MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON COMMERCE AND LABOR

Seventy-Ninth Session
March 24, 2017

The Committee on Commerce and Labor was called to order by Chair Irene Bustamante Adams at 12:37 p.m. on Friday, March 24, 2017, in Room 4100 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/79th2017.

COMMITTEE MEMBERS PRESENT:

Assemblywoman Irene Bustamante Adams, Chair
Assemblywoman Maggie Carlton, Vice Chair
Assemblyman Nelson Araujo
Assemblyman Chris Brooks
Assemblyman Skip Daly
Assemblyman Ira Hansen
Assemblywoman Sandra Jauregui
Assemblyman Al Kramer
Assemblyman Jim Marchant
Assemblywoman Dina Neal
Assemblyman James Ohrenschall
Assemblywoman Jill Tolles

COMMITTEE MEMBERS ABSENT:

Assemblyman Paul Anderson (excused)
Assemblyman Jason Frierson (excused)

GUEST LEGISLATORS PRESENT:

Assemblywoman Teresa Benitez-Thompson, Assembly District No. 27
Assemblyman Keith Pickard, Assembly District No. 22

STAFF MEMBERS PRESENT:

Kelly Richard, Committee Policy Analyst
Earlene Miller, Committee Secretary
Olivia Lloyd, Committee Assistant

OTHERS PRESENT:

Paula Berkley, representing Board of Examiners for Social Workers; and Board of Occupational Therapy
Brett Kandt, Chief Deputy Attorney General, Office of the Attorney General
Keith L. Lee, representing Board of Medical Examiners
Michael D. Hillerby, representing State Board of Pharmacy
K. Neena Laxalt, representing State Board of Physical Therapy Examiners; Board of Massage Therapists; Board of Psychological Examiners; Nevada State Board of Veterinary Medical Examiners; and Board of Dispensing Opticians
Margi A. Grein, Executive Officer, State Contractors' Board
William C. Horne, representing Board of Dental Examiners of Nevada

Chair Bustamante Adams:
[The roll was called.] I will open the hearing on Assembly Bill 387.

Assembly Bill 387: Revises provisions relating to social workers. (BDR 54-540)

Assemblywoman Teresa Benitez-Thompson, Assembly District No. 27:
This is a bill to address language that had unintended consequences in Assembly Bill 93 of the 78th Session. We mandated all of the behavioral health boards to have suicide awareness and prevention be part of their continuing education units (CEU) component. All of the licensing boards except one are on a two-year licensing cycle and a two-year CEU cycle. The Board of Examiners for Social Workers is on an annual licensing cycle and a two-year CEU collection cycle. The intent was that every two years following the CEU cycle requirements, the licensee would have to do two hours of suicide prevention education and awareness. It was interpreted that every year the licensee had to have two CEUs. It doubled the number of CEUs that we had intended. This language will effectively clarify that to properly implement A.B. 93 of the 78th Session.

Chair Bustamante Adams:
Are there any questions from the Committee?

Assemblywoman Carlton:
Would it be better to say one CEU for every year?

Assemblywoman Benitez-Thompson:
We believe adding the language in Section 1, subsection 2 that says, "every 2 years" will do that. That way it is consistent with the way that the licensing board collects and audits

CEUs. A licensed social worker gets audited every two years. If audited, you have to produce your certificates of your CEUs. We do not want to require a certificate for one CEU every year. Most of the classes are for two CEUs.

Chair Bustamante Adams:
Is there any support for A.B. 387?

Paula Berkley, representing Board of Examiners for Social Workers:
This bill helps the licensees as well as the Board to eliminate the confusion.

Chair Bustamante Adams:
Seeing no other support, are there any in opposition? [There were none.] Is there anyone in neutral? [There was no one.] There are no closing comments, so I will close the hearing on A.B. 387.

[Assemblywoman Carlton assumed the Chair.]

Vice Chair Carlton:
I will open the hearing on Assembly Bill 328.

Assembly Bill 328: Revises provisions relating to professional licensing boards. (BDR 54-157)

Assemblywoman Irene Bustamante Adams, Assembly District No. 42:
Before you today is Assembly Bill 328 for your consideration. Several sessions ago, in a bipartisan fashion, this body created the Sunset Subcommittee of the Legislative Commission. Its purpose was to review all boards and commissions within the state. Last interim, I served on the Sunset Subcommittee and we examined the Board of Dental Examiners of Nevada because we had received a lot of complaints from the public. The Sunset Subcommittee put forth a bill that addresses the Board's investigative procedure as it relates to its licensees. That bill is Senate Bill 256 and is being carried by the Chair of the Sunset Subcommittee, Senator James A. Settelmeyer, Senate District No. 17. There were some additional issues that arose after that examination and thus, the premise for this bill.

My commitment to former Assemblyman Lynn D. Stewart was to work with his replacement in Assembly District No. 22, Assemblyman Keith Pickard. The commitment was to make sure that we follow this through and bring resolution to some Nevadans who have had some problems.

