MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Eighth Session
February 5, 2015

The Committee on Judiciary was called to order by Chairman Ira Hansen at 8 a.m. on Thursday, February 5, 2015, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 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/App/NELIS/REL/78th2015. In addition, copies of the audio or video of the meeting may be purchased, for personal use only, through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Ira Hansen, Chairman
Assemblyman Erven T. Nelson, Vice Chairman
Assemblyman Elliot T. Anderson
Assemblyman Nelson Araujo
Assemblywoman Olivia Diaz
Assemblywoman Michele Fiore
Assemblyman David M. Gardner
Assemblyman Brent A. Jones
Assemblyman James Ohrenschall
Assemblyman P.K. O'Neill
Assemblywoman Victoria Seaman
Assemblyman Tyrone Thompson
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Diane Thornton, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Lenore Carfora-Nye, Committee Secretary
Janet Jones, Committee Secretary
Jamie Tierney, Committee Assistant

OTHERS PRESENT:

Jeff Fontaine, Executive Director, Nevada Association of Counties
Vanessa Spinazola, representing American Civil Liberties Union of Nevada
Jerrie Tipton, Chair, Board of Commissioners, Mineral County
Josh Foli, Comptroller, Lyon County
Mary C. Walker, representing Carson City, Douglas County, Lyon County, and Storey County
Diana Foley, Securities Administrator, Securities Division, Office of the Secretary of State
Terry Johnson, Member, State Gaming Control Board
A. G. Burnett, Chairman, State Gaming Control Board
Barry Smith, representing Nevada Press Association

Chairman Hansen:
[Roll was taken.] There are three bills to hear on the agenda today. We are going to take things out of order. The first bill we are going to hear is Assembly Bill 10.

Assembly Bill 10: Revises provisions governing the payment of costs associated with legal representation of indigent criminal defendants charged with capital crimes. (BDR 14-467)

Jeff Fontaine, Executive Director, Nevada Association of Counties:
Good morning to the Committee. On behalf of Nevada Association of Counties (NACO), I would like to thank this committee for allowing us to present Assembly Bill 10. The provision of defense counsel for indigent persons charged with criminal acts is one of the bedrocks of the judicial system in the country. In the landmark case *Gideon v. Wainwright* 372 U.S. 335 (1963), the Supreme Court held that the *United States Constitution* requires states to furnish legal counsel to indigent persons who are charged with certain crimes. In 1963, the United States Supreme Court made the funding of the Sixth Amendment right to counsel services incumbent upon states through the Fourteenth Amendment. Nevada requires local governments to shoulder the

vast majority of the costs of providing public attorneys to the indigent accused. The purpose of A.B. 10 is to rebalance some of the costs for the provision of indigent defense between the counties and the state, specifically for capital cases in which the death penalty may be imposed. In Nevada, Clark and Washoe Counties are required by statute to have a public defender's office. The other 15 counties may create a public defender's office, which can also be filled by contract counsel, or they can use the Office of the State Public Defender. Regardless of which method is used, the fact is that the counties are responsible for nearly all of the costs of providing defense counsel for indigent persons charged with criminal acts. The counties that opt to use the Public Defender's Office are assessed a fee for the services that office provides. The provision of indigent defense counsel is not inexpensive. In a report which was prepared for the American Bar Association (ABA), entitled "State, County, and Local Expenditures for Indigent Defense Services Fiscal Year 2008," indigent defense costs for Nevada were reported as totaling $76,747,000. Of this amount, the state contributed $504,569, or about seven-tenths of 1 percent of the total cost. The instances and occurrences of when counsel must be provided have been expanded over the years by rulings of the United States Supreme Court. The bottom line is that this cost of providing indigent defense services continues to rise.

Our counties try to project their indigent defense costs. Their annual budgets can easily be exceeded. This is especially critical in many of our rural counties that may have to provide indigent defense for a capital case. Though it may not be unconstitutional for a state to delegate these cost responsibilities to the local government, it is important that the state must guarantee the local governments are not only able to provide such services, but that they are in fact fulfilling the state's constitutional obligation to provide effective counsel to the poor.

There are a number of reasons why we believe the county should not be funding the state's constitutional duty. As a Dillon's Rule state, Nevada's counties have very limited authority to increase taxes and no authority to add new revenue streams to pay for indigent defense. There are already nine counties that are at or within a penny of the statutory property tax rate of $3.66. Therefore, they cannot raise the tax rate to pay for indigent defense services. The counties' general funds are used to pay for a myriad of services, including those that are mandated by the state. The counties that are most in need of indigent defense services are the ones that are least likely able to pay for it due to low property values, sales tax revenues, and other issues. These are also the counties that tend to have a greater need for broader social services for which they have a responsibility.

Nevada Association of Counties has submitted three bill draft requests in each of the last legislative sessions to try to address funding for indigent defense. One included a dedicated funding source with county optional sales taxes and established a catastrophic fund for indigent legal defense. None of these bills were passed out of committee.

We believe that the provision of public services in Nevada is dependent upon a partnership between the state and local governments. As such, we believe the state has a responsibility to ensure equity and uniform comprehensive services and should use its revenue base to underwrite federally mandated programs that protect the health, safety, and welfare of the citizens of Nevada. The failure to provide adequate funding for these federal mandates has ultimately resulted in program and cost shifts to local governments that are already burdened by ever-growing local demands and limited revenues.

Unfunded mandates on counties are not new, but requirements for counties to shoulder the state's Sixth Amendment duties are particularly problematic. In addition to the growing caseloads, various Supreme Court rulings and orders are increasing costs. In effect, the counties are in the middle. They are between the judiciary, which is enacting new requirements to ensure that states are meeting their constitutional obligation to provide affective legal counsel to the poor, and legislative actions to balance its budget and pass those costs for indigent legal defense on to the counties.

Where do we stand in Nevada as far as the costs and who pays those costs compared to other states? There are currently 28 states that pay 100 percent of the cost for indigent defense. There are 8 states that pay 50 percent of the costs. In only 4 states—Arizona, Pennsylvania, Utah, and South Dakota—the counties pay more of the cost of indigent defense than do Nevada's counties.

Why are we addressing capital cases in A.B. 10? They are by far the highest cost cases. According to the legislative performance audit of the fiscal cost, the defense cost for death penalty cases exceeds those of non-death penalty cases by as much as 11 times. This is due, in part, to the requirement that death penalty defendants must have two attorneys. Defending a death case is expensive, often exceeding several hundred thousands of dollars.

Last December 4, the Nevada Supreme Court held a hearing to consider the recommendations of the Rural Issues Subcommittee of the Court's Indigent Defense Commission (Exhibit C). The Subcommittee agreed that the state's unfunded mandate results in an unfair burden on Nevada's counties, and it could unnecessarily result in less effective legal representation for indigent people in some counties. They also recommended that the state fully fund the

constitutional requirement of providing indigent defense in rural counties to take the pressure off those rural counties. Additionally, they recommended that, given the unlikeliness that the Legislature would fully fund the Office of the State Public Defender for the rural counties, the county should continue to have the flexibility to use contract counsel to fulfill that requirement. It is contingent upon the counties not using what is referred to as a flat fee, but instead a contract that allows for modification fees for death penalty cases, among other things. We have a number of counties that use these flat-fee contracts. None of these contracts provide specifically for additional fees for death penalty cases. In fact, we have a couple of counties that have flat-fee contracts that include the defense for capital cases. One example is Esmeralda County. They have a death penalty case included in their contract. If the Supreme Court ultimately issues an order that prohibits the use of that flat-fee contract, Esmeralda County will have to find additional funds to defend that case. This is in a county with a total annual budget of 5 million dollars.

Why do counties use flat-fee contracts? It is a way to provide some level of fiscal certainty, which is vital in our rural counties that have smaller budgets. While we recognize the need to address totally flat-fee contracts, we are also concerned such a reduction of those contracts will have a serious impact in some of our counties. As the Nevada Supreme Court noted in 1969, one serious criminal case can literally bankrupt one of our small, financially insecure counties.

We have reviewed the state's fiscal note on this bill. We certainly recognize the complexities of trying to analyze the cost to the state. With all due respect to the state, we just do not agree with certain methodologies used to come up with that fiscal note. We believe it is less because the cost per case is less. The number of cases per year that they would have to defend is fewer. In any case, we feel that we could justify reducing the fiscal note based upon how A.B. 10 would apply. Instead of taking on all 58 pending cases, maybe there is a subset of those cases that the state could take on, or just new cases effective certain dates. That would significantly reduce the fiscal note.

