative Counsel Bureau. The abstention and voting provisions are still there after 32 years. It seems to me that this raises some ethics questions with regards to issues as far as the Legislative Counsel is concerned.

In 1977, the Legislature adopted an ethics law. That was the will of the Legislature. That law remained in effect and was amended as late as 2007. The abstention and voting provisions were amended without objection from the Legislative Counsel Bureau. After a complaint by a single Senator, Senator Hardy, the Legislative Counsel Bureau that crafted and supported the law for 32 years has all of a sudden done an about-face. It seems to me that one of the issues the Legislature might want to inquire into is this: When, and under what circumstances, does the Legislative Counsel Bureau abandon supporting the laws it crafts? That is exactly what has happened here. In the Supreme Court, who is representing the will of the Legislature? Who is representing everyone who voted for the original ethics laws and all the amendments? It is not the person who crafted the law. The person who crafted the law that created the Commission on Ethics is arguing against it.

Here is the analogy: I was able to listen to the Supreme Court argument on my computer and as I was listening to it, I could not help but feel for the Legislative Counsel for the Ethics Commission. It seemed to me to be very strange. Here is counsel for a body created by the Legislature arguing that it is legitimate. And the attorney who crafted the law is arguing that the ethics law is illegitimate, so the child of the Legislature is arguing with the father of the law.

When the original ethics law was passed in 1977, the Legislative Counsel did an excellent job intruding into the executive branch powers. The Legislature has created a commission that can judge the ethics of the executive branch. This is normally done by executive order. The President of the United States issues executive orders regarding ethics of executive branch members. So the argument that is being made by the Legislative Counsel becomes an argument for effectively finding the ethics law unconstitutional with regard to its application to executive branch members.

Thank you very much for listening, I would be happy to provide support for some of my statements in writing.

Chair Koivisto:
Thank you, Mr. Kops. Please provide us with that information as soon as possible, because we do not have a lot of time left in this session.

Gerald Kops:
I certainly will.

Chair Koivisto:
Are there any questions from the Committee? [There was no response.] Seeing none, we will bring the bill back to Committee and close the hearing on S.B. 160.

[The Committee had a short recess as the Chairs exchanged seats so Chairman Mortenson could convene the Constitutional Amendments portion of the Committee.]

Chairman Mortenson:
We will open the hearing on Senate Joint Resolution 2 of the 74th Session.

Senate Joint Resolution 2 of the 74th Session: Proposes to amend the Nevada Constitution to revise provisions relating to the selection of justices and judges. (BDR C-177)

Senator William J. Raggio, Washoe County Senatorial District No. 3:
This is my first opportunity this session to appear in the House of the People, and I am privileged to be here and thank you for arranging for this hearing.

The longer you serve in this body, you start to reminisce. I was reminiscing about the bill you just heard, and I talked to a couple of Committee members during the recess. At the risk of wearing out my welcome, I am the culprit. I was the father of the Ethics Commission back in 1977. We used to get accused of having conflicts all the time, so I decided we needed some place we could turn for advisory opinions. That is the reason the Ethics Commission was created. It did not have all the bells and whistles referenced by the last speaker from Las Vegas, or any of the things you heard here today. So I apologize to this Committee for having to go through all this travail. The original intent was to provide public officers with an opportunity to get advisory opinions. Over the years, it has grown into the vehicle and process that it is today. I assume only the responsibility for the initial creation, and nothing else.

Let me address Senate Joint Resolution 2 of the 74th Session. [Senator Raggio gave his testimony by reading from prepared text (Exhibit E).] This is probably

the best crafting of this type of legislation now before any state in this nation. Just for your information, in Nevada, a Supreme Court candidate fund-raising record was broken in 2004. Over $3 million had to be raised for Supreme Court elections alone. Where does that money come from? It comes primarily from lawyers and litigants and those who have potential issues before the Supreme Court. I provided a list of the states that have instituted this type of judicial reform (Exhibit F). There has been an array of negative media reports concerning judicial performance in Nevada (Exhibit G). The problem is that the public perception has been disturbed by the manner in which we elect judges, and the influence the present system has on the acceptance by the public of the integrity of the courts. As a result, there is considerably more support now for this concept. I think it is timely, since it has passed one session of the Legislature, that we afford the public the opportunity to vote on whether or not this system, which is a better system than was ever presented before, ought to be instituted in the initial selection of judges. This does not take away the right of the public to vote. It gives the public information they do not presently have about electing judges or Justices of the Supreme Court. I am frequently asked who to vote for, for judge and Justice of the Supreme Court, probably because I am a lawyer. That information is really not widely available in any kind of detail for nonpartisan offices such as judicial positions. They are supposed to be unbiased and completely impartial so they can hear all sides of an issue. Today most judges run unopposed, so what does it take for one judge to get elected? One vote. This legislation would require a judge to receive 55 percent of the votes in a retention election. To me, that is giving far more oversight to voters.

