MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON LEGISLATIVE OPERATIONS AND ELECTIONS

Eightieth Session
May 9, 2019

The Committee on Legislative Operations and Elections was called to order by Chair Sandra Jauregui at 4:16 p.m. on Thursday, May 9, 2019, in Room 3142 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/80th2019.

COMMITTEE MEMBERS PRESENT:

Assemblywoman Sandra Jauregui, Chair
Assemblyman Ozzie Fumo, Vice Chair
Assemblyman Skip Daly
Assemblyman Glen Leavitt
Assemblyman William McCurdy II
Assemblywoman Brittney Miller
Assemblywoman Daniele Monroe-Moreno
Assemblyman Tom Roberts
Assemblywoman Selena Torres

COMMITTEE MEMBERS ABSENT:

Assemblyman John Hambrick (excused)

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Carol Stonefield, Committee Policy Analyst
Kevin Powers, Committee Counsel
Catherine Bodenstein, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

Yvonne M. Nevarez-Goodson, Esq., Executive Director, Commission on Ethics

Chair Jauregui:
[Roll was called and Committee protocols were explained.] Welcome, everyone, to the Assembly Committee on Legislative Operations and Elections. We can go ahead and get started on our agenda. We only have one item on our agenda today and it is Senate Bill 129 (1st Reprint), so I will open the hearing on Senate Bill 129 (1st Reprint).

Senate Bill 129 (1st Reprint): Makes various changes relating to ethics in government. (BDR 23-191)

Yvonne M. Nevarez-Goodson, Esq., Executive Director, Commission on Ethics:
With me here today is our Commission counsel, Tracy Chase. We are both available to answer any questions. In the meantime, I would like to provide a relatively brief overview of a large bill, Senate Bill 129 (1st Reprint). I have had the opportunity to meet with most of the members here today to discuss the bill in length, but the goal here today will be to address your questions in more length than my overview. I have, again, provided you a copy of the lengthy summary of the bill on the Nevada Electronic Legislative Information System for your reference as I talk about these issues (Exhibit C).

Senate Bill 129 (1st Reprint) is essentially a product of the last two years of work of the Commission on Ethics having implemented Senate Bill 84 of the 79th Session, which provided a relatively large overhaul of the Ethics in Government Law set forth in the *Nevada Revised Statutes* (NRS) Chapter 281A.

Most notably, S.B. 84 of the 79th Session contemplated a new structure by which the Ethics Commission would process advisory opinions and ethics complaints. In particular with respect to ethics complaints, S.B. 84 of the 79th Session provided an opportunity to have additional types of penalties that could be imposed other than monetary penalties. It also provided a structure whereby a review panel instead of an investigatory panel could enter into deferral agreements with subjects for minor violations, and also allowed the Commission other opportunities to address ethics complaints through what we refer to as "letters of caution" or "letters of instruction."

As a result of these large overhauls from S.B. 84 of the 79th Session, the Commission has been implementing those changes. Senate Bill 129 (1st Reprint) here this session is intended to capture either the loopholes that we have discovered or process concerns that we have endeavored to overcome through the implementation of S.B. 84 of the 79th Session. What I would like to do today with Senate Bill 129 (1st Reprint) is to summarize the provisions into six main categories.

The first category is our request for advisory opinion. Under current law, a public officer or a public employee may request a confidential advisory opinion from the Commission on

Ethics regarding his or her own conduct, whether there is a conflict of interest, and if so, whether that conflict is disqualifying. Senate Bill 129 (1st Reprint) would authorize a special or local ethics committee or legal counsel or the supervisory head of an organization to also request an advisory opinion from the Commission on Ethics. As far as intent is concerned, the Commission attempts to collaborate primarily with local agency counsel at the local level and state agency counsel for state Executive Branch agencies to be able to collaborate on issues and provide advice about Ethics in Government Law.

Because Nevada has 145,000 public officers and public employees, our best efforts at outreach to these individuals are through agency counsel. The ability of S.B. 129 (R1) to authorize the Commission to also provide advisory opinions to these individuals would be a tremendous help at the Commission's outreach.

The other minor amendments related to the advisory opinions in the bill include establishing a two-year statute of limitations on advice for past conduct, authorizing stays or dismissals upon filings of related ethics complaints, and clarifying the scope of waivers of confidentiality.

The second subject set forth in S.B. 129 (R1) deals with ethics complaints. The Commission's goal behind the proposed amendments related to the ethics complaints are focused on providing additional due process and clarity to subjects of ethics complaints and updating or streamlining certain procedures undertaken by the Commission to process these cases.