That concludes my testimony. I thank you again for the opportunity to testify.

Chairman Hansen:
Thank you, Mr. Fontaine. Are you going to go through any specific sections of the bill? We are not going to address anything fiscal because that part will be heard in the Committee on Ways and Means.

Jeff Fontaine:
I was not prepared to, but the bill basically states that for those counties using the state's Public Defender currently, the Public Defender would bear the cost for capital cases, as they do now, but would not bill the counties. For those counties who use contract counsel or have their own state public defender, the Public Defender's Office would reimburse the counties for the cost of providing indigent services for capital cases. It is pretty straightforward that way, I believe.

Chairman Hansen:
Before we go to questions, I would like to invite anyone else who is willing to testify in favor of this bill.

Vanessa Spinazola, representing American Civil Liberties Union of Nevada:
I am here in support of A.B. 10. I submitted a letter to the Nevada Electronic Legislative Information System (NELIS) this morning (Exhibit D), and a 2008 letter written by our national legal counsel that litigates indigent defense cases throughout the country (Exhibit E). It will outline the history that Mr. Fontaine just explained.

I do not say lightly that Nevada has been in an indigent defense crisis for the past 20 years. There are people in our rural communities negotiating plea deals with district attorneys without a lawyer present simply because they cannot wait three weeks in jail for a lawyer to come across several hundred miles. This particularly affects our rural communities. The caseloads are too high. They are not up to ABA standards. The permissions sought from judges in death penalty cases are arguably unconstitutional. We are at the point where, if the Legislature does not do something about this, we might have to look at litigation which, as you all know, costs additional money. I outline, for the record, that the ACLU in Montana, Idaho, Michigan, and many other states with a geography similar to Nevada, have litigated these cases against the state. To correct myself, in Idaho, the Legislature made the choice to proactively address this issue by setting up an indigent defense commission. I would encourage the Legislature to take action before it gets sued. The people in our rural communities simply cannot be deprived of their liberty at this rate any longer.

In the footnote of the letter I submitted (Exhibit D), there is a report by the Sixth Amendment Center specifically on the State of Nevada. It is called "Reclaiming Justice: Understanding the History of the Right to Counsel in Nevada so as to Ensure Equal Access to Justice in the Future." It is particularly sad in Nevada: we were actually the first state to have a citizen with an indigent defender. There was a gentleman who was involved in a train robbery in Nevada, and he demanded a lawyer in court. We were the very first state to

provide for public defense. Now we are one of the worst in the country. I would encourage you to support A.B. 10.

I also wanted to note that every year the Legislature puts more misdemeanors and felonies on the books, and that is a direct cost to our indigent defense system. Even though you see the prison budget and you see people incarcerated, I encourage you to think about the fact that, when we add misdemeanors and felonies, we are required by the Sixth Amendment to make sure those people have counsel in court.

Jerrie Tipton, Chair, Board of Commissioners, Mineral County:
We are one of the frontier counties in Nevada. About 3 percent of 4,000 square miles is privately held. Of that 3 percent, less than half has taxable infrastructure on it. I have almost as many citizens in the county as I have square miles. We have about 4,200 people, and Mineral County is in the middle of nowhere. We are one of those counties with a contract for public defense. For many years, we would pay out almost half as much more for an attorney with our contract firm because we have no local attorneys for public defense. We have to use attorneys from Churchill County, Lyon County, or somewhere else. The contract currently with our public defendants' counsel is between $65,000 and $70,000. We feel like it may be a better contract because we have two attorneys instead of one. Therefore, we will have a lesser amount on conflict. The contract is drafted such that if we have a jury trial lasting more than two days, the contract disappears and we go back to an hourly rate. There is no provision for capital cases.

Mineral County has a murder about once every 10 years; we are due. It has been about 10 years since we have had one. It was not a capital case, but it could have been if circumstances were a little bit different. What if we have a capital case and we do not have the funding for it? Our budget is less than $10 million a year. We have no tax base. We have no other way to get revenue. We will probably end up handing the keys of the county to this committee. We are fortunate that we have not had to, but when 25 percent of your population is at or below poverty level, aged 65 and older, with long-term unemployment at 30 to 35 percent, it gets dicey. If we have one, and we are due, I do not know what we are going to do to pay for it.

Chairman Hansen:
Please stay at the table, and can I have Ms. Spinazola and Mr. Fontaine come back up for questions?

Assemblywoman Diaz:
Ms. Spinazola, you mentioned that currently the caseloads, especially in the rural counties, are huge, and there are people having to wait weeks in order to receive legal representation. Do you have numbers indicating how many cases, in volume, are not being tended to? Secondly, if we are only covering costs for capital cases, does that really alleviate the systemic problem?

Chairman Hansen:
Before you answer that, on NELIS there is a handout (Exhibit C). In the back of it, there is a very thorough breakdown, by county, of the number of cases, cost of attorneys, et cetera. Therefore, the absolute specifics of what you asked are already in there.

Vanessa Spinazola:
The Rural Subcommittee of the Nevada Supreme Court Commission on Indigent Defense did collect all of the data on the individual counties. Mr. Fontaine has included it on the record, as Chairman Hansen has pointed out. The ABA suggests that 400 misdemeanors or 150 felonies are what is appropriate for an indigent defender to carry out. The Rural Subcommittee outlines that in the vast majority of our rural counties, the contract attorneys and the State Public Defender's staff are carrying much more than that. No, this would not solve the problem, but it is a step in the right direction.

Assemblyman Ohrenschall:
My question is to Ms. Spinazola. You mentioned the other states with geography similar to Nevada where there has been legal action. What has been the outcome? Is there a defender in each county with a small population? What is the outcome, and do you feel it has been positive for indigent defense in those states?

Vanessa Spinazola:
Most states have moved toward some sort of independent commission that has oversight of all the public defenders in the state. I neglected to mention earlier, where the state is failing is in the non-uniform application of the Sixth Amendment to the counties. If you are arrested for a felony in Mineral County, you get significantly different representation than if you were in Clark County. The State of Nevada, and not the counties, is ultimately responsible for the uniform application across the state. A lot of the other states that have been sued are states with large rural geographies who were having similar issues. They basically create a commission that is independent. The State Public Defender currently is under the Division of Health and Human Services, which means they must fight with all of the other social services in the state to get their budget included. It is basically more political than it should be.

States have moved toward having a separate indigent commission with an executive director. It is a nonprofit organization that gets all of the public defenders, legislators, and judges at the table to figure out what is a consistent funding source.

Assemblyman Wheeler:
It is easy to see what you are doing with small counties like Mineral, Esmeralda, et cetera. They really cannot afford this and it is a state-level trial, therefore the state should probably jump in and pay for it. We are not a money committee, as you know, but we are looking at the policy of money reimbursement. My question is for Mr. Fontaine. You said you did not agree with the numbers on the fiscal note. What are the real numbers?

Jeff Fontaine:
We are still looking at those, but the premise here is that each case costs $750,000, which is the cost based on your legislative auditor's report referenced earlier. We think that number should be broken down because perhaps it includes things like prosecution costs. By the way, if these cases are moved to the State Public Defender's Office for reimbursement for those counties, the counties that have a death penalty case would still incur the cost for prosecution. We want to look at that $750,000 to see if it includes prosecution costs or court costs, which the counties would still bear, or appeals, incarcerations, et cetera. As far as how those costs are spread out over the next biennium, it is premised on each of those 58 pending cases being addressed in one particular year. Most of us can agree, a death penalty case does not last just one year. It is a lengthy process; therefore, the actual costs would be spread out over more than just one year, or even the next biennium.

Regarding the 58 pending cases, on a going-forward basis, we are hopefully not going to see 58 capital cases each year in Nevada. The number is probably closer to 10 to 15 total capital cases in any given year. If you add it all up, we could probably come up with a number, but we think it is substantially less than the $42 million per year in the fiscal note.

Assemblyman Elliot T. Anderson:
This question is for the panel. Are you aware of any prisoners that have had their convictions overturned on habeas corpus review based upon lack of sufficient counsel?

Vanessa Spinazola:
No, but I can look into it. It is something that we will be looking for when we look for plaintiffs.