Assemblyman Keith Pickard, Assembly District No. 22:
The bill came as the result of problems experienced over the last biennium with at least one of our *Nevada Revised Statutes* (NRS) Title 54 boards. This bill in no way seeks to punish or otherwise call out any particular board. This bill addresses some of the significant systemic problems, some real and some optical. Title 54 of NRS houses most of our professional regulatory boards. Each board is tasked with policing its own profession to one degree or

another. Some, like real estate brokers and salesmen, fall under a larger executive department umbrella, such as the Real Estate Division of the Department of Business and Industry in that example. Others, like the Board of Medical Examiners, do not, relying on their own market participants to regulate and administer to the needs of their practitioners and the public. Each board is required to adhere to the provisions of its respective practice acts as well as NRS Chapter 233B, the Nevada Administrative Procedure Act. Additionally, unless exempted therefrom, regulatory boards are required to meet the requirements of NRS Chapter 622A, which protects the professionals generally in various proceedings. These acts guide the boards in everything from rules regarding licensure and best practices to the procedures to be employed when discipline is required. These rules exist to make sure that public safety is assured while also protecting the due process rights of the practitioners accused of wrongdoing. Since a license to practice in their profession is vested with powerful property interests, the state is required to assure: (1) that the profession is sufficiently overseen by the state, and (2) that the professional being charged with wrongdoing has sufficient due process protections. Things like notice and the opportunity to be heard by an impartial adjudicator are sacrosanct.

Several sessions ago, the Legislature exempted a number of boards from the application of NRS Chapter 622A. The reasons why varied, but it was generally understood to be because they were sophisticated enough in their professions and practice acts not to need to adhere to the tenants of NRS Chapter 622A. The Sunset Subcommittee of the Legislative Commission discovered that some did not interpret their practice acts in a way to meet the minimum standards under NRS Chapters 233B and 622A. Similarly, Governor Sandoval, as Chairman of the State Board of Examiners, was also involved in reviewing the actions of some boards, leading him to propose the related legislation that is being heard in the Senate. They also worked closely with us on this bill.

The goal of A.B. 328 is to provide boards with a minimum set of standards placed in NRS Chapter 622A. We worked with many, if not most, of the other boards that will be affected by this. Thus, this bill seeks to remove the exemptions from NRS Chapter 622A for those boards that do not currently fall under a larger framework and to require they meet the minimum standards of NRS 622A. The bill does not require those boards that currently have superior practices in their practice acts and regulations to make any significant changes.

Section 2 of the bill provides best practices for boards that wish to hire their own attorneys to advise the boards or to prosecute disciplinary actions. It also requires boards to contribute to the Fund for Insurance Premiums, which is the fund we use to insure against potential claims made against the board and by extension, against the state. We refer to that as the state claims fund. Surprisingly, some boards, although endowed with the imprimatur of the state agency status, were not contributing to the fund, leaving the state exposed to whatever liability that might have been imposed.

We have garnered a fair amount of interest in this portion of the bill. Several of the smaller boards hire, as an employee, the same attorney. This practice, though successfully maintained by these boards for some time, causes some concern regarding potential ethical

and practical considerations. Under the standard employer-employee arrangement, the employer is responsible for the conduct of the employee. The relationships are muddied when, for example, the interests of one board come into conflict with the interests of another. Similarly, if one board contributes to the state's claim fund but the other does not and the attorney is found to have done something improper, there is a significant question as to whether the employee's actions would be covered, exposing the state to additional liability. While it could have been a convenient way of doing business, we came to the consensus that the best approach would be to limit the attorney to employee status for only one board or to choose to be an independent contractor like most attorneys who represent multiple clients.

Section 3 of the bill requires the Department of Administration to establish, through regulation, standards and best practices for the financial accountability of the boards. This would include requiring periodic audits in order to confirm that the boards have used their funds in accordance with their best practices, their practice acts, and their regulations. We have a request for an amendment in this regard. Some of the smaller boards that do not have significant financial means, though they are allowed to petition for a state augment in order to cover the cost of the audits, have requested that we amend the language from an annual audit to a biennial audit, which we are not opposed to doing. We will be communicating with them, and I want to alert the Committee that may be an additional point for which we see an amendment.

Section 4 of the bill establishes best practices for the boards relative to their executive directors ensuring, for example, that the executive director is a resident of and keeps the official board records within the state of Nevada. That is a practice which has not always been the case, creating all sorts of jurisdictional problems if trouble arises.

Section 8 of the bill removes exemptions for those boards that do not currently fall under a larger Executive Branch umbrella. Section 9 expressly allows for those boards that already exceed the requirements contained in NRS Chapter 622A in their own practice acts and regulations, to continue on their current path. This relieves several of the boards of the concern that they would have to weaken their standards in order to comply with those contained in NRS Chapter 622A. The safeguard here is that NRS Chapter 622A is deemed to be the minimum procedural standard and that all boards must merely meet or exceed them.

Section 10 of the bill allows for executive directors who are hired as independent contractors to receive the same immunity from civil liability in good faith performance of their duties as the employee would enjoy under the current statutory scheme. Sections 11 through 13, and 15 through 21 of the bill confirm existing state law that the Office of the Attorney General continues to have joint representation duties now subject to sections 6 and 7 of this bill. The boards are still allowed to hire their own attorneys subject to the rules of section 2.