I have seen a lot of judges sitting in the waiting rooms of law offices or those of potential litigants seeking campaign contributions. I think it is demeaning and degrading. I would like to read a quote from Ohio Supreme Court Justice Paul E. Pfeiffer into the record:

> I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race. Everyone interested in contributing has very specific interests. They mean to be buying a vote. Whether they succeed or not, it's hard to say.

We received a letter from former Supreme Court Justice Sandra Day O'Connor. I think it is compelling, and I cannot think of anyone whose credibility or reputation should be more revered than former Supreme Court Justice Sandra Day O'Connor. I would like to read this letter into your record (Exhibit H). It is addressed to Assemblywoman Koivisto and Assemblyman Mortenson and to your Committee.

I understand that the Senate has passed and the Assembly is considering a resolution this week to adopt a merit selection system for Nevada's judges, or at least most of them. This is a topic of interest to me. When I was in the Arizona State Senate I helped construct a change in Arizona's law to adopt a merit selection for our appellate court judges and the judges in our larger counties. It remains one of my proudest achievements, and it has given Arizona as good a judicial system as any in the United States. It has been a great blessing in Arizona, and my sense is that Nevada would be equally well served if you were able to adopt a merit selection system. (In writing this, she had a copy of our proposed resolution.)

Such a system would ameliorate the substantial problems caused by judicial elections. Elections frequently produce judicial candidates who raise money for their campaigns from the very lawyers who will appear before them and from special interest groups that have or will have legal issues to be resolved in the courts. Such fundraising leads to the perception, and sometimes the reality, that justice is not blind but biased. It has been shown that voters in states that elect judges through partisan elections are more cynical about the courts, more likely to believe that judges are legislating from the bench, and less likely to believe that judges are fair and impartial.

An appointment process for judges followed by periodic retention elections offers clear advantages over judicial elections. Citizens can be confident that appointed judges are insulated from special interests who would seek to buy justice through campaign donations. Judges who don't need to raise money for partisan campaigns can focus on applying the law fairly and impartially to each litigant. Retention elections are a critical component of the system. (As I indicated, this would include us with 15 other states that have retention elections.) They provide for accountability without subjecting voters to overt campaigning. Retention elections are most effective when information is gathered on judicial performance and made available to the public through voter guides. These guides give citizens the unbiased information on judicial performance necessary to an informed retention vote. (This goes even further. A commission on judicial performance with all that information, interviews, recommendations, and voting would be in a report.)

> One of the most difficult issues for states that use a merit-selection system is the composition of the selection panel. I believe attorney representation on such panels is essential, but that the panels must not be dominated by lawyers. (The permanent commission and temporary commission contain appointments of non-lawyers as well as lawyers.) ... States that allow their selection panels to be dominated by attorneys face the sometimes-founded attack that judicial selection is purely a matter of insider or bar politics. (That is why this resolution and the composition of the performance commissions advocates and includes attorneys and non-attorneys.)
>
> A fair and impartial judiciary is one of the essential elements of good government. I wish you success in supporting a good system of judicial selection for your state....(signed Sandra Day O'Connor).

I appreciate your time and am happy to respond to any questions.

Assemblywoman Koivisto:
I have an email from Speaker Buckley's office. She was planning to be here to testify, but because we went so late on the first bill she had to leave.

Senator Raggio:
She did appear last session in support of the measure.

Assemblywoman Koivisto:
Yes. Do you know what percent of the vote is required for retention in other states that have this system? Also, do you know what these other states' experiences might be relating to fundraising for retention elections?

Senator Raggio:
I do not have information on either of your questions, but will be happy to get it for you. The bill we originally introduced had a retention requirement of 60 percent. I think this Committee decided to amend that figure to 55 percent, which is where it is now. It would seem to me that if a person is running unopposed, has a recommendation, but cannot get 55 percent of the vote, it would be hard to justify that individual's retention in office.

Chairman Mortenson:
Are there additional questions from the Committee? [There was no response.] Senator, it is going to take a tremendous effort to convince the public to change from an elected system to an appointment system. That is the way it will be

viewed. Are there any entities that are going to work to convince the public of this or do some publicity to encourage it?