Assemblywoman Diaz:
I am curious how NACO came up with a determination to strictly cover only capital cases? From what I am hearing, as in Commissioner Tipton's testimony, it really does not do much to alleviate her circumstances or situation with the number of capital cases her county might see.

Jeff Fontaine:
Ideally, we would like to have the State pick up all of the costs for indigent defense, but we realize that that is just not realistic. There are two reasons why we selected capital cases. One reason is because of the budget impacts of a capital case, particularly in a rural county. For a county such as Mineral or Esmeralda, with an annual budget of less than $10 million per year, having to deal with a capital case that may cost as much as $500,000 would have a significant impact on their budget. The second reason is to anticipate the possibility that the Nevada Supreme Court will issue an order that would prohibit flat-fee contracts to include capital cases. This means that counties like Esmeralda, or other similar counties with flat-fee contracts, would have that additional liability.

Chairman Hansen:
Thank you very much. May I have the next testifiers come up?

Josh Foli, Comptroller, Lyon County:
I have been in my position for almost 11 years. I would like to let you know that, within that 11 years, we have had only one capital case come up, and we are in the middle of it right now. It happened in May of 2013. It is set to go to trial July or August of this calendar year. We have a little bit more money than Esmeralda County, but we are still a rural county. We have a budget of about $30 million, or just under, for our general fund. We are probably one of the counties that was hardest hit during the recession. We cut our staffing by 25 to 30 percent. It is similar to some of the other entities out there; however, when you are already thin to begin with, it makes a significant difference. This particular case has covered a three-year period, which helps us with the fiscal impact. We have contracts with three public defenders with a flat-fee contract. Included in those contracts is a capital case. Thank goodness, we only had one in the last 11 years covered under that, but we have a second attorney to represent us on the defensive side. With that being said, we have spent about $250,000 in previous fiscal years towards this case. We have to bring in an outside consultant, and we are budgeting approximately $500,000 this year. Plus, we will have some costs next year. The entire cost does not occur in one fiscal year. It expands over multiple fiscal years. If it occurred in a county like Esmeralda, those type of costs are very significant. For us, it is about one-third

as significant because we have about three times the funding, but it is still a large hit to our budget.

Mary C. Walker, representing Carson City, Douglas County, Lyon County, and Storey County:
We are here to support A.B. 10. There are two major problems. It is very difficult in the rural counties to find qualified people for these capital cases. Secondly, the funding is very difficult. I was Carson City's Director of Finance for 12 years through the '80s and '90s. I remember having a very lean budget. There was enough in the budget for a normal defense. Then all of a sudden, in the middle of the year, we had a capital case. The uncertainty of that type of cost is very difficult for these small rural counties to deal with. That is the big problem with regard to the capital cases. That is why it is so important for the State to support this.

Chairman Hansen:
Is there anyone else here to testify in support? [There was none.] Are there any questions?

Assemblyman Wheeler:
I do not see an effective date on the bill. Is this effective on passage, or is it six months from now?

Chairman Hansen:
Our legal staff can answer that.

Brad Wilkinson, Committee Counsel:
There is no specific effective date on the bill; therefore, it would be October 1, 2015.

Chairman Hansen:
Are there any further questions? [There were none.] Is there anyone to testify in opposition or neutral? Seeing none, we will close the hearing on A.B. 10. We will now open the hearing on Assembly Bill 51.

Assembly Bill 51: Revises provisions relating to securities. (BDR 7-449)

Diana Foley, Securities Administrator, Securities Division, Office of the Secretary of State:
I am very happy to be here today to talk about Assembly Bill 51. I was prepared to talk about the division and what we do. I recognize you are short on time; should I skip that?

Chairman Hansen:
No, please go ahead.

Diana Foley:
Before I begin the discussion of A.B. 51, I would first like to provide you with a little background about the Nevada Securities Division which is responsible for the administration and enforcement of NRS Chapter 90. The Nevada Securities Division is part of the Secretary of State's Office. The Securities Division is responsible for, among other duties, administering and enforcing the laws and regulations related to the Nevada Uniform Securities Act which is found in NRS Chapter 90. [Continued reading from prepared statement (Exhibit F).

Chairman Hansen:
Before we go to questions, is there anyone else here to testify in favor of A.B. 51? Seeing no one, we will go to questions.

Assemblyman Elliot T. Anderson:
The way this is drafted, would it require self-reporting of other colleagues that are abusing elders in the course of their business? Would that be a duty now of a securities broker?

Diana Foley:
That is a good question. I believe, absolutely, it would. Also, I think there are some reporting requirements specifically for broker-dealers who uncover certain conduct and fire an individual. They have to report it currently. I do think this bill would require it if it falls within the financial exploitation definition.

Assemblyman Elliot T. Anderson:
My second question would be about the definition of a broker-dealer in *Nevada Revised Statutes* (NRS) Chapter 90. Do you read that to include attorneys?

Diana Foley:
My recollection is there is a specific exemption that says, if an attorney is performing normal legal services, he or she would not be considered as someone who is a broker-dealer.

Assemblyman Elliot T. Anderson:
I think I saw that as investment advisor but not broker-dealer.

Diana Foley:
I would have to look at that, but an attorney normally is not in the business of affecting securities when performing legal services. Additionally, they do not normally receive compensation based on the sales of those securities.

Assemblyman Elliot T. Anderson:
It is not your intent to apply it to attorneys?

Diana Foley:
No.

Assemblyman Wheeler:
Being over 60 myself, I understand that is the definition of an older person. One of the things that I would like to know is the unintended consequence of fees for older people, since the Securities Division will have to meet different levels of training. Have you thought about any fees based on demographics through the securities companies? For instance, will my fees go up?

Diana Foley:
I think the training that is required by this bill is very basic. The Securities Division is currently crafting a training program that will be available for smaller broker-dealers or smaller investment advisors. The State of Maine has created something called Senior Safe. Senior Safe specifically provides this type of training. We are currently looking at providing that same type of program and hope to have it rolled out prior to July. It is also an educational program and not just a training program.

Assemblyman Wheeler:
I would really like to see something in the bill that says that those people with special needs and older people do not get enhanced fees due to different training and reporting procedures.

Assemblywoman Diaz:
I have two questions. You have just mentioned that Senior Safe is the entity that will be crafting the training that these broker-dealers and investment advisors have to provide to their employees?

Diana Foley:
Senior Safe is actually going to be a program that the Division creates and makes available. We are hoping to work with the Division of Aging and Disability Services to make sure the information we provide is accurate. We are hoping to provide that ourselves at no cost to the public.

Assemblywoman Diaz:
I want to get an idea of what the training will look like. How is it translated, and how is the Division of Aging and Disability Services going to oversee that it is high quality training and the companies are complying with A.B. 51?

Diana Foley:
I did not mean to imply that this was going to be the responsibility of the Division of Aging and Disability Services for the training. This is something that we, as a division, are taking on. Section 8, subsection 3, indicates the following: the specific training is an explanation of the conduct that constitutes exploitation; the manner in which the exploitation is recognized; the information in which reports of exploitation of an older person is investigated; and instruction how to report. It is really an identification of the red flags and where you go in the state to report that abuse.

Assemblywoman Diaz:
I like that you give an outline of what is expected to be in the training; however, how do we know that they are, in fact, giving the training to their employees? How do we know they are complying?

Diana Foley:
Generally, this will become part of the Uniform Securities Act. I mentioned earlier that the compliance audit investigators go out and regularly inspect broker-dealers and investment advisors. That will be one of the programs that they will check to see if it is in place. When we inspect, we will look for that specific issue. I will tell you that the larger broker-dealers, such as Wells Fargo and some other big ones, are already recognizing that this is an important issue. They do already provide some training. This is just us making sure it is maintained across the board.

Assemblywoman Diaz:
My second question is, who is impacted? Can you shed some light as to who this encompasses?

Diana Foley:
This bill would encompass all of the licensed broker-dealers, their sales agents, and all of the investment advisors along with their representatives. We have a multitude of broker-dealers and investment advisors. I have provided this bill to the Securities Industry and Financial Markets Association, which is one of the member organizations that represents broker-dealers and asset managers. We had some discussion about the timing, but they were not taking a position that was contrary or in support. They were taking a neutral position on the bill.

Assemblyman Ohrenschall:
Is this primarily aimed at broker-dealers for possible fraud against older and vulnerable persons by them and their employees or aimed at trying to get them to find out if there is exploitation going on and reporting it to the proper authorities?