Section 14 strengthens the due process considerations and disciplinary actions without losing the flexibility currently afforded these less formal administrative proceedings. Section 22

increases the time from 10 to 15 days for boards and practitioners to prepare an appeal for a suspension or revocation of a license. Sections 23 through 30 make conforming changes to practice acts consistent with this legislation.

In sections 6 and 7, there have been significant changes made to the language (Exhibit C). This was because the rule we intended to create was truly unworkable. In combined efforts, we have simplified the rule such that it conforms to the best practices currently used by many of the existing successfully managed boards. Section 6 provides that a deputy attorney general may sit as a prosecutor in disciplinary actions or as board counsel. Due to the size of the Office of the Attorney General, they can and regularly do successfully wall off prosecutorial and administrative support functions. Never will the same attorney prosecute a case and also advise the board. This is a basic requirement under the Administrative Procedure Act and a fundamental practice that protects the due process rights of the practitioner. Section 7 requires private attorneys for the board to have the same separation. Currently, only the State Contractors' Board has two attorneys, one to advise the board at all times and one to prosecute cases. In the instance where a board decides to engage the services of only one attorney, that attorney may not ethically prosecute a case and advise the board as it handles the case. In those instances, section 6 is invoked and any deputy attorney general will step in either to prosecute or more likely advise the board in the disciplinary proceedings, thus maintaining the integrity of the process. A full explanation of the rationale is found on the second page of the amendment.

We have a small amendment from the State Board of Pharmacy (Exhibit D). They noticed their practice acts differ from other boards in that they are currently allowed to hire only one attorney. To conform with the intent of this act, and the practice acts generally, they have requested and we have accepted an amendment to allow them to make the conforming change.

Vice Chair Carlton:
Are there any questions from the Committee?

Assemblyman Brooks:
How many boards will be affected?

Assemblyman Pickard:
There are over 50 boards subject to NRS Title 54. There are a few boards that are not exempt that fall under a larger umbrella that acts as supervisor for those boards. The balance of them will now fall under NRS Chapter 622A. Some of the boards that are subject to NRS Title 54 are the State Board of Osteopathic Medicine, the State Board of Pharmacy, the Board of Medical Examiners, and the State Contractors' Board. There are numerous regulatory boards and they can all be found under Title 54. Title 54 is a large section of the statutes that includes NRS Chapters 622 and 622A among others. All of the practice acts for the boards differ in their content.

Assemblywoman Neal:
Typically, it has not been the case that the regulatory board shall contribute to the Fund for Insurance Premiums. Now you want the legal counsel to be an independent contractor and have professional liability coverage. What will the cost be to the agency for the change in the structure for the attorney?

Assemblyman Pickard:
Each board is required or should be required to contribute to the state claims fund.

Vice Chair Carlton:
Either they are required or they should be.

Assemblyman Pickard:
The requirements typically have fallen under the practice acts. Some of them did and some of them were not required under their individual practice acts. The purpose of the insurance program, however, is to cover liability for state actors. Boards acting with the imprimatur of the state will be deemed state actors. We discovered as we analyzed this that some of the boards are not currently contributing to the Fund for Insurance Premiums. This creates a liability problem for the state because there are provisions within the Fund for Insurance Premiums statute that allow for the state to intervene on behalf of a state actor. If a state board is not contributing to the fund, then not only is it not exposed to the protections, but the state may be liable for additional expenses that would not otherwise be incurred. There is no independent requirement for them to have a separate policy. This would just have all of the state agencies that are ultimately going to be sued and protected by the state, contribute to the Fund for Insurance Premiums.

When the attorneys are independent contractors, they are expected to carry their own malpractice insurance. In the underwriting process, we are anticipating that as the Fund for Insurance Premiums is looking at what they charge each board, they are going to look at the potential for liability or exposures to the risks. In doing so, if they have employed an attorney as an employee and the attorney changes to independent contractor status, that should lower the risk profile for that board. I would anticipate the savings to the board will correspond to the insurance that the practitioner will ultimately incur. I do not anticipate that there will be a significant difference. If they are already paying into the fund, that amount should go down and that money will be paid to the attorney to cover the cost of insurance. It should be a wash. As a licensed attorney, insurance policies are not particularly expensive. As a new attorney, the most I paid was about $3,500 a year, and now I am paying a little more than $2,000 a year.

Assemblywoman Neal:
Was there any discomfort to the attorney with having to shift from an employee to an independent contractor? The burden of the liability is being shifted to the attorney so the risk is lowered for the board. Was anybody uncomfortable with having their roles being changed?

Assemblyman Pickard:
We got some feedback. The State Board of Osteopathic Medicine hired a part-time attorney as an employee. This was a consideration we discussed and rejected because of the liability exposure. If we had the same attorney for two boards and his interests became adverse, that would put the attorney in a predicament so he can represent neither, so each board has to hire a new attorney. I suppose some attorneys will find obtaining liability insurance daunting, but I did not find it difficult. The problem this creates is that we are asking people to change. Nobody likes change, but we think this change is justified to lower the exposure to the state. It is not onerous to obtain insurance. Having been both an employee and a solo practitioner, it is not difficult. There may be a question of how that might impact the attorney's tax position, but I found with the right business structure, I am still an employee of my firm with the added expense of using an accountant once a year. I have not found it to be significantly different from what the overall expenses were.