In particular, the bill clarifies the responsibilities for jurisdictional and investigatory determinations by the Commission and the review panel, and the associated duties of the executive director. It clarifies that upon conclusion of an investigation, the executive director takes party status with regard to ethics complaints to ensure that there is no improper access or communication with the Commission that is separate or distinct than that which might be available to the subject of an ethics complaint. Notably, this is the current practice before the Commission under existing law. The requests for the changes in S.B. 129 (R1) are an attempt to make clarifications to our existing practice.

To further summarize the changes related to ethics complaints in S.B. 129 (R1), we propose the following changes:

1. Extensions to statutory deadlines for good cause shown. Good cause may include limited and appropriate extensions necessary for subjects to retain legal counsel, compliance with subpoenas, and perhaps increased caseloads and/or staff conflicts, vacancies, or other limitations that might occur at the staff level. These extensions are not deemed to be waivers, so they will be time-specific extensions upon the authority of the Commission for good cause shown.

2. We are going to be clarifying the preparation and service of appropriate notices, written determinations of Commissions and panels, and orders that might otherwise be issued by the review panel or the Commission at all stages of proceedings.

3. We are going to require the participation in investigations by both subjects of ethics complaints as well as public officers and employees who may be witnesses, and then we will have the associated confidentiality protections therewith.

4. We are going to be eliminating the designation of "willful violations." Instead, the Commission will evaluate the seriousness or severity of conduct of a violation to determine whether or not a penalty is appropriate. Notably, with regard to the elimination of the designation of willfulness, the *mens rea* of the mental status intent provisions of the law remain the same as existing law. We are simply eliminating the word "willful" before violation, but the definition of violation will still require a finding of intentional and knowing conduct by the Commission. For your purposes, "knowing" means that you knew the conduct you were engaging in, and "intentional" means that you intended to engage in that conduct. It does not mean that you knew that you were violating the law and it does not mean that you acted with bad faith or some sort of malicious intent. The Commission will consider those factors in any determination about the severity of the conduct.

   The implications of the removal of the willfulness designation include an enhanced protection under the safe harbor provisions for public officers and employees who rely in good faith upon the legal advice of the attorney who is hired or elected to represent the agency. Under current law, the safe harbor protection only applies to a finding of a willful violation.

   Finally, the removal of the willful designation under ethics complaints will also change the structure by which the Commission will have the ability to move for the removal from office of certain public officers.

The third issue set forth in S.B. 129 (R1) is with respect to the ethical standards of conduct. Senate Bill 129 (1st Reprint) establishes new standards and amends existing standards of conduct as follows:

1. With regard to the "cooling-off" provisions, there are several provisions of cooling off under existing law. There is one provision that provides for cooling off of Executive Branch employees of state government. That particular section of existing law prohibits Executive Branch employees from leaving public service and going to work for the business or industry that is regulated by their agency for one year if certain conditions apply. This amendment in this bill would limit the application of that prohibition to management-level employees of the Executive Branch agency.

   The further additional change has to do with contract vendors of various agencies. There are limitations on moving into employment in the private sector with an agency

that has had a contract with your agency in the year preceding your termination of public service. This bill would amend that language to include that we are not only talking about those positions that have had influence over the awarding of the contract, but also those positions that have been materially involved in administering or managing the contract during the immediately preceding year.

2. The next standard of conduct you will see in the bill is a new standard of conduct regarding abuse of power or authority. This section would prohibit actions by public officers or employees that a reasonable person would find to be gross or unconscionable abuse of official position or power. This does not include allegations of bias, error, or abuse of discretion within normal scope of duties.

3. The next standard of conduct addresses misuse of government resources. Under existing law, a public officer or public employee is prohibited from using government property for a private purpose, and there is a limited-use exception in the law that provides that certain use is appropriate if it has been authorized by a supervisor issued pursuant to a policy of the agency and does not create an appearance of impropriety. This bill would limit the limited-use exceptions, or rather clarify them to require that the policy in place be a written policy that was adopted before the action was taken, and it also seeks to address a definition for what constitutes an appearance of impropriety.

4. The next standard of conduct deals with our disclosure in abstention provisions. Under our disclosure and abstention provisions, we will provide for a new limited exception from disclosing certain information for legally protected confidential relationships. For example, if we have a conflict of interest and it relates to a private client that we might have if we are an attorney in our private life, we would be prohibited under our attorney-client privilege and relationship from disclosing the nature of that relationship or the nature of the underlying issue. This law would provide that the disclosure of that confidential information is not required, but if you choose not to disclose that level of detail, you must also abstain from acting on the matter.