Diana Foley:
This is broad-based. We believe that there is basically an epidemic of elder abuse and financial exploitation. When we were starting to look at how we could strengthen the laws, we recognized that Nevada already had adopted these laws, and they applied to thrift companies, credit unions, and banks. It was broader than just our area of securities in that it requires that they report all financial exploitation. It is broader than just the conduct of their employees. One of the red flags might be that someone suddenly comes in with a caregiver who has taken an unusual interest in the individual. The caregiver maybe has signing authority on the account. That is the type of thing that we are also hoping to cover with this.

Assemblyman Ohrenschall:
Let us say that the exploitation of a vulnerable older person is by a broker-dealer or one of the employees. Will the remedies to the injured party that are already available in NRS be supplanted by these proposed penalties in the bill?

Diana Foley:
It is not our intention to supplant any remedies. It is our intention that in certain circumstances those penalties can be increased. There is a group that has reached out to us to propose additional language, making it clear that we are not removing or modifying any other remedies. We are looking at the language and will work with them for clarification.

Chairman Hansen:
When that comes up, we will address it at that time.

Assemblyman Nelson:
Section 10 deals with the ability to adopt regulations and orders. It looks like they are tied to the federal law. Is it the intent of the bill to limit any regulations or orders to being consistent with the federal law or regulations, or would you also like the ability to adopt additional regulations or orders other than what the federal government wants to do?

Diana Foley:
We do have the ability to adopt certain regulations already regarding other exemptions. We just wanted to make it clear that we can adopt regulations

consistent with the Jumpstart Our Business Startups (JOBS) Act. The reason we are tying it to the JOBS Act is that a large portion of that act preempts us from doing otherwise. Partly, what we are trying to do with this provision is allow us to adopt a regulation to require a portal to notice-file with us. It will be consistent with the JOBS Act because that federal act will not allow us to regulate funding portals any broader than the SEC does. We are constrained by federal law, and that is why that specific limitation is in there. It pertains to any filing, registration, or exception requirements related to the JOBS Act.

Assemblyman Jones:
I used to practice securities law, and one of the problems we had was the Blue Sky Laws, which are the state laws versus the federal laws. Is the JOBS Act funding separate from the elder abuse act?

Diana Foley:
Yes, it all amends NRS Chapter 90.

Assemblyman Jones:
It is easy for Wells Fargo to have more requirements than Blue Sky Laws because Wells Fargo can afford to have counsel. The problem gets down to the smaller level. There are smaller broker-dealers that do not have all of the money, like the problems we are having with the Dodd-Frank Act on the federal level. The small guys cannot afford all of this new regulation. It seems you are putting an affirmative action upon the individual broker/dealers that did not exist previously. Are you going beyond the SEC law? If you are going beyond the federal law, do you think Nevada is specifically more aggressive towards abusing elders than on a federal level?

Diana Foley:
I am not aware of a federal law that requires broker/dealers or investment advisors to report financial exploitation. I think that would probably be more in the realm of the state. It is a law that we are requesting. This is an area of law that all state regulators are interested in. We belong to the North American Securities Administrators Association, which is the organization of all state securities regulators. They have formed the Committee on Senior Issues and Diminished Capacity, and part of what they are looking at is this particular area of financial exploitation. I do not think we are unique, and most regulators are concerned about that issue. I do not think we are the only state that requires it. A lot of states clearly require it in the area of financial institutions. Of course, there are some entities that are big and in multiple states. They may fit that definition of financial institution already. I think this is an important issue and is something we should require them to do. They have the ability, they are on the front line, and I would like to see it weigh in favor of the elderly.

Assemblyman Thompson:
I would like clarification on section 13 of the bill. Did I hear you correctly that it is saying that if a person does not properly train, or train at all, that they are going to potentially face a category B felony?

Diana Foley:
No, it is the opposite. We removed it. Most violations of the Uniform Securities Act can be a felony. We had to specifically include that if they failed to report it, it would not be considered a felony.

Assemblyman Thompson:
Is that the same with training?

Diana Foley:
That is correct.

Assemblywoman Seaman:
Has not having these particular laws on the books been a deterrent to prosecuting this type of exploitation?

Diana Foley:
I think what we are seeing on a national level is that this type of crime is underreported, and underprosecuted. I would say that anything we can do to make it more visible and reported more quickly is important.

Chairman Hansen:
Are there any further questions? [There were none.] Thank you very much for your testimony. Is there anyone else who wants to testify in favor? [There was no one.] Is there anyone in opposition or in the neutral position? Seeing none, we will close the hearing on A.B. 51. Now we will go to a presentation on the State Gaming Control Board.

Terry Johnson, Member, State Gaming Control Board:
On behalf of my colleagues, I will provide a brief overview of the Gaming Control Board and then lead into Assembly Bill 40. I would like to give the Committee an overview of the regulatory structure here in Nevada and how it is set up (Exhibit G). The Governor makes appointments of the persons that serve on the State Gaming Control Board and the Nevada Gaming Commission. I will talk more in detail in a few moments about the different functions between the Gaming Control Board and the Gaming Commission. It will be helpful in understanding A.B. 40 as well. The Gaming Policy Committee meets periodically to discuss matters of general policy of the gaming industry.

We have a two-tiered system in the State of Nevada consisting of a gaming control board that predominantly conducts investigations into applicants, conducts audits, ensures taxes are being paid properly, and monitors other internal control systems in place to protect the public and gaming establishments [page 3, (Exhibit G)]. The Board makes licensing recommendations and enforces the laws and regulations governing the collections of fees and gaming taxes. In essence, the Gaming Commission is the final authority on those gaming matters. One way to think of it is the Gaming Control Board, regardless of the area, generally proposes. The Gaming Commission disposes as to matters that come through the system.

Regarding the Gaming Control Board, we have a statutory charge to regulate the gaming industry through strict regulation [page 4, (Exhibit G)]. Interestingly, that is the only area in the *Nevada Revised Statutes* (NRS) where I think you will see admonishment statutorily to strictly regulate an industry and all of the persons, locations, practices, and related activities associated with the gaming industry. Obviously, the objective is protecting the integrity and stability of the industry, the public that it serves, and ensuring the timely collection of those fees.

The Gaming Control Board is organized with six divisions [pages 6 through 9, (Exhibit G)]: Administrative, Audit, Enforcement, Investigations, Tax and Licensing, and Technology. The Enforcement Division is the largest component of our board consisting of our sworn peace officers. The Investigations Division conducts background checks. The Tax and Licensing Division issues licenses and collects the taxes. The Technology Division does everything from ensuring the machines and games are functioning properly to assisting with disputes that might arise between gaming patrons and licensees. Overall, they help with setting policy with regard to emerging technologies in gaming.

I would like to discuss the comparison between the Commission and the Board [page 10, (Exhibit G)]. There is occasional confusion by the public about the difference between the two. Nevada is a state with the two-tiered system. The Gaming Control Board has three members, versus five commissioners that serve on the Gaming Commission. The Board comprises three full-time members who have day-to-day management of those different divisions. Each board member will supervise two divisions on a day-to-day basis, whereas the Gaming Commission does not have a role in managing the agency on a day to-day basis.

Regarding some of the adjudicated matters, the Gaming Control Board acts as the investigator or the prosecutor to bring matters forward, compared to the Gaming Commission, which sits as the trier of fact. They will actually be

the judge over the matters the Board has brought forward and will make the decisions. The Gaming Control Board makes recommendations whether a person should be issued a license. They generally make recommendations on whether regulations should be adopted, although it is not a power the Board must exercise. It generally does so in cooperation with the Gaming Commission and obviously makes recommendations related to investigations. The Gaming Commission disposes of those recommendations on licensing regulations and investigations.

There is a check-and-balance system between the Board and the Commission regarding recommendations on licensing [page 11, (Exhibit G)]. The reason I categorize it that way is because if the Gaming Control Board votes to deny a license or application, whether by a two-to-one vote or unanimously, the person who was denied can go to the Gaming Commission to seek to have the vote overturned. It would require a unanimous vote of all of the gaming commissioners to overturn a vote made by the Board to deny. It creates a bit of balance between the Board and the Commission on denials. It is my understanding that in the last 55 or so years only one time has the Gaming Commission voted to overturn a recommendation by the Gaming Control Board to deny a license to a gaming applicant. The presentation, which is available to the public, goes into a bit more narrative about the interplay between the Board and the Commission in terms of the various activities that we undertake.