Vice Chair Carlton:
In section 2, we are asking the regulatory bodies to pay into the Fund for Insurance Premiums, also known as the "torts claim fund," which basically backs up these boards if they get sued and they do not have enough money. You are saying that there are some boards that are not contributing to the fund. When I look at NRS 331.187, under subsection 5(b), there is a definition of "state agency" and it includes "without limitation, a part-time or full-time board, commission or similar body of the State which is created by law." Your interpretation of NRS 331.187 is that it does not apply to regulatory boards, or they are not complying with the law that is already in existence.

Assemblyman Pickard:
I do not want to go so far as to say any board would not be in compliance with state law. The language here is to fix the problem that some of the boards were not paying into the fund. I agree they should be paying in, but I did not think it was necessary to accuse a board of not following state law so we cleaned it up in this bill.

Vice Chair Carlton:
If it is already stated in law, is saying it twice going to make a difference? We will just cross those bridges when we get there, and maybe we will need to make it clear.

Assemblyman Ohrenschall:
I have a question about the prohibition against an attorney being legal counsel for more than one board, but the lack of prohibition about that same attorney being an independent contractor. Do you think there is less likely to be conflicts between the two different boards?

Assemblyman Pickard:
We are not aware of any actions where two boards were in conflict, but we were certainly aware and could come up with scenarios that would put boards in conflict with each other. Because of the experience of the Sunset Subcommittee of the Legislative Commission in the prior biennium, we looked at the structure of the attorney-client relationship and saw there were a number of different forms that it took. We recognized that employee status created

some obligations on the part of the state that an independent contractor would not. It also created some ethical concerns for an attorney acting as an employee for both. One of the scenarios we discussed was what happens if two boards hire one attorney. One board pays into the Fund for Insurance Premiums and the other does not. If that attorney does something improper, then both boards are potentially implicated for a whole host of different concerns such as negligent entrustment or negligent hiring. If the attorney was found to be acting within the scope of his employment, this would leave the state exposed to liability. If one state agency was paying into the fund and the other was not, the Fund is not implicated. The smaller board might not have enough money, and now the state is exposed to untold liability due to that lawsuit.

This bill will resolve that. When it comes to an attorney representing multiple clients, we have lots of experience in the state with that. Certainly as an independent contractor, they may do so. At that point, if they are representing multiple boards, they merely notify the boards that there is potential conflict. They could conceivably continue to act for one, but not the other, or recuse themselves from both which would be most appropriate because they would be privy to inside information that probably should not be disclosed to counsel on the other side. This bill seeks to resolve all of those concerns simply by removing the ability of a particular board to hire an attorney who is also an employee of another board.

Assemblyman Ohrenschall:
That is only if they are the actual counsel of the other board. If they are an independent contractor, then it is up to the attorney to communicate with each board as to possible conflicts and see if they want to waive those conflicts.

Assemblyman Pickard:
That is correct.

Vice Chair Carlton:
We will move to section 3. We are asking the Department of Administration to adopt regulations for standards for financial operations and administration of regulatory bodies. Were we planning on putting the statutory authority for that someplace other than here, or was this going to be the statutory authority because you only adopt regulations when you give the authority? Typically, boards adopt their own regulations, because each practice act is a little bit different. They adopt their regulations, go through the Legislative Counsel Bureau process, and come to the Legislative Commission or the Legislative Commission's Subcommittee to Review Regulations. What was the thought process behind giving the responsibility to the Department of Administration?

Assemblyman Pickard:
We determined that they are probably best suited to address, as a general proposition, what the financial best practices should be for all boards. This would be deemed the enabling legislation and if we need to enhance the enabling legislation elsewhere, we could do that.

This was intended to enable them to address the regulations that would be adopted as a basic set of rules for each board. The boards that already meet the standards within their practice acts would be able to continue without any significant intrusion into their practices.

Vice Chair Carlton:
In the audit provision, currently if you have less than $50,000, it is a balance sheet audit and if it is more, they are asked to go through a full-blown audit. How does this provision affect that?

Assemblyman Pickard:
The intent of this was to allow the Department of Administration to propose those standards. We would anticipate that they would fall within the same standards that the Legislature has enacted previously. Certainly the intent was not to allow them to go beyond the procedures and limitations that the Legislature has put on the boards. We would expect them to remain consistent with them.

Vice Chair Carlton:
Did you survey the different boards to find out who was doing what? I know there is a report that is filed with the Legislature, I believe every two years, that gives us the standing on discipline and on audits. Do we know where these boards stand right now?

Assemblyman Pickard:
We did not have that conversation directly with the boards in that level of specificity. We invited the major boards to the discussions we had with the Office of the Governor. We discussed the issues more globally. We discussed the idea of audits and our perception for their need. They did not object to them. They mentioned that the auditing process is already ongoing. It was anticipated that those who are currently doing those audits would simply continue to do so. The others who do not currently do them would be required to, so the Legislature has a more complete analysis of what is going on with the boards.