Senator Raggio:
My experience has been that there is a lot more interest this time than ever before, because of all the negative publicity lately in connection with the judicial election process, as well as the activities of judges. I am not going to name judges, you can name them yourselves—these are judges who probably could be exhibits for this campaign when it occurs—but I can tell you that there is a lot more interest now. The State Bar of Nevada has endorsed the proposal. I do not know whether there will be editorial or financial support. Chair Koivisto asked about campaign funding in other states where there are retention elections. It is just a guess, but I cannot imagine that it would take a lot to finance a retention election. To those who say a judge would never be removed, California has this process and removed three judges. So retention is not automatic; the judge must run on his record. What else can a judge do? What can a candidate for judge promise? A retention election is the fairest way to evaluate a judicial candidate, and the public has the right to vote on that. The answer is that I am not sure, but I think there will be a lot more support for this procedure because of what has occurred over the years and the public's perception about some of these processes.

James Hardesty, Private Citizen, Reno, Nevada:
I would like to make clear that I appear here today not in my capacity as Chief Justice of the Supreme Court, but as an individual who has been through this process. I have not been appointed. I always ran as a candidate in the election process, but I do believe this suggestion has enormous merit for consideration. At least the people of the State of Nevada ought to evaluate how we select our judges.

For me, the most important aspect of this bill is the process by which we vet candidates' qualifications to serve as judges. Do we want to pick a judge based upon who has raised the most money, run the best 30-second ad, put up the most campaign signs, or attended the most political events? Or would we rather select a judge who has actually tried cases, can write a sentence of more than three words, has been in a court room, and knows the rules of evidence and the rules of law? I submit that in several elections in this state, judges have run for the district court, which is the general jurisdiction trial court in this state, having never tried a jury trial in their careers. Do you want a person serving as a judge who has never tried a jury trial hearing a death penalty case? Do you want a person hearing a major products-liability case who has never tried a jury

trial before? But that person can hear that case because he won an election and not because he is qualified to serve as a judge.

Similarly, do you want someone serving on the Supreme Court who has never argued a case in the appellate court in his career? Who has never written a brief before an appellate court in his career? Do you want someone serving on the Supreme Court of the state or on the district court who has a mental health problem; who has a drug problem; who has a criminal history—none of which was disclosed in the process of an election campaign—as contrasted with the Commission on Judicial Selection, which I currently chair.

I have been through this process as chairman in two different setups. First, we vetted the candidates for replacement of two family court judges in Clark County. In that process, we not only receive a thorough review of each individual's educational and professional background, but we get criminal background checks, credit checks, tax returns, and the candidates sign releases for access to mental health records and health records. In this process, we found two candidates with criminal backgrounds that probably would not have been disclosed in the process of an election.

Similarly, at the invitation of the Clark County Commission, I chair the committee that is currently vetting candidates for selection to two justice of the peace positions there. We publicly interviewed 28 candidates, and are now down to the final 8 candidates who will be interviewed on May 15. That process utilized the same rules that the Commission on Judicial Selection has adopted following an Arizona model, which is a further reason you should consider endorsing this. Those rules call for a judicial-selection-commission process that is public, in which the interviews are open and anyone can come in and explain to the commission why the individual should or should not be considered as an applicant and recommended to the Governor for appointment.

This is not a "star chamber" process; at least not anymore. We have had a number of people testify in front of the Commission on Judicial Selection at the state level, and in front of the justices-of-the-peace interview process, about candidates they feel should or should not be considered by the Commission or the selection committee.

The other feature of this bill that I think is enormously important and that the court intends to pursue, regardless of what happens with S.J.R. 2 of the 74th Session, is the judicial evaluation system. As the lawyers on this Committee know, judges are currently evaluated through what I would call a "popularity contest" in both ends of the state. The Washoe County Bar

Association's evaluation is a little bit more in-depth, but both are essentially blind reviews of the judges by lawyers only. They do not interview my court staff; they do not talk to my law clerks; they do not interview jurors or witnesses or a whole plethora of people who come in contact with a judge, to evaluate that judge's performance. I submit that there is a lot more involved to being a judge than just submitting yourself to a lawyer's evaluation and a newspaper report. This evaluation report, also trailing on the recommendation of the Arizona model, is a very in-depth, "360 degree review" of the judge's performance in office. We think that would provide a much-improved review of judges for the public to determine on a retention basis.

I would urge the Committee and the Assembly to give the voters an opportunity to review how judges are selected in the state. Judges do not take a position on this matter. I do not take a position on this matter nor does the court, because it is up to the people how they wish to have their judges picked. As far as I am concerned, I will participate in either process, but I share with you my personal experience and what I think provides the best-vetted individual for consideration.

Chairman Mortenson:
Are there any questions for the Chief Justice? I see none. Thank you very much for your testimony.

Robert Crowell, Past President, State Bar of Nevada, Carson City, Nevada:
I am here appearing as the Past President of the State Bar of Nevada and a practicing lawyer in this state for 36 years. I support S.J.R. 2 of the 74th Session for all the reasons Senator Raggio and retired Justice Sandra Day O'Connor mentioned in her letter to you.