The second bullet point talks about some of the disciplinary actions [page 13, (Exhibit G)]. If we believe that a violation has occurred, we can issue an order to show cause to the licensee as to why they should not be disciplined, or we can agree to some informal resolution such as a letter of violation. The third bullet point is dealing with complaints. The Board can choose to file a complaint against a licensee. That complaint is filed with the Commission. The Board does not file and then adjudicate the complaint. That is different from a lot of state agencies. I have worked with many agencies over the last 20 years where you would have the prosecutorial function, the adjudicatory function, and the investigative function all rolled into one. Staff would file a complaint with the agency, and the head of the agency would sit and hear that case. We are set up differently. We would do the investigation, generate the complaint, file it with the Commission, and then go and prosecute the case before the Commission with the Office of the Attorney General as our counsel. We have looked to find another example of a state board or agency where there is that investigative function without that adjudicative function. So far, we have not found another example similar to the Gaming Control Board, where we conduct the investigation and then turn it over to a completely separate body consisting of its own statute, members, salary, and staff where they

would do the adjudication. That is a key point to remember when we talk about the handling of complaints later.

The next page [page 14, (Exhibit G)] references some general information about the revenues that are collected. In Fiscal Year 2014, the total revenues collected is in the area of $912 million. That will become a key point when we talk about how this agency operates, ensuring that it operates with the appropriate levels of efficiency, which is one of the reasons this bill is coming forward. This agency overseeing this industry plays a critical role to the economy. If there is an agency that must, at all times, operate on all cylinders, clearly it is the Gaming Control Board and its function in terms of the Nevada economy and large industry relative to gaming.

Next, provided for the Committee's information is an overview of some of the changes that have occurred in the gaming industry over the last decade and a half [pages 15 to 16, (Exhibit G)]. It gives an overview of the evolution of gaming from smaller corporate ownership to some of the larger entities and some of the technologic advances that have made their way to today's gaming industry, which is largely held by publicly traded companies. There are a lot of international players involved with gaming. The universe has certainly changed in terms of the complexity of the security issues that we deal with, financing transactions whether merger or acquisitions, or some of the largest bankruptcies that have been seen in the Nevada economy. We make that information available for your benefit.

The last page of the presentation includes some contact information [page 17, (Exhibit G)]. Mr. Chairman, if there are no questions about the overview, I am prepared to discuss Assembly Bill 40.

Chairman Hansen:
Are there any questions on the presentation?

Assemblyman Ohrenschall:
What is left of the lab regarding the new duties in terms of checking on the independent agencies that are testing new equipment? How many employees are left doing that? How many manufacturers and labs do we have testing here in Nevada versus out of the state or out of the country?

Terry Johnson:
We have a total of 24 persons in our technology division. Two of them are in Carson City, and 22 are in Las Vegas. They work very closely with the lab industry in terms of bringing those products to market. I have not heard much negative pushback on the overhaul made to privatize some of those functions.

We are certainly doing the best that we can to continue to move things through the pipeline as efficiently as we can to bring those new technologies and products to market as soon as possible.

Chairman Hansen:
Let us now hear Assembly Bill 40.

Assembly Bill 40: Revises provisions relating to the State Gaming Control Board. (BDR 41-352)

Terry Johnson, Member, State Gaming Control Board:
Thank you for considering this matter and allowing us to talk about it here this morning. What I would like to do while presenting this bill is to briefly talk about the purpose of the bill and the problem that needs to be solved, review the language, which is very straightforward, discuss the specific reasons why we are advocating passage, and summarize the role of gaming here in Nevada.

The purpose of the bill is to grant a limited exception to the Gaming Control Board from the Nevada Open Meeting Law. I say limited as it would deal with the Board's investigative activities, such as when we are acting in our investigative capacity to determine whether violations have occurred, and if so, what actions we should take in determining whether those violations have occurred. The Open Meeting Law would still apply to the balance of the Board's procedures. We have monthly meetings the first week of each month which would still be governed by the Open Meeting Law, as they have been for the past 50 years. The purpose is to grant a limited exception for the purposes of our investigative role.

The problem to be solved here is that the Open Meeting Law is broad enough that it specifically covers any board as a public body. You will hear about the unique nature of the Gaming Control Board, which is a board with an investigative function. The design of the Open Meeting Law is that all deliberations, discussions, and actions are to take place in a public setting. In practical terms, if you are conducting an investigation of a licensee or applicant, how much of that do you comfortably and realistically expect to discuss in public? The meeting would cover the nature of the investigation, to whom you might issue a subpoena, which documents you might want to review, which parties you might want to talk with, which witnesses you may want to bring in, strategies you might want to pursue in the course of the investigation or prosecution of the complaint, and strengths or weaknesses of your case. Those are things that would be a godsend to a defense attorney who would sit in the audience and hear us discuss that on a public level. In practical terms, it would compromise our investigation if we are having those

types of discussions in a public setting. Because this is a board composed of three, it is critical that each of those three persons be able to talk with each other without worry of violating the Open Meeting Law. I want to assure the Committee and assure the public that the Gaming Control Board—and I think I can speak for the Gaming Commission—abides by the Open Meeting Law. We do everything in our power to ensure that we comply with the Open Meeting Law. That, in itself, creates some challenges for us that we hope to overcome as we go forward. The essential problem to be solved is that we have a conflict here with a broad Open Meeting Law requirement that applies to any board. We have, perhaps, the only board in the state that has an investigative function without an adjudicative function. It does not decide its own cases. The Board hands it over. That is what we are looking to remedy with Assembly Bill 40.

Next, I will walk you through the bill and what it talks about. You will see that it grants a limited exemption to the Open Meeting Law, specifically *Nevada Revised Statues* (NRS) 241.020 which generally requires that meetings of a public body be held in public. This bill seeks an exemption from that for the following three areas: to determine whether a violation has occurred, as covered in NRS Chapters 462, 464, 465, or 466; to determine whether to file a complaint; and to address the resolution of a complaint including discussion and negotiation with the licensee. Those are the very narrow limitations that are being sought here with regard to this bill.

There are five reasons why this bill would be helpful to us and beneficial to the gaming regulatory system here in Nevada. It would provide much needed guidance to the Gaming Control Board as to the parameters of the Open Meeting Law. For example, did the Legislature intend for discussions about investigations, the scope of the investigations, and the strategies related to the investigations to take place at a public setting, on a public record, for public consumption, and for public comment? This bill would give us clear guidance so that we do not have to construct workarounds to ensure that we are complying with the Open Meeting Law. We have clear direction as to the applicability of the Open Meeting Law to our investigative duties. It would minimize the amount of time that we spend trying to develop workarounds to ensure compliance with the Open Meeting Law. These clearer operating instructions from the Legislature would result in clearer operations for the gaming regulators in this case. As I have said earlier, it is important that this particular agency operate with the maximum levels of efficiency at all times, given the role it plays in overseeing our largest industry and its revenue collection role to the state.

It will allow us more efficient handling of investigative matters and these disciplinary matters that I have talked about. Some have suggested that

perhaps multiple meetings should be used. For example, if a licensee that we are investigating, or their attorney, their legal team, or their compliance team, wants to talk with the Gaming Control Board about an issue, in order to avoid violating the Open Meeting Law, perhaps it would be best to meet individually. They would come in and have not one meeting but three different meetings with three different board members so that all three board members are not in the room at the same time. This has been the suggestion, but as you can appreciate, that, in itself, raises issues with the Open Meeting Law as to whether those can constitute serial meetings in violation of that law. It also creates a scenario where, instead of having the three members of the Board make the decision, how about we just designate one person to make a decision so that we do not violate the Open Meeting Law by discussing it amongst the three? That creates a fairness issue as well as a fidelity to the statute issue. I do not think it is fair to the other two board members that one board member's voice has been heard on an investigative issue, but the other two have not. That is an inefficient means of doing business. If we were to meet with people in separate meetings, in addition to the implications I have mentioned, it creates the potential for an information gap. If you have three different meetings with three different board members, there is a chance that something will be said in meeting one that was not said in meeting two. A question is going to be asked in meeting three that was not asked in meeting one or two, so you do not have consistency among the board members about the scope, reach, and approach that they want to pursue relative to the investigation. You would want to avoid those information gaps as well as provide consistent direction to the Board's staff.