Vice Chair Carlton:
It was my understanding that they were all required to. If the Legislature believes this is an important public policy that we would like to implement, I would hate to hand it to the Department of Administration to administer for us. We should put it in NRS Chapter 622 ourselves and make sure everybody complies. Pull the boilerplate language that we used years ago and make it apply to everyone because we set the rules.

Assemblyman Pickard:
We are certainly amenable to that change. We could address that if the Committee would prefer.

Vice Chair Carlton:
When I go to the $200,000 expenditure, is that all part of this whole component?

Assemblyman Pickard:
Yes, we would anticipate that any change in the detail would involve both of these subsections.

Assemblyman Kramer:
Some of the state agencies, not boards, if they are very small like some of the improvement districts and they have a budget of under $50,000 a year, have a waiver on the audits. Some of the smaller ones have a biennial audit. Would that fit into this when the Department of Administration writes it up or when you make a call on that?

Assemblyman Pickard:
One of the things that influenced us was the Supreme Court of the United States ruling in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* 574 U.S.___ (2015). That was a case on anticompetitive practices in interstate commerce. It has a fairly narrow application to that. There are some repercussions that we felt throughout our discussions, the main thing being whether we are providing sufficient oversight for these boards. They are considered to be state actors. One of the things in the U.S. Supreme Court case was that states are expected to adequately manage, maintain, and supervise the actions of the boards. We recognized that there may be instances where some of the smaller boards were not doing an audit. Maybe they were doing only a balance sheet and maybe not within a regular periodic time frame. We wanted to tighten that for purposes of supervision. That is why we are trying to apply the same rules to all. The State Board of Osteopathic Medicine and others are suggesting that this might be onerous for them so they asked us to go to a biennial audit. As we embark on a discussion about how we want to put the audits together, that will dovetail nicely into that effort.

Vice Chair Carlton:
Section 4 is about the executive director or the executive secretary. Are there any questions? For years, we had a problem with boards, especially small boards being able to keep executive directors. It is very important to have a good executive director because that is success or failure for these small boards, because they do not know they need the audit or that they need to comply with a number of these different things. They need a true professional to manage them. Years ago, I tried to inspire a couple of the boards to share a person so if they had someone who was really good, they would work across. They do not do a lot of the other duties; they are more the executive branch of the boards. We never came across any conflicts with that. I am concerned with this because I would hate to see one of our small boards that does not have a lot of money have to let someone go. Have you surveyed the boards to find out if we would impact anyone?

Assemblyman Pickard:
This actually started in a discussion with the Office of the Governor. The Governor is the Chair of the State Board of Examiners and they were reviewing the fiscal side of all of these boards. They were identifying specific best practices that they thought were particularly important. As we were discussing that, and we were looking at the idea and the conflicts that

had arisen in their experience, that was the genesis of why we chose to suggest that these were going to be stand-alone individuals. We were flexible on the language, but that was coming from some input from the Governor's Office, so we adopted that.

Vice Chair Carlton:
The interesting thing about boards is that they have one foot in the Executive Branch and the other in the Legislative Branch. We set the statutes that they comply with; we set their fees and establish their scope of practice. But they are a regulatory body so therefore they are within the Department of Administration. It is a balancing act.

Assemblywoman Bustamante Adams:
For me, the major concern was that they must be a resident of the state. In the Sunset Subcommittee of the Legislative Commission, when we were reviewing boards and commissions, we had the problem that the executive director lived in another state. That is why there was no access for some of the licensees and it took a long time to process paperwork.

Vice Chair Carlton:
Assemblyman Pickard, can you get a feel for what the impacts of section 4, subsection 3 might be? The last thing I want to do is pass a bill and get somebody fired. In section 6, regarding the Office of the Attorney General and prosecution, are there any questions?

Assemblyman Ohrenschall:
If this passes and a deputy attorney general is the official counsel for a board, then that person will be prohibited from prosecuting a case if it goes to an adjudicatory hearing?

Assemblyman Pickard:
That is correct. The Office of the Attorney General is prepared and regularly does have one deputy attorney general working as an advisor to the board. Someone in another part of the office might be able to prosecute the case. They are large enough to be able to put that firewall up, and they do so regularly. The intent is that the attorney who is advising the board as to legal matters and decisions would never be prosecuting the case.

Assemblyman Ohrenschall:
When they have a deputy attorney general as counsel, do they ever have to find an outside prosecutor?

Assemblyman Pickard:
My understanding is that they are sufficiently large and divided into departments such that they can provide both if necessary. I am confident that they would refer out to independent counsel if they felt that was necessary.

Assemblyman Ohrenschall:
Do you have any data on how many boards employ a deputy attorney general as legal counsel versus hiring outside counsel?

Assemblyman Pickard:
I do not.

Vice Chair Carlton:
Was there any discussion with the Office of the Attorney General regarding whether they would have enough staff to accomplish this?

Assemblyman Pickard:
Yes, there were discussions as you have identified. It is somewhat unknown as to what the requirements would be. The Attorney General represented to us that as it currently stands, they would be willing to take it on, but they may have to staff up if this turns out to be more than they can handle.