This is an important measure in my view for a number of reasons. I believe this bill takes the money out of judicial elections. Money in judicial elections creates, as you heard earlier, not only the appearance of impropriety, but also the appearance of bias. By the mechanism set forth in S.J.R. 2 of the 74th Session, we go a long way to removing that. It also removes what I think is an awkward situation judges are placed in when they are raising money for their campaigns from lawyers. I get calls all the time asking me to contribute to various judges' campaigns. I do not want to do that, but it is an awkward situation.

I also believe strongly in the election process, and I believe it is important for people to get out and see what is going on in their communities. I believe that is important for judges as well. I believe that this bill, as currently crafted, is a

fair blend between the appointment process and the election process, particularly when it comes to the retention process.

Finally, and most importantly, I believe that this bill enhances the judicial qualifications and quality of our judges in this state. As you heard from Justice Hardesty, it is difficult for judges to explain much about themselves during a judicial election. I cannot tell you the number of times I have been asked what I like about a judge, or why I am voting for a particular judge. I am also asked if I know where a particular candidate for judge stands on particular issues. Candidates routinely say that they cannot answer those questions because if they do, they will be pre-judging the issues.

Citizens are naturally concerned about that dearth of information, because then it is hard for them to make a determination as to whether or not a person should sit on the bench. Citizens cannot get that information because it is difficult for a judge to explain where he would be on various issues, and particularly political issues, without violating the judicial canons of ethics.

I tell people that I look for a judge who is fair, impartial, unbiased, understands the need for access to justice in this system, understands the stress of litigation on not only litigants but lawyers, and is educated in the law. I believe the best way to make those determinations at the first cut is by a judicial selection committee that is properly embodied and charged with evaluating people on those criteria. For those reasons, I urge your passage of S.J.R. 2 of the 74th Session.

Bruce Beasley, President, State Bar of Nevada, Las Vegas, Nevada:
I am here to speak on the bill as a citizen and also on behalf of the governing board of the State Bar of Nevada. We urge the passage of S.J.R. 2 of the 74th Session for all the reasons stated by the previous speakers. There are a couple of important considerations that need to be amplified. When I started practicing law in Nevada 30 years ago, Nevada had fewer than a million people divided among a number of counties, small towns, and a couple of fairly good-sized cities. In that circumstance, there was a fairly good chance you either knew the person who was running for judge, or knew someone who knew the person running for judge because you had lived in Nevada all your life. The prospective judges lived in Nevada all their lives and were known in the community.

At least in Clark and Washoe Counties, that simply is not true any more. The counties are too big. Even if the judicial candidates have lived there all their lives, most of the voters have not lived there all their lives, and it is almost

impossible for regular citizens to know any significant number of the people running for office.

I think the system we had worked well for almost 130 years, but the state is much bigger now. It is just not possible for people to know who to vote for using the 30-second sound bites they get. Voters are certainly not going to spend two weeks in a person's court room to get an idea what that judge's judicial demeanor is like.

This proposed system would give people the right to vote-out judges who had not performed. The evaluation committee is much better than anything that currently exists. It is an in-depth evaluation presented to the people like a voter's guide, and the selection process initially is, as Justice Hardesty said, completely open to the public. You can go and watch. It is the system Arizona has. If I were seeking an appointment for judge, any one of you could come and watch me be interviewed. You could hear the questions I get; you could watch people testify against me or for me. If you had a reason and some knowledge of me, you could come in and say you thought I should or should not be appointed judge. That is very different from the system that has existed until very recently here, but it is a system that gives lots of public exposure to the people who are seeking judgeships.

In order for our system of justice to work over the long term, it has to be fair and it has to be impartial. Probably as important or more important, the citizens of Nevada have to believe that the system is fair and impartial. With the statistics you heard from Senator Raggio, and the kind of anecdotal comments I get from clients, a lot of people do not believe that is true. I would urge the passage of S.J.R. 2 of the 74th Session.

Assemblywoman Koivisto:
Who would be on the commission?

Bruce Beasley:
There would be members of the public, members of the judiciary, and lawyers appointed by different groups. Some members would be appointed by the Governor; some would be appointed by the State Bar; and some would be appointed by the Supreme Court, much like judicial selection committees are now. They are comprised of a range of people.

Cam Ferenbach, Vice President, State Bar of Nevada, Las Vegas, Nevada:
I have practiced law in Clark County for 29 years. For the reasons Mr. Beasley articulated, as the state has grown, and particularly in Clark County, we face an

increased danger that an unqualified individual can successfully run for a vacant court seat; or even successfully challenge a highly qualified, fair, and efficient incumbent. The reason is that there is limited relevant information regarding candidates available to the voting public.