The third reason is, in addition to wanting to make the most of efficiency within the Gaming Control Board, you want to ensure there is an efficient use of the legal resources that the Board has at its disposal. The Gaming Division of the Attorney General's Office provides the exclusive legal representation, and there is an exception to the Open Meeting Law for when you meet to receive information from your attorney about potential or pending litigation. What happens in practical terms is there is a need for the three board members to talk about an issue and the effort to ensure compliance with the Open Meeting Law becomes a matter of calling our deputy attorney general or calling our attorney and telling them that we need to meet with them. Sometimes, if you are an attorney who happens to be unlucky enough to be within eyesight of the board members when they have an impromptu issue come up, they will grab you and haul you into the meeting. We may say things like: we have to talk about this issue because we need to discuss how to proceed; time is of the essence; we may have some evidence that may be compromised; we may have some witnesses that may not be available to us, and we need to talk about this

right now. This is not a very efficient use of our legal resources—pulling them away from other matters that we have asked them to work on.

The fourth reason is fidelity to the statute. The Legislature has appointed a three-person body. It is incumbent to follow through with the Legislature's intent to ensure that those three persons contribute to the discussion. The statutes require that, of the three members who serve on the Board, one has general public administrative experience, one has a background in law or gaming, and one has a business background. The legislative design is that those three persons would bring those statutorily desired talents and abilities to bear on the discussions before them. If you do not have the ability to collectively discuss those matters, I think it frustrates the legislative design. Additionally, as I have mentioned before, it would alleviate the need for a workaround with one person acting in the place of three. There are some areas where the legislative design specifically allows the Chairman of the Board to exercise certain administrative duties. We also have some ability within the statute to allow the chairman to appoint one member to carry out certain duties. Generally, we have a board of three who should act collectively without fear of violating the Open Meeting Law and without having to go through these machinations of ensuring compliance.

The fifth and final reason for passage is that it would provide for fidelity to our objectives of regulatory reform where Nevada as a state tries to present itself as one that has a government system that is responsible and reasonable in its regulatory approach. If we have regulations that are outdated and no longer serving their purposes, we look to revise them or repeal them. If we have practices that are placing unreasonable burdens upon those affected by the regulatory scheme, we look in-house and revise those practices. Here is an area where I think we have an opportunity to make government more user-friendly to those it serves and to resolve our investigations and litigations in a more timely fashion. I do not want to misrepresent, in any way, that this is going to result in savings in time or savings of millions of dollars. Conceivably, it could generate savings over the course of time, if we can operate more efficiently as a result of what is proposed before you today. Say we were to follow the suggestion to have three separate meetings so as to not violate the Open Meeting Law. This will force a business owner to sit through three separate meetings. This could range from a small mom-and-pop business to the largest casino or manufacturing entity. It is not reasonable to subject businesses to that type of additional time and cost. They will have to bring in their attorneys, consultants, or accountants, sit through three separate meetings, and proceed along those lines while generating more fees. This change will allow business owners more time to run and grow their businesses with less time dealing with regulators.

In summary, the Legislature has long recognized that gaming regulation enjoys a unique role. Gaming regulation is unique in that it is, perhaps, the only instance in statute where you specifically ask that there be strict regulation of everybody and everything involved in this industry. The Legislature has previously recognized the unique nature of gaming regulation in a couple of ways. In most state agencies, the documents submitted to the agencies are public records, public information, and generally publicly available. In the case of the Gaming Control Board and the gaming regulatory system, there are existing statutes. For the record, NRS 463.120 places confidentiality on certain information submitted to the Gaming Control Board. Also, the Legislature has previously recognized the unique nature of gaming regulation with regard to the Administrative Procedures Act. Generally, all state agencies are required to go through the administrative rulemaking process set for in NRS Chapter 233B. The Gaming Commission is exempt from the Administrative Procedures Act. It allows the regulatory body and this regulatory system to be more nimble in responding to emerging technologies, regulatory issues, or compliance issues.

My last example, something that I have not seen in the 20 years that I have been in state government, is where the Legislature has entrusted a regulatory body to waive a statute. Nevada Revised Statutes 463.489, and some of the sections that follow, give the gaming regulators the ability to waive certain provisions of statute if there is a finding that it comports with the state's overall policy with regard to gaming.

The Legislature has previously recognized the unique nature of gaming regulation in crafting the statutory scheme that we administer, and we believe this is in furtherance of recognizing that unique roll. In Nevada gaming regulation, we have a system that has been created legislatively in statute that is a model for the other 47 states that now have gaming. It is a model for nations around the world that now have gaming. They look to us to see how Nevada leads, operates, and the efficiencies it utilizes in administering its gaming systems. There are examples where they have picked up the Nevada statutes and taken them to their jurisdictions, dropping them in place in those other jurisdictions. There is recognition, not only in the confines of these walls, but across the country and across the world, of the unique nature of gaming regulation. We are mindful of the magnitude of this request. Although it is a bill that is just a few sentences long, we understand the magnitude and the interest that it generates whenever you talk about carving out an exception to the Open Meeting Law. We fully understand the public's interest in transparency, and we look to balance that with our mandate to conduct investigations and ensure that they are not compromised through disclosures of information in a public setting. To be clear, it is limited in its scope. What would not change is the regular board agendas, actions, and meetings that take

place on a monthly basis. Additionally, it would not change the information currently available to the public under existing law. There is nothing currently available that would be rendered unavailable as a result of this statute. All final actions relative to a complaint would still require approval of the Gaming Commission at a public meeting. We hope you will look at this favorably and recognize our desire to have that clear guidance about the reach of the Open Meeting Law on investigative matters and that you will continue to recognize the unique nature and role of gaming regulations as in times past and that you will allow us to operate with maximum efficiency to provide fair and timely outcomes to the investigative matters that we undertake. With that, I will conclude my presentation of A.B. 40.

Chairman Hansen:
Before we go to questions, does anyone else want to testify? Seeing none, let us open up the questions. Who wants to start?

Assemblyman Elliot T. Anderson:
I would like to discuss your concerns about compromising an investigation. certainly understand why you would want to get rid of hurdles when doing an investigation. Do you have a specific example of where having to meet in public has compromised an investigation?

Terry Johnson:
I cannot give you a specific example of where a meeting in public has compromised it because we take great steps to find a way to comply with the Open Meeting Law without compromising our investigations.

Assemblyman Nelson:
I enjoyed your presentation. It seems to me that the way you were describing the unique situation at the Gaming Control Board, it would be analogous to a district attorney or the assistant district attorney talking about a case and discussing strategies and negotiations in public. Is that correct?

Terry Johnson:
That is correct. That is a good analogy. Not only can that be analogized to a district attorney, but it could be analogized to other state agencies. Say you have the state labor commissioner at a meeting where you are talking with your staff on whether to proceed on a matter. The only difference between the Gaming Control Board and those types of agencies is that they are headed by a single individual like the district attorney, the state labor commissioner, the head of banking for the state, or the director of health and human services. There is one single person at the top, whereas here there is a board of three which triggers the Open Meeting Law. However, your analogy is certainly on point.

Assemblyman Ohrenschall:
Whenever a board or local government comes to the Legislature asking for a carve out from the Open Meeting Law, it is a weighty decision. Usually, in the past, when I have seen carveouts asked for, it has to do with public security reasons. Especially in this modern era, where we are so worried about terrorism, the local government comes forward with the type of issues needed to discuss in a closed, private hearing. I look at what you are asking for, and I look at NRS 463.110, which to me appears like an already generous carveout in statute from the Open Meeting Law. I guess I am just at a little bit of a loss. It has not been a problem in the last decade in complying with the Open Meeting Law, and I need more of a comfort level in terms of understanding why it is needed now, and why NRS 463.110 is not adequate. To me it appears generous.