Brett Kandt, Chief Deputy Attorney General, Office of the Attorney General:
Speaking specifically to sections 6 and 7, I want to emphasize to this Committee that what is proposed in the amendment reflects current practice. Due process prohibits the same attorney prosecuting a case before a board and also advising the board at the hearing on that case. Not only does due process prohibit that, but it would also constitute a conflict of interest in violation of Rule 1.7 of Nevada Rules of Professional Conduct that govern attorneys. Whether we are talking about our office, and our office's representation of a board that does not utilize outside counsel in any capacity, we always have a different deputy attorney general prosecuting a case than sitting as board counsel at the hearing on that case. If it is a Title 54 board that has the authority and has exercised the authority to either employ a staff attorney or to retain outside counsel to represent them, it is still the same case. That attorney could never wear both hats at an administrative hearing adjudicating the rights of a licensee. There are 18 boards that have the authority to retain outside counsel or to employ their own staff attorney. Not all of them have exercised that authority. I am pleased to tell you that in the last two years, a couple of boards that were utilizing attorneys outside of our office have made the decision to come back to our office and utilize us and our expertise. I hope to continue that trend. Typically, when a board employs its own staff attorney or has an attorney on retainer who needs to prosecute a case before the board, our office brings in a deputy attorney general to sit as the board counsel at that hearing. We would also be available to prosecute the case ourselves.

Vice Chair Carlton:
In the past, there was an attorney for one of the boards who did the investigations, represented the board, and was the prosecutor. In essence, they were violating Rule 1.7 when they were doing that?

Brett Kandt:
To my knowledge, unless there is a board operating outside of our advice, whenever a board has adjudicated the rights of the licensee in a hearing, they have ensured that there were different attorneys wearing those two hats. Typically, if they employ outside counsel, we come in and sit as board counsel during the hearing where the rights of the licensee are adjudicated.

Vice Chair Carlton:
I am hearing you say that sections 6 and 7 are amended to state what our best practices are now. This is just saying it again.

Brett Kandt:
Yes, sections 6 and 7 with the proposed amendments (Exhibit C). Sections 6 and 7 as drafted were incredibly problematic. Section 6 as drafted would have conflicted out our entire office from ever having one deputy attorney general prosecute and another sit as board counsel. We are a large office and we take the appropriate screening measures when we have deputy attorneys general wearing both of those hats, which we do for various boards.

Vice Chair Carlton:
Are there questions in section 8?

Assemblywoman Jauregui:
Why did we only leave in the real estate and related boards?

Assemblyman Pickard:
That is because the Real Estate Commission and the Real Estate Administrator all fall under the Real Estate Division of the Department of Business and Industry, so they already have an oversight body that is able to review what the Commission does. They already have the same kinds of protections within their practice acts. We felt that because they fall under an administrative organization that has a supervisory capacity which falls under the State Board of Examiners and the Legislature, we did not feel it necessary to add a layer. Instead we asked the boards that do not fall under that supervision, to adopt NRS Chapter 622A as a minimum set of standards.

Assemblywoman Jauregui:
Are they exempt from the entire bill? Could they share an attorney or an executive director?

Assemblyman Pickard:
That is correct.

Vice Chair Carlton:
Are there other questions under section 8? Seeing none, section 9? Section 9, subsection 3, paragraph (b) is about the protections for the licensees. A regulatory board's ultimate mission is to protect the public. Is there anything in this provision or the other provision that would slow the board down from protecting the public?

Assemblyman Pickard:
The short answer is no. If we look at it from the perspective of the procedures the board should have taken in the first place, those boards that were not adequately following the requirements of NRS Chapter 622A might be slowed down a bit. I think that is appropriate because they were arguably ignoring some of the due process considerations that they should have been adhering to, particularly since all boards already fall under the requirements

of NRS Chapter 233B, which is the basic Administrative Procedure Act. Since it was perceived that they were not meeting that standard and because they were exempted from NRS Chapter 622A, the feeling was that they had interpreted the statutory scheme to allow them to do what they were doing. This cures that. With respect to those who were already following these standards, the answer is no.

With respect to the greater provisions, for example, the Board of Medical Examiners has a more stringent set of requirements that afford their practitioners a different set but certainly no less protections than are in NRS Chapter 622A. That is why we chose that language.

Vice Chair Carlton:
In the past, we had an instance where there were multiple licensees involved in a case that was discussed a lot. The nurses on one side were handled in a much different way than the doctor in the case was handled. Would this make a difference in how that was handled? There were a lot of concerns about that doctor having his license even though there was no more harm being done.

Assemblyman Pickard:
I share your concern. I believe that when we were going through this, we were not really considering the details of the differences between the practice acts that would instruct or guide the boards to do things in a different fashion. This was to set NRS Chapter 622A as a minimum set of standards and then the boards can elect to adopt more stringent standards should they so choose.

Vice Chair Carlton:
Are there other questions on the remainder of the bill?