5. Finally, under our amended standards of conduct, we have prohibited contracts with governmental agencies. Under existing law, public officers and public employees are prohibited from engaging in contracts with governmental agencies unless various exceptions apply. This is a very broad restriction. This is any state or local governmental agency. This bill would limit the application of those contracts to agencies with which the person is affiliated, either the agency he or she works for, or any agencies with a reasonable connection to the work of that agency. Again, the same exceptions would continue to exist, except that we would delineate a distinction between those types of contracts that are subject to open-competitive bidding and those which are not suited toward the competitive process.

The next standard of issue in S.B. 129 (R1) deals with Open Meeting Law (OML) exemption and application. Under current law, the Commission is subject to OML for all of its regular business. However, the Commission is currently exempt from OML for its proceedings regarding requests for advisory opinions, review panels, and for its receipt of information and deliberations regarding ethics complaints. Final actions taken in an ethics complaint must comply with OML.

This bill seeks a complete exemption from OML for its proceedings related to ethics complaints and instead provides that the Commission will take final action in an open meeting defined under its regulations, but that it would not be required to comply with the notice, agenda, and supplemental materials requirements of OML for confidential documents and scheduling and noticing challenges that we endure during our cases.

The OML also requires that a public body take legal action regarding litigation in an open, public meeting under OML. This bill would authorize the Commission to delegate litigation decisions to its chair, executive director, or both and to allow Commission counsel to initiate, defend, participate, and appeal in legal proceedings with the consent or ratification of the Commission or from the chair or executive director if it has been so delegated. This bill exempts such delegation decisions from OML if the delegation needs to occur during confidential phases of proceedings; for example, our advisory opinions are entirely confidential and our ethics complaint proceedings are confidential up to and until the review panel has made its decision one way or another.

This exemption that we are requesting, by the way, is consistent with what you might see in Assembly Bill 70, which is the Attorney General's Open Meeting Law bill applicable to all public bodies.

The next issue in the bill has to do with the jurisdiction of state legislators. Under current law, the Commission's jurisdiction of state legislators is limited to conduct that does not constitute a core legislative function or that implicates legislative privilege and immunity. Only the legislator's own house can discipline a legislator for that conduct.

This bill would authorize the Commission to conduct preliminary investigations and direct its executive director to refer a matter by filing a complaint with the appropriate house ethics committee with questions that come before the Ethics Commission over which it does not have jurisdiction. Such a referral would maintain the confidentiality of the matter.

As a final matter, Madam Chair, there are other highlights in the bill to include things such as the executive director being required to be an attorney in the state of Nevada given the party status and the requirements for training and educating all the public officers and employees throughout the state. Published Commission opinions would be deemed to be administrative, persuasive precedent for future cases. That is how we currently operate and currently cite to our cases. Finally, the bill makes a distinction between the issuance of decisions and the issuance of written opinions. There are statutory deadlines in place under the current law for us to render decisions in advisory cases and ethics complaint cases, but this bill requests

additional time for the Commission to turn that decision into a written opinion. That extension is not to exceed 90 days unless there is good cause shown for a reason to extend that time frame.

Madam Chair, one thing our summary did not include that I failed to add was an amendment from the other house, which was the elimination from the original bill of the request to change our acknowledgement form process. What I failed to highlight in this summary was that we did eliminate that out of the bill, but in its place, we did request that, much like the local governments and the state agencies provide to the Office of the Secretary of State, we would also like to receive a list of the public officers from those agencies so that we can ascertain compliance with our acknowledgement of statutory ethical standards form.

Madam Chair, that is a very big overview. I appreciate your time, but we will take questions on the specifics.

Chair Jauregui:
Committee members, do you have any questions?

Assemblyman Daly:
I will go through the sections in order as I was reading them. My first question is in section 7, subsection 1, starting at line 25 where it says, "Every public officer or employee of the State or one of its political subdivisions, regardless of whether he or she is otherwise subject to the provisions of this chapter, shall cooperate." Who are you trying to capture in there? If you came to me in my private capacity in my regular day job and said, Hey, you have to do this, I would say that I am not subject to your chapter. Go away and leave me alone. Who are you trying to get to and where are we going?