Senate Joint Resolution 2 of the 74th Session creates a commission on judicial performance which will provide the public with substantive, fact-based reports and recommendations on the judge who is running for retention. Of course, the bill also maintains, with significant improvements, the Commission on Judicial Selection. With a high degree of openness to the public, the Commission selects applicants that are qualified for appointment by the Governor. The selection is based on the professional and personal record of the applicant.

Based on my experience with the Clark County Bar, the State Bar, and various community efforts, I am personally confident that if this amendment is passed by you, and then eventually by the voters, the State Bar and the public will provide commission members who are willing and able to do the hard work that this system will require. If that happens, the administration of justice in our state will be very well served. There is the additional benefit that we will be moving away from a system where political donations, TV ads, and billboards can strongly influence, if not determine, the outcome of our present judicial selection process.

Senator Raggio:
For your record, I would like to respond to Chair Koivisto's question. On page 7 of the bill, you can read that the commission would be a permanent commission comprised of the Chief Justice or his designee. In addition, there would be four members of the Bar appointed by the Board of Governors of the State Bar of Nevada and four persons, not members of the legal profession, appointed by the Governor.

For the district court, there would be a temporary commission comprised of the members of the permanent commission. In addition, two lawyers would be added by the Board of Governors of the State Bar from that particular judicial district; plus two additional residents of that judicial district, not members of the legal profession, would be appointed by the Governor. On page 8, language sets out additional restrictions that would keep the commission as unbiased as possible.

Chairman Mortenson:
Are there any questions? [There was no response.] Now, we will go to those in opposition to the bill.

Lynn Chapman, State Vice President, Nevada Families, Sparks, Nevada:
We are opposed to this bill. I am here as one of the "little people" of the state. We do not vote for federal judges or U.S. Supreme Court judges. State judges are the closest to the people, and that is why we feel we should be able to vote for judges.

People should have the right to say who will be sitting in judgment of them. Our constitutional republic has a government that is supposed to be for and by and of the people. If we lose the right to vote for one branch of government, that does not give us the checks and balances we need.

I have a story about a Brooklyn, New York, District Attorney who was investigating a party chairman, Clarence Norman, for allegations that Norman was demanding money for candidates. In order to become a state court judge in Brooklyn, a candidate had to be selected by the chairman of this party—Chairman Norman. Then the candidates were referred to a screening panel that was appointed by Chairman Norman. They would screen the candidates and, finally, the judges were selected by judicial convention made up of friends, relatives, business partners, and employees of the party overseen by Chairman Norman. Only then were the people able to vote for a judge who would serve on the bench for 14 years.

Chairman Mortenson:
Ms. Chapman that is not the system we are discussing here.

Lynn Chapman:
I know, but I wanted to show how corruption can happen. I had a question. Do judges being retained buy mailings and billboards and such to run their retention races? Would they still have to do that?

I would also like to mention that I do know a lot about many of the judges in the area because I read the newspaper. I see how different judges have decided different cases. You can ask people who have been in court with judges how they were treated and what the judges were like. We have ways of finding out about people.

The International Association of Women Judges had a conference in May 2006. In their report, they stated that an elective system favors women and minorities who are not insiders and would never be appointed to the bench. When those outsiders are competent and talented, they can win elections. Deborah Agosti, former Chief Justice of the Nevada Supreme Court, favors election of judges,

saying that she could never have become a judge, much less a chief justice, in an appointive system.

Please, do not vote this through. I know people say that we will have a chance to vote for retention, but then I would only get to vote for someone else's choice for a judge.

Assemblyman Hambrick:
How do you reconcile the fact that some people and attorneys believe some judges are being bought because those with the best sound bites or those who get the most money are winning? Do you still believe the election process truly elects the best qualified individual or does the best-funded judicial candidate win?

Lynn Chapman:
I think that could happen in any type of election or appointment. Considering the corruption I was telling you about, it happens whether elected or appointed, so it could happen for an appointment as well. An individual could buy the office in either situation.

Assemblyman Hambrick:
This might be a little more subtle though.

Assemblyman Horne:
Do you not consider it to be ironic that you are opposed to us sending this to the people to vote on? You do not want this proposal to even be on the ballot to be considered.

Lynn Chapman:
We have already voted on this issue a number of times. The voters keep saying, "No." I do not know how many times we have to keep voting on it. We have always said that we want to retain the right to elect judges rather than appoint them.

Assemblyman Horne:
I would agree with you if the state was the same as it was before, but it is remarkably different than in the past.

Lynn Chapman:
I do not see it that way. I think the people should not have their rights stripped from them, and I think that is what is happening.

Assemblyman Horne:
Not if they are voting for it. Not if they vote for the change. Your group has always advocated allowing the people to vote for any changes. You quoted Justice Agosti, but I thought your group was opposed to her.

Lynn Chapman:
We were opposed to what she did. But she was Chief Justice and she was elected, not appointed.