Assemblyman Daly:
In section 10, and I believe there is similar language in section 30, where you are extending the state's sovereign immunity to an independent contractor, there is a concern there. There was a bill in 2013 in which an irrigation district wanted to pay for insurance to indemnify the board against whatever act they might have done. We took that out because we thought it created a conflict. We felt they needed to do their job and their personal liability is their personal liability. I have a concern extending sovereign immunity to an independent contractor. If we open the door, every vendor for the state is going to want sovereign immunity too.

Assemblyman Pickard:
We know that we are going to be affecting a few boards, in terms of those that have employees currently protected as employees, to make it so they are not taking on additional exposure that they would not have had, now that we are asking them to become independent contractors. They are currently so covered. This was a means of ameliorating the difference. That said, every attorney should have liability insurance. They should also have malpractice

insurance. To the extent that they are performing, in good faith, the acts that an employee is currently maintaining, the thought was that we would extend the same protection they had under one hat, under the new hat.

Assemblyman Daly:
If we are changing the policy, and we are saying we want to have this different representation, the employee can choose to stay as an employee and he can have one role, but not the other. It seems to be a short-term problem and you need to put a sunset on that immunity until those people adjust or retire. I am uncomfortable with extending the state's sovereign immunity to any vendor without opening up a lot of problems.

Assemblyman Pickard:
Our concern was along the lines of Assemblywoman Carlton in terms of finding appropriate attorneys, particularly for the small boards. If they have the experience and the know-how but are under the umbrella of sovereign immunity, that only extends to the extent that they are acting in good faith on behalf of the board. The next day, they are independent contractors and no longer have that. The concern is that many of the existing counsel would opt not to do that. If they are working for a small board or multiple small boards where they would be required to take on the role of an independent contractor, then they would try to elect to stay the employee of one and the other boards would have to find new counsel. One of the things we heard consistently was that the small boards are already having difficulty finding adequate support, and we were trying to be sensitive to them. If the independent contractor goes beyond the extent of the scope of their engagement, he cannot take advantage of sovereign immunity. It is only to the same extent as if he were an employee of the organization in the first place.

Assemblyman Brooks:
Are there other independent contractors who work for the boards who are covered by this? I do not see it defined in NRS Chapter 622A as an attorney. Would they be immune from civil liability for making a decision or action on any law or regulation governing occupational licensing?

Assemblyman Pickard:
The intent is not to extend this to any other type of independent contractor, and I think that would be worthy of an amendment to make sure that we tighten that. We are talking only of attorneys working as independent contractors. We will find the appropriate language to make that fit.

Vice Chair Carlton:
Are there any other questions on the bill?

Assemblywoman Neal:
I had a question in section 19. There is a strikeout where you have expanded the time to one year in regard to the revocation. Why did you go from the six months to the one year?

Assemblyman Pickard:
I will have to research that and respond to you later.

Assemblyman Ohrenschall:
In section 7, you spoke about a firewall at the Office of the Attorney General. Do you envision under the amended section 7 any scenario where a law firm has one of its attorneys as legal counsel for a board, and another prosecutes the board? Do you see that happening and could they try to build a firewall to try to deal with that scenario like the Office of the Attorney General?

Assemblyman Pickard:
The short answer is no. That is not the intent. The State Bar of Nevada has established rules for that type of thing. There has to be appropriate screening and they would have to meet that to avoid sanctions from the Bar. It was not our intent. We are not aware of any law firms other than the Office of the Attorney General that are large enough to be able to do that successfully. I would imagine if a firm was large enough and could demonstrate to the Bar that they could meet those requirements, that would be technically possible under this legislation.

Vice Chair Carlton:
We will hear support for A.B. 328.

Keith L. Lee, representing the Board of Medical Examiners:
We appreciate being able to work with the sponsor and Mr. Kandt. The procedure of the Board of Medical Examiners with respect to disciplinary matters is clear-cut and it has been this way for a number of years. We have several counsel who are employees of the Board of Medical Examiners, not independent contractors. When a complaint is received, a file is opened, and it is assigned to an investigator and to an in-house counsel. The investigator and the in-house counsel begin the investigation, convene an investigative committee which comprises three members of the Board, one of whom must be a layperson. If a decision is made to file a formal complaint, that begins the disciplinary process against the licensee. If it goes to a hearing, the counsel who has been involved from the investigation forward prosecutes the case. Our deputy attorney general always advises the adjudicatory board with respect to legal matters regarding the adjudication of the case.

Vice Chair Carlton:
Is there other support? Seeing none, is there any opposition?

Paula Berkley, representing Board of Occupational Therapy:
With a small board, you do not get many new licensees so the revenue does not change that much. Having a biennial audit rather than one every year would be helpful. Full annual audits are expensive for small boards. The Board of Occupational Therapy shares an office with two other boards to share costs. The small board that is in the office writes about six

checks a month. Doing a full audit with a very small board is both time-consuming and expensive. I think all of the boards believe we need to be fiscally responsible and accountable.

Vice Chair Carlton:
Does the Board of Occupational Therapy do the balance sheet audit or the full audit? What is its yearly number?

Paula Berkley:
We do the full audit. Our budget is $80,400.

Vice Chair Carlton:
So the number we put in years ago, with inflation, probably should be adjusted as far as that balance sheet audit would go.