Terry Johnson:
The reason for bringing this forward now is because there has been a complete changeover with the Gaming Control Board. There are new sets of eyes, and new sets of examinations on those statutes and issues that have been out there for years and years but have not been brought forward. The Board understands the magnitude of the request. I think it is that magnitude that may have caused prior boards to not even broach the subject, given the interest that it generates whenever an exception to the Open Meeting Law is discussed. *Nevada Revised Statutes* 463.110 is something we can, and certainly may, continue to look at, depending on the outcome of this measure to help us in dealing with these matters. It deals with investigative hearings, and the language predates the Open Meeting Law. I believe that language was adopted back in 1955, whereas the Open Meeting Law came into existence in approximately 1959. We certainly can avail ourselves of that as necessary, and we have done so. If we need to continue to refine our process ease to harmonize them with those statutory provisions, that is something we can look at. We are trying to make it so that you do not have to go through these contortions to determine if NRS 463.110 applies when three board members are looking to confer amongst themselves. An argument can be made either way. We do not want to make arguments. We want statutory guidance that is clear and unambiguous. When we see a problem, we want to fix it. We think this is the cleanest, clearest, most efficient way to fix what we see as a problem.

A. G. Burnett, Chairman, State Gaming Control Board:
I commend Member Johnson's presentation to you. It is excellent and incorporates all of the ideas I had with regard to this bill. To address Assemblyman Ohrenschall's question, you are absolutely correct. We do have the ability to do this under existing law; however, as Member Johnson has stated, it is just not clear enough to allow the Board and the people who assist

us day-to-day to feel comfortable. In the Open Meeting Law, we have an exception for discussing litigation with our counsel which goes there but does not go all the way.

Secondly, there is a provision in NRS Chapter 463 that speaks to the ability of the Gaming Control Board to hold investigative hearings; however, that, too, does not necessarily go all the way. It would be my argument that A.B. 40 does go all the way. It not only protects the Gaming Control Board in its investigative duties, which are usually absolutely sensitive regarding what a licensee may or may not have done. It also protects the potential for abuse. If the Gaming Control Board were required to show on its public agenda a discussion as to whether or not to file a complaint against a licensee, it would be something that is rife for abuse. It would be absolutely harmful and detrimental to an individual who is the topic of that discussion. We also have numerous publicly traded companies that we regulate. We oftentimes have discussions as to whether or not they have broken NRS Chapter 463 or any of the Gaming Commission regulations. We do not always conclude that they have, however. Yet, if we were to list that on a public agenda and discuss the notion of a potential violation by a publicly traded company, I would imagine their stock price could suffer immediate and irreparable harm. It is with those concerns that we submit this change.

Assemblyman Ohrenschall:
Currently, NRS 463.110 and the other carveouts you mentioned are being used in terms of being able to have closed hearings, correct?

A. G. Burnett:
Yes, in certain cases. However, those are only in instances where we feel it is appropriate under that particular statute or provision. There are times where we will conduct a proceeding in three separate meetings. For example, Member Johnson may be in Las Vegas, the other board member and I may be in Carson City, making it a very lengthy, time-consuming process. That is just on the front end. On the back end, when a decision must be made to settle the case, the same thing occurs, which is equally as cumbersome and time-consuming for all parties involved.

Assemblyman Gardner:
Section 1, subsection 1 of the bill only includes NRS Chapters 462, 464, 465, and 466. I was wondering why it did not include the rest of Title 41, specifically Chapters 463, 463A, 463B, and 467. Why was it only these specific chapters that were covered?

Terry Johnson:
I think the intent was to focus on the crux of our regulatory and investigative activity, which is predominantly in Chapter 463. I then followed, in the order of priority in terms of the remaining issues that arise with NRS Chapters 462, 464, and 465. The crux of what we are trying to reach would certainly be in NRS Chapter 368A and regulations adopted thereunder.

A. G. Burnett:
To further that comment, the change is actually in NRS Chapter 463. If you look at the chapter regarding the live entertainment tax, I believe it is Chapter 463(A), those determinations would not be a part of this.

Terry Johnson:
In some of those other statutes, the violations are criminal in nature. I think we would refer those over to the prosecuting entity such as the Attorney General, or the local district attorney's office, for follow-up on their part.

Assemblywoman Diaz:
The people of Nevada have decided that they want open meetings. I can see where you need to tailor the Open Meeting Law to fit your needs, but can you please inform the Committee why you need to do away with four complete chapters? You are sweeping these away by saying the Open Meeting Law does not pertain to these four areas. It is too broad for me and causes a lot of concern. We, at the Legislature, are a big operation, and we try to abide by the Open Meeting Law as much as possible with huge time constraints. I do not know why four entire chapters are being swept.

Terry Johnson:
I would need some clarification on the scope of your question. It is my understanding that the Legislature is completely exempt from the provisions of the Open Meeting Law, unlike the agencies that are subject to and try to comply.

Assemblywoman Diaz:
To clarify, in the interim, or when we have any committee meetings or hearings, maybe we are not subject to them, but we try to comply. Why do you have to remove the entirety of NRS Chapters 462, 464, 465, and 466?

Terry Johnson:
In those instances, it is talking about whether a violation of those chapters occurred. It is saying that the provision in the Open Meeting Law, which is one section of one chapter, specifically NRS 241.020, does not apply to the Board when making those actions relative to the statutes that are listed. It is not

eliminating applicability of those statutes to our processes. It is saying that one section dealing with publicly noticed meetings, NRS 241.020, would not apply. I am still not understanding the perception that it is somehow eliminating chapters from applicability.

Assemblywoman Diaz:
Can I have Legal Counsel explain? Those chapters are not just dealing with one thing. There are many things under each chapter, and I need Legal to clarify.

Brad Wilkinson, Committee Counsel:
What Mr. Johnson said is correct. This pertains to exempting from the meeting requirement and whether a violation of those chapters has occurred. That is the whole scope of the bill. It is just the determination of whether a violation occurred, whether to file a complaint, and how to resolve that complaint.

Chairman Hansen:
Mr. Wilkinson, you may also want to address the question of where the relationship is between the Legislature and the Open Meeting Law.

Brad Wilkinson:
The Legislature is exempt from the Open Meeting Law; however, the Legislature does aspire to comply with the Open Meeting Law.

Chairman Hansen:
Thank you for the clarification.

Assemblyman Elliot T. Anderson:
One thing I worry about is the unequal application of justice. I have a high regard for both of you. Presumably, if we pass this statute, it would remain past your tenures on the Board. Do you think it is possible that licensees could either pressure the Board, or the Board could show fear or favor if this is brought into the shadows and not for everyone to see? Is that a potential worry for the future?

Terry Johnson:
The short answer is no. Before a complaint can be disposed of, it would have to go before the Gaming Commission. The Gaming Commission would decide how that matter is disposed of. That issue would be agendized, noticed to the public, and made available for public comment. The process of how we get to the complaint, including the investigation that takes place, the issuance of subpoenas, interviewing of witnesses or confidential informants, would not be compromised. I also have no concern that there would be discussions taking place that would somehow invoke fear on the part of the Gaming Control Board

or any other gaming regulator. I think we have a respected role within this state and in this country. We are not at the point of being captured by our regulated entities. I am confident that there would remain the levels of transparency in terms of how those complaints are disposed of in a public manner.

Assemblyman Elliot T. Anderson:
Let me clarify. I am not talking about the resolution of the complaint. The decision to file a complaint itself is a very big and important decision; however, you have answered my question. I just wanted to clarify what I was asking, for the record.

Chairman Hansen:
The first amended version of the Open Meeting Law has been on the books since 1977. What have you been doing since 1977? Have you been having three separate meetings every time? My other question is, why the name change?

Terry Johnson:
Mr. Chairman, I apologize. That is a part of this bill. The Board is proposing to change its name to the Nevada Gaming Control Board. It is my understanding that at the time this statute was created, the Gaming Control Board was the only one in existence. Now, across multiple jurisdictions in America, there are gaming control boards. The intent was to clarify the reference to Nevada. In terms of what we have been doing up to this point, I talked about what I think are some operational inefficiencies taking place to ensure that we comply with the Open Meeting Law. There have been some suggestions that the Board should meet separately with parties or that a board member acts on behalf of all three to avoid violating or triggering the Open Meeting Law or otherwise just deal with the situation as best as we can. That is why we seek the clarity that we seek.

Chairman Hansen:
I understand, and I appreciate that. I just wonder why now?

A. G. Burnett:
I have been around for nearly 20 years at the Gaming Control Board. I have worked with various chairmen, boards, and commissions. Internally, this has been discussed continuously. No one has been as brave as Member Johnson and I to come before you to ask for that change.