If this goes to a vote of the people, so be it. That is fine, too, but we have already voted on this. That is my point. We have voted on it already, and we have always said that we wanted to keep the right to vote for our judges, especially the judges that are the closest to the people.

Assemblywoman Koivisto:
Electing judges was probably all right 50 years ago when we did not have the population we have now, but our experience with some of the judges elected to the bench in Clark County during the last two or three years has been horrendous.

Chairman Mortenson:
Are there any further questions for Ms. Chapman? I see none.

Janine Hansen, President, Nevada Eagle Forum, Elko, Nevada:
I certainly appreciate the opportunity to discuss this issue with you. This is a wonderful forum we have at the Legislature to have discussions with legislators who have been elected by the people, because you are more responsive to the concerns and the needs of those you represent.

It alarms me when I see one bill after another being considered in the Legislature which would take away the right of the people to vote. This will go on the ballot if it passes this House. We will be participating in that activity, and that is as it should be. But we all know the process begins here, so if you oppose something, you argue against it at the Legislature. The process begins here and that is why we are here.

We are happy that the retention percentage is lower, but one of the big issues with this bill is the fact that it is very hard to remove someone who is once appointed. Our national president, Phyllis Schlafly, is an attorney. She has written a book about the "imperial" federal judiciary. You can find information on that book on the national Eagle Forum website. Much of her book deals with the fact that the unelected, imperial, unaccountable federal judiciary does not

respond to the concerns of the people. So the people go unrepresented, and the things the courts do are not in accordance with what the majority of the people would like to have happen.

Of course, we all know that the courts need to also protect the rights of the minority; but oftentimes, the courts run roughshod over the sentiments of the people. One issue we saw this on was the *Guinn* decision made by our own Nevada Supreme Court. The people were smart enough to figure out what happened there. One of the justices decided not to run because of the sentiment of the people in that particular issue. Another justice was put off the bench because she had supported the *Guinn* decision. It is interesting to note that even the Supreme Court thought better of their *Guinn* decision and reversed much of it later, recognizing that it was a very egregious decision.

One of my concerns about the Commission on Judicial Selection is that it will be a closed shop. It will represent the "powers that be," which would ensure bias by those who are choosing the candidates. It would ensure bias because it would be a closed shop.

My brother Joel Hansen ran for the Supreme Court in 2004. Although he has an excellent record as an attorney and has successfully brought many issues before the Nevada Supreme Court, he would never be chosen by the Judicial Selection Commission because he is too controversial. Yet in that 2004 election, he was leading in the polls before the "powers that be" got upset and thought that he might possibly win. This is another reason I am very concerned about it, because people who are not politically correct, who may not have the same philosophy as the current chief justice or those on the Commission, would never have the opportunity to be selected in this closed circumstance.

Another issue that was brought up here that concerns me is the Commission on Judicial Performance. This sounds like a great way for all of us to find out how certain justices are performing—according to the "powers that be." It would be like a voter guide. That worries me. Will we, as the public, be paying for a voter guide from the Judicial Performance Committee or some such thing? If we were trying to oppose someone who was appointed, would we have to use our own money to oppose this particular person? Our national president of Eagle Forum, Phyllis Schlafly, lives in Missouri, the state where this plan emanated. She told me that it was almost impossible to get rid of a bad judge in that state. She mentioned they tried several times to not retain one of the judges there and failed every time. Why is that? Well, it is pretty easy to run a

campaign when you do not have a candidate running against you. You also do not have to attend candidates' nights and speak with the people.

We do not want the judiciary to be independent of the people. We want them to have to be accountable. They do not always make the right decision, just like voters do not always make the right decision about who is elected to the state Legislature, or to the county commission, or to some other office, but usually in the long run, when someone bad is elected, the people finally figure it out and it changes. So in the long run, I have far more faith in the understanding and the will of the people than I have in the closed shop, in the special interest, and in the "powers that be" who will be making all the decisions and denying the rights of the people. It will make the judiciary independent of the people.

Chairman Mortenson:
Are there questions for Ms. Hansen from the Committee? I see none.

Nanette Moffet, Private Citizen, Carson City, Nevada:
I am representing myself. I remember several years ago when this idea came up, Mills Lane and Ralph Crow were the only two attorneys who testified against it. Ralph Crow practiced law in Missouri for about 20 years and then for a number of years in Nevada. Mr. Crow testified that what you are proposing is called the "Missouri plan." He testified that if the people of Missouri were given another opportunity to vote again on the Missouri plan, they would immediately abolish it.

Janine Hansen and Lynn Chapman covered most of the points I was going to make, except that I can empathize with the lawyers. I know they are under a lot of pressure when it comes to donating to campaigns, so why not eliminate any member of the bar from contributing to a campaign?