Paula Berkley:
That would seem appropriate.

Assemblyman Hansen:
I have a bill in the Assembly Committee on Government Affairs, Assembly Bill 134, this session which will exempt the need for full audits for special districts with budgets of less than $300,000.

Vice Chair Carlton:
We may need to change that requirement because we did not want to impose that level of cost and time on a smaller board. That impacts the licensees.

Michael D. Hillerby, representing State Board of Pharmacy:
We are here in opposition to the bill as introduced. We have an amendment (Exhibit D). We support the amendment to sections 6 and 7 (Exhibit C). The Board of Pharmacy employs in-house counsel. The Board also uses the Office of the State Attorney General to sit as board counsel at each meeting. We are doing exactly the kind of thing that the bill envisions. The amendment from the Board of Pharmacy is the result of looking at the statute which is very old, dating back to 1975. *Nevada Revised Statutes* 639.070 subsection 1, paragraph (k) says the Board may employ an attorney, singular. Most of the boards that have this language, such as the State Contractors' Board, State Board of Professional Engineers and Land Surveyors, Board of Medical Examiners, and the State Board of Nursing, that section is plural and the list of other people the Board may employ in the pharmacy chapter is also plural. The Board is just about at the point where it is going to need an additional counsel. They did have to look for some outside counsel this year because they had a large disciplinary case. The sponsors said they would support this amendment. With that, we would be supportive of this bill.

K. Neena Laxalt, representing State Board of Physical Therapy Examiners; Board of Massage Therapists; Board of Psychological Examiners; Nevada State Board of Veterinary Medical Examiners; and Board of Dispensing Opticians:
All of these boards have concerns with sections 6 and 7 the way it was drafted. With the proposed amendment (Exhibit C), we are neutral. The Board of Psychological Examiners does not hire outside counsel, so we are not taking a position on section 2. I am not directed to take a position on section 2 by the Nevada State Board of Veterinary Medical Examiners and the Board of Dispensing Opticians. They both hired the same person for in-house counsel. That has seemed to work very well for them.

Vice Chair Carlton:
If you would double-check with the boards about their position on the audit provisions, that would be very helpful.

Margi A. Grein, Executive Officer, State Contractors' Board:
We were not involved in any of the discussions on this bill prior to it being introduced. We are concerned that there are conflicting provisions in other sections of the statutes. Section 3 requires the Department of Administration to adopt standards for financial administration of regulatory bodies and to submit annual audits. *Nevada Revised Statutes* (NRS) 218G.400 requires boards to submit an annual audit prepared by a certified public accountant to the Legislative Auditor and the Chief of the Budget Division of the Office of Finance of the Office of the Governor on or before December 1 each year. The State Contractors' Board and other boards are exempt from the State Budget Act pursuant to NRS 353.005. If we have a provision in NRS Chapter 622 that requires an audit and we have a conflicting statute under NRS 218G.400, why would the Department of Administration have oversight of our budget when we are exempt from the State Budget Act? Chief Deputy Attorney General Brett Kandt has addressed our concerns under sections 6 and 7.

Section 8 is a concern because of the exemption that we currently have from NRS Chapter 622A. We have gone through our statutes and regulations under NRS Chapter 624 pertaining to our procedures for disciplinary hearings and prosecution of cases, although there is a section in the bill that says if it is less stringent, it does not apply. Who makes that determination? If you have conflicting statutes and regulations, which one would prevail when there is a conflict? We request the Committee or the Legislative Counsel Bureau to give us clarification.

Vice Chair Carlton:
Would you please share your information with the sponsors; they will evaluate it. Seeing no other opposition, are there closing remarks?

Assemblyman Pickard:
I was approached before this hearing with the analysis that the State Contractors' Board performed. Regarding who determines whether the standards are compliant with NRS Chapter 622A or greater, as is currently the case, any time a board or state agency deviates from NRS Chapter 233B, it is within their purview to do so. They would make the

determination whether their regulations met the standards. That would be done in consultation with legal counsel. If that were challenged, then a court would probably analyze the decision. We anticipate and it is our intent that the boards make the determination on their own, so they can do what they think is best in administering their individual board actions. The intent of the bill is that NRS Chapter 622A become the minimum set of standards with which everyone should comply.

Vice Chair Carlton:
Is there any neutral testimony?

William C. Horne, representing Board of Dental Examiners of Nevada:
We are neutral on A.B. 328 with the proposed amendments in sections 6 and 7 by the sponsor as explained by Chief Deputy Attorney General Kandt.

Vice Chair Carlton:
I will close the hearing on A.B. 328. Is there any public comment? [There was none.] The meeting is adjourned [at 2:09 p.m.].

RESPECTFULLY SUBMITTED:

_____
Earlene Miller
Committee Secretary

APPROVED BY:

_____
Assemblywoman Irene Bustamante Adams, Chair

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a document titled "Proposed amendments to AB 328," presented by Assemblyman Keith Pickard, Assembly District No. 22.

Exhibit D is a proposed amendment to Assembly Bill 328 presented by Michael D. Hillerby, representing State Board of Pharmacy.