Terry Johnson:
I wanted to also say that if you look at something that is not efficient, you should look for ways to change it. I have had staff come to me and say the

statute causes problems. Well, fix it. If you have operational inefficiencies out there that are creating additional costs for businesses, resulting in inefficient administration of your own agency, put something on the table that will make it work better. Here we have an opportunity to make government work better than it has in past years. Just because that is the way we have always done it does not mean it is the best way of doing it.

Chairman Hansen:
Agreed. We are also trying to balance out the needs of the public, so you can see where we are coming from on this, as well.

Assemblyman Araujo:
I am trying to get a better perspective as to how many meetings or events require three-day meetings within your scope of work. I am trying to determine how burdensome it is.

A.G. Burnett:
Our main type of meeting is a Gaming Control Board hearing where we have an agenda every month. We either have it in Carson City or in Las Vegas. Those are two-day meetings. Usually, the first day we hear licensing requests from nonrestricted applicants. On the second day, we will hear restricted agenda items, which is your 15 or fewer gaming requests. We have a staff of approximately 400. The Investigations Division consists of 95, and the Enforcement Division consists of 105. All of them are out conducting day-to-day investigations that may or may not turn up a violation or potential violation of the regulations or statutes. Those investigations are going on constantly. As Member Johnson stated, all of those staff may be in his office, they may be in my office, or they may be in Shaun Reid's office, our third board member. They could be discussing any number of the results of those types of investigations. I hope that answers your question.

Assemblyman Thompson:
This question may be for Legal to answer. I have a concern that if we allow this exception, we will start to see numerous exceptions. We are trying to keep the integrity of the Open Meeting Law. Also, you talked about your commission being comfortable, so I am wondering, is that a matter of just educating them? Is it already practice that if you post your agenda, it is allowable to indicate that you need to have a closed meeting? I have seen that before, where you have a closed meeting and then resume the open meeting.

Brad Wilkinson:
There are certain exceptions to the Open Meeting Law where a closed meeting would be allowed. I am not sure that this situation would fit into any of those.

I do not believe any of the existing exemptions would apply. They reference the ability to meet with their attorney to receive information. That is not considered a closed meeting, but is considered an exemption to what is considered a meeting. I am not aware of any provision that would allow them to close the meeting to talk about an investigation.

Chairman Hansen:
Thank you for your testimony. Is there anybody else here to testify in favor of A.B. 40? Seeing none, is there anyone in opposition?

Barry Smith, representing Nevada Press Association:
I appreciate the Gaming Control Board bringing this forward because clearly there has been a conflict in the way they interpret what they are doing. It needs to be discussed by the Legislature. Secondly, I recognize the problem they are having, the issue they face, and the unique nature of the Gaming Control Board, with its exemptions and exceptions in the law, allowing them to do their job.

It was pointed out throughout most of this discussion that it is about investigations. There is a clear exemption already in NRS 463.110 for investigations. The language of this bill goes beyond that and seems a little vague to me. A determination of whether a violation has occurred, a determination of whether to file a complaint, and anything addressing the resolution of a complaint is pretty broad language. It goes far beyond investigation. It involves any kind of discussion. It was very aptly pointed out that perhaps the criminal investigation is as close as it comes because of the prosecutorial nature and the filing of charges. There are two ways that it happens. The investigation can be undertaken internally, or a complaint may be brought to this board or the police. The investigation occurs, and that information is held from the public. There is a very good reason to keep some details of the investigation. There are some differences here because at the conclusion there are charges filed or the case is closed, and that information does become a matter of public record. That does not occur with the Gaming Control Board, as I understand it.

There is a big gray area addressed by section 1, subsection 3, in the bill, referring to negotiations with the licensee such as settlements. It provides the opportunity to handle it, discuss it, and close it with a settlement or agreement, with no provision for how that is reported. Let me make clear the distinction from a complaint. I might bring a complaint against a licensee who is then investigated. The complaint then goes on to the Gaming Commission by the Gaming Control Board. They are the intermediary step, and they can actually settle a complaint, as I understand it. The whole area of we can talk about this,

we can investigate it, we can meet with the licensee, and we can reach a settlement without ever filing a complaint, is never disclosed. There is no recording process. I am looking for a window of accountability to the public and to this body as to how you know the job you intend them to do is actually being done in the manner in which you intended. That is a quick summary of some of the concerns I have. I commend them on bringing this to your attention, because it is an issue that should be resolved, and it is a policy issue. Thank you.

Chairman Hansen:
Are there any questions for Mr. Smith? [There were none.] I actually have one. With NRS 463.110, the investigations are currently exempt from the Open Meeting Law, as you testified. Are you okay with that? From what I can tell, they are just expanding a bit beyond that into some of the other categories. I wonder if you are okay with the NRS 463.110 exemptions?

Barry Smith:
I understand it. I think it is consistent with court rulings and the way the law is. Regarding investigative procedures, while under investigation there is a reason to keep those secret. They can affect the ability of the investigation to be carried out. Ordinarily, under other circumstances, there is some result of that investigation. The investigation either goes to a complaint, gets filed in court, or the case is closed, becoming a matter of public record. It is an ongoing investigation which may be open for years. I would not go so far as to say that I am in favor of any exception to closed hearings by a public board, but I do understand the nature and the need for why they do it.

Chairman Hansen:
Thank you, Mr. Smith. I have a question for Legal. He mentioned the idea that they did the investigation privately, they present the information to the Commission for possible adjudication, and the Commission makes a settlement. At that point, would the settlement be public record?

Brad Wilkinson:
It is my understanding that it would be done at a public meeting with the Commission, therefore, yes.

Chairman Hansen:
Mr. Burnett, can you come back up to summarize? Is there anything else that you would like to address?

A. G. Burnett:
I would like to start with your question to counsel and explain the process of how it works. There is a staff of 400 out there investigating. There are three board members. The staff may present to the three board members that, let us say, Assemblyman Hansen has committed a violation of our regulations and statutes. At some point, all three of us need to come together as a body to make a determination whether we feel you have violated the law. At that point, if we determined that you have, the decision is made to file a complaint. All complaints are public the minute they are filed with the executive secretary's office. They become public record. After a complaint is filed, the decision has to be made to settle the case. Oftentimes, licensees recognize that they have made a mistake. They sometimes come to us during the process of filing the complaint indicating that they not only understand what the complaint says, but they would like to settle it. That is why, oftentimes, there will be a complaint and a settlement both filed publicly at the same time with the Commission's executive secretary. If that does not occur, we litigate. The Gaming Control Board acts as the prosecutor against the licensee, as the defendant in front of the Gaming Commission, which acts as the judge and jury. The litigation rules are similar to what we see in civil litigation today. All of that is public. What we are talking about is, essentially, what grand juries do, which is the decision on whether or not to move forward. Here is an example, in an effort to address some of the concerns that Assemblywoman Diaz had. If she had a gaming license, she is under scrutiny every day. If she made a mistake, I doubt she would want us to display on a public agenda the decision whether filing a complaint against her is good or not. It would be displayed for public and media consumption when, in fact, she may not have done anything wrong at all. The damage is done and is irrefutable to her reputation and to her business as a licensee. In fact, we would not even need a complaint process after that.

Gaming regulators live in a very strategic world. It is very Machiavellian, Mr. Chairman. I can certainly see the potential for going completely against public policy. If there was a bad actor at the Gaming Control Board who simply did not like a person, entity, or individual, and he placed an item on the agenda about whether licensee X has done something wrong, it may cause everyone to debate it or talk about it in public. Again, I would submit that there is no need for a complaint at that point. The damage is already done. The adjudication process would not even need to occur publicly in front of the Gaming Commission. I am happy to answer any other questions you may have.

Chairman Hansen:
Thank you. Is there anyone here to testify in the neutral position? [There was no one.] Is there any further business or public comment? Seeing none, we will close this hearing. [The meeting adjourned at 10:15 a.m.]

RESPECTFULLY SUBMITTED:

_____
Lenore Carfora-Nye
Committee Secretary

APPROVED BY:

_____
Assemblyman Ira Hansen, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: February 5, 2015 **Time of Meeting: 8 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 10	C	Jeff Fontaine	Supreme Court Hearing
A.B. 10	D	Vanessa Spinazola	ACLU Letter
A.B. 10	E	Vanessa Spinazola	Letter to Nevada Justices from the ACLU
A.B. 51	F	Diana Foley	Written Testimony
A.B. 40	G	Terry Johnson	PowerPoint Presentation