I do not know how many of you watch Fox News, but the O'Reilly Factor has done extensive research on judges who made horrific decisions. One that sticks in my mind was a child abuser who had abused a little boy for seven years. The judge gave him 60 days probation and no prison time. The judge could not be removed from office. When you take the power out of the hands of the people, you give too much power to a committee, a person, the appointee in power. Absolute power corrupts, and there is no way to get around that.

If this were going to be put before the people, perhaps you could add an amendment that "none of the above" be put on the ballot. If "none of the above" won, then it would go to a vote of the people and it would be by

popular vote. I remember an election many years ago in which the usual one name appeared on the ballot for Supreme Court Justice. "None of the above" won more votes, but there was no recourse if none of the above won. There again, there was no competition. I am sure lawyers do not want to run against a Supreme Court Justice; it is rather intimidating. They may have to come up before that justice in court. Face it; everyone is human, and there could be a revenge factor and I am sure that thought goes through the minds of the attorneys.

I can see the problem they have. They are constantly solicited for campaign donations. You could eliminate the ability of any member of the bar to contribute to a campaign.

Assemblyman Horne:
Ms. Moffett, we could not do that because of First Amendment, free speech issues. You cannot preclude a member of the bar from contributing to a political campaign.

Nanette Moffett:
That crossed my mind, too, but there is no way to protect lawyers. I know the pressure they are under.

Assemblywoman Gansert:
I was thinking that judges could be removed by the Judicial Disciplinary Commission. You had mentioned that a judge could not be removed if there was a problem, but we still have that option with this plan.

Nanette Moffett:
But it is made up of attorneys.

Chairman Mortenson:
Are there further questions for Ms. Moffett? I see none. This concludes the people who have signed up. Is there anyone else who wishes to speak on this? If not, we will close the hearing on S.J.R. 2 of the 74th Session.

We will open the hearing on Senate Joint Resolution 1 (1st Reprint).

Senate Joint Resolution 1 (1st Reprint): Proposes to amend the Nevada Constitution to replace the State Board of Pardons Commissioners with the Clemency Board and to require the Legislature to provide for the organization and duties of the Clemency Board. (BDR C-552)

James Hardesty, Chief Justice, Supreme Court; Chairman, Advisory Commission on the Administration of Justice:
Senate Joint Resolution 1 (1st Reprint) is a proposed constitutional amendment which would revise the makeup of the State Board of Pardons Commissioners. As all of you are familiar, the Pardons Board currently is comprised of the Governor, the Attorney General, and the seven Justices of the Nevada Supreme Court. That Board is empowered by the *Constitution* of our state to review and commute punishments, grant pardons, and take other actions which would relieve an individual of certain implications created by a criminal conviction.

The Advisory Commission recommended this to the Legislature for this session for a variety of reasons. There is a concern that you have two of the busiest executives in state government, and the seven justices of the Supreme Court sitting on a pardons board. It is awkward for justices to sit on such a board when they may have to review other actions in a criminal case. Most importantly, it creates a problem in bringing the board together. Since I have been a Justice on the Supreme Court, we meet only twice a year. We hear cases in the spring that deal with community relief—whether someone's firearm rights should be returned or their voting rights should be returned. In November or December we hear the more serious cases about whether there should be relief granted from a criminal conviction.

We usually get somewhere between 200 and 300 applications from the prison for pardon relief. Since I have been on the Board, we have never heard more than about 22 cases at a time. You have a huge backlog of people who might otherwise be considered for clemency relief, but you have a board that is not able to meet frequently enough to address that issue.

Some of you might recall that, as members of the Pardon's Board, we take a look at the demographics of those who are in prison and consider conditional releases of those who are on Immigration and Customs Enforcement (ICE) holds and deport them from the country. The Pardons Board is the only board in the system that can accomplish such an objective. As of last September, 1,736 inmates you are housing in the Nevada State Prison are on ICE holds. That represents more than 13 percent of your prison population. What is an ICE hold? An ICE hold is a hold by the Immigration and Customs Enforcement

Department. When that inmate finishes his sentence, they will deport him to his country of origin.

We identified over 450 inmates who were part of a group of inmates with ICE holds. They had no prior criminal history, and were not in prison for crimes of violence. We went through about 150 inmates' files, and identified 110 of them who could be released to ICE and deported to their countries of origin. The savings to the taxpayers of this state was $22,000 for each one we got out of the system and deported.

In order for that to be accomplished, the Pardons Board would have to meet monthly. It was extremely difficult, and it took a considerable effort to get the Governor, the Attorney General, and the seven Justices with their calendars and their commitments to conduct those meetings.

The other reason for suggesting a clemency board to replace the Pardons Board is to place people on a board who have the professional expertise to evaluate the backgrounds and the issues surrounding whether people should be granted some relief from an arbitrary decision made by a judge in a sentencing scheme, or some other relief that is otherwise appropriate, such as the program I just talked about.

We recommend S.J.R. 1 (R1) to you for your consideration. It would change the makeup of the current Pardons Board to a clemency board—a board that would be made up of three people appointed by the Governor; three appointed by the Chief Justice of the Supreme Court; and three appointed by the Attorney General. That board of nine people would then carry out the powers of the current Pardons Board and would have the ability to meet more frequently. The state is currently dealing with a prison-overcrowding situation. The clemency board would have alternative means of dealing with pardon relief and would be better equipped to accomplish that. Having sat on the Pardons Board, I feel this would be an improvement to the current situation. I encourage you to consider this approach, and will entertain any of your questions.

Assemblyman Hambrick:
Of the ICE holds, would you know how many have warrants of deportation? How many have completed the immigration process and are waiting for deportation, or has ICE not yet started the process for their deportation? For example, ICE could have a hold on a student who was arrested for shoplifting, but should he be released to ICE and go before an immigration judge? If the reason he was in prison was not a crime involving moral turpitude, he might not

be deported. We have to be careful, because the individuals still may go back on the streets prior to completing their sentences.

Justice Hardesty:
Actually, we addressed that issue. In every case, the individual signed a waiver of their deportation-hearing process and consented to the deportation.

Assemblyman Horne:
I see that the Legislature would set the organization of the clemency board, but would you anticipate that in its decision making, this board would be independent of the three branches of government? Would they have to report back?

Justice Hardesty:
They would be independent, but subject to the Legislature's statutes that are enacted.

Assemblyman Horne:
Also, the nine members of the clemency board would have to have experience in the criminal justice system. How do you anticipate that would be allocated among the three branches if each is appointing three members? If this were to happen, I assume all nine members would be appointed at the same time. Are we going to have staggered term lengths?

Justice Hardesty:
I think the Legislature can establish that. Stagger the terms and decide which branch offers up the criminal-justice experts.

Assemblyman Horne:
Initially upon creation of this board, you would have to appoint nine members right away.

Justice Hardesty:
Yes.

Assemblyman Horne:
Some would have two-year terms and some would have four-year terms.

Justice Hardesty:
Correct.

Assemblyman Horne:
Would the three branches of government have to appoint the first nine members?

Justice Hardesty:
Or the Legislature could set that.

Assemblyman Horne:
The Legislature does not get to choose the members, according to this bill.

Justice Hardesty:
No, but they could decide which branch selects the criminal justice members. In my view, the most appropriate branches to identify people with criminal-justice experience would be the Chief Justice of the Supreme Court and the Attorney General, but that is a matter for the Legislature to debate. The Governor typically appoints lay people to these commissions. By the way, there was a discussion here earlier about the Judicial Discipline Commission. The Judicial Discipline Commission is not made up only of lawyers. As you all well know, it is primarily made up of lay people and chaired by the lay member, and those people are appointed by the Governor.

Chairman Mortenson:
Are there any further questions? I see none. Thank you very much for your testimony.

Rebecca Gasca, Public Advocate, American Civil Liberties Union of Nevada, Reno, Nevada:
We are here in support of the clemency board because it will be meeting with increased frequency. We receive a considerable number of complaints on a monthly, weekly, and daily basis from individuals waiting to have their pardons heard. As Justice Hardesty noted, those individuals who currently serve on the Pardons Board are among the busiest in the state. We hope that a clemency board will meet more frequently and thus offer a better structured component to create a more thorough due process for individuals.

Chairman Mortenson:
Are there any questions for Ms. Gasca? I see none. Since three people are now missing from the Committee, we will close the hearing and not take a vote. Is there any further business to come before the Committee? I see none; we are adjourned [at 6:56 p.m.].

RESPECTFULLY SUBMITTED:

_____
Terry Horgan
Committee Secretary

APPROVED BY:

_____
Assemblywoman Ellen Koivisto, Chair

DATE: _____

_____
Assemblyman Harry Mortenson, Chair

DATE: _____

EXHIBITS

Committee Name: Committee on Elections, Procedures, Ethics, and Constitutional Amendments

Date: April 30, 2009 **Time of Meeting: 3:49 p.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 160	C	Kevin C. Powers	Mock-up of proposed amendment 4617 to the bill.
S.B. 160	D	Julie Tousa	Written testimony
SJR 2*	E	Senator William J. Raggio	Prepared text
SJR 2*	F	Senator William J. Raggio	"Judicial Selection in the States"
SJR 2*	G	Senator William J. Raggio	Copies of various newspaper articles
SJR 2*	H	Senator William J. Raggio	Copy of letter from Ret. U.S. Supreme Court Justice Sandra Day O'Connor