A follow-up question on that is then in section 7, subsection 1, paragraph (a), it says that they have the right to privileges and immunity recognized by the law, and under paragraph (b), "Any confidentiality or other protection recognized by law." Who is going to decide the scope of those protections? Or are they just going to say, I am claiming this immunity and you are going to say, Oh, no you are not. How are you going to resolve all of those things? I just do not know how you will rope in people who are not covered by your statute.

Yvonne Nevarez-Goodson:
The goal of this particular section is really many. First of all, most of the witnesses that the Commission talks to in the course of any ethics complaint involve public officers or public employees who work in the same agencies as the subject who is complained about. So if someone has an ethics complaint against them, first of all, he or she must be a public officer or public employee to be a subject of an ethics complaint before the Ethics Commission. If there is alleged conduct that is being complained about, it has to be with respect to the subject's public duties. A lot of times, the witnesses who we need to talk to are the very people who work with those public officers and public employees in those agencies. That is who is being targeted here: any person who might be a public officer or public employee who would have information relevant to an ethics complaint investigation.

Now what I would say is, any public officer or public employee is subject to the jurisdiction of the Ethics Commission anyway, so failure to cooperate makes it very difficult for us to get the information that we need. But as you can probably appreciate, most public officers and public employees are very reticent to have to cooperate in an investigation that involves their colleagues or perhaps their supervisors. So our investigatory file and our investigatory process is confidential, and we do protect them from being identified as witnesses and persons to whom we talk to during the course of an investigation. Their names may come out as potential witnesses if we get further down the road in an adjudicatory process, but this language is also modeled after identical language that applies to the Commission on Judicial Discipline. We took that language from them because they, again, in their course and scope of their investigations, rely equally upon the cooperation of our public officers and public employees.

To your second question with regard to the recognition of rights, immunities, and things of that nature, we do want to respect that. If there is a legally recognized right or immunity applicable to public officers or public employees, they have the right to assert it. The most obvious example might be something to the effect of if their own conduct is going to be implicated somehow by being a witness, they would be able to assert certain rights or privileges including the right against self-incrimination. We have seen that happen on a number of occasions. This language also provides that they have an opportunity to have legal counsel available to them in the course and scope of any investigation in which they would be a witness.

Assemblyman Daly:
I got all that, and I understand that all public employees are covered by the Ethics Commission and that most of the people you would be talking to and compelling to cooperate—except by virtue of their privilege—would be there. But that is not what the words say. The words say that it applies to anyone notwithstanding whether or not they are subject to the statute. How are you going outside that notwithstanding part? That is why I said, you come to me and maybe I did business with them in a separate deal. I am not a state employee. You do not have jurisdiction over me. How can you compel me to cooperate even though I am just going to say that I do not have to talk to you? You can subpoena me or whatever you want to do, I guess, but you are saying notwithstanding that, every citizen in the state who you might want to talk to is now compelled.

I understand about the exemptions, the privilege, the self-incrimination, and all that. I was asking who decides that. Or is the Commission just going to put up a defense and then you will have an argument over whether or not they apply? If that is the answer, I accept that, but it says notwithstanding, whether or not you are covered by the statute, you are compelled. I question that you have the authority to do that.

Yvonne Nevarez-Goodson:
You know, as I look at that language, I think my original intent was that it would be a public officer or employee who was not otherwise the subject of an ethics complaint before the Commission, but I will have to go back and look at that language. The point that you made

is well taken. It is not only public officers and public employees who cooperate in investigations. The Commission has broad subpoena power to subpoena any person regardless of whether or not he or she is a public officer or public employee if we believe he or she has information relevant to an ethics complaint. So in existence with our current subpoena power, this is a provision where any public officers or employees, frankly, we could subpoena as well if we believe they have information. But short of having to issue a subpoena and go through that process, this statute was aimed at requiring people who were nevertheless subject to the requirements of Ethics in Government Law to cooperate in our processes.

To your other question, you are correct. It would take someone asserting a right or a privilege for the Commission to be able to weigh in on that particular issue. It would not necessarily—we are going to recognize and respect any legally recognized privilege or confidentiality provision that is asserted, but the questions that became more contrary would go up to the Commission for full vetting if there were some dispute. Or, again, legal rights could also be recognized in the courts if something were pursued by the Commission that someone felt that they did not have the obligation to comply with.

Assemblyman Daly:
Thank you. I have often said this, so I will say it again: The English language is the most precise language in the world. So we should use it to be precise if you want to talk about people who are not otherwise the subject of the complaint who are public employees, and for people who are outside of state service, you would just have your subpoena power anyway.

The next question will be a little bit easier. I think it is just an explanation on making sure that I am reading it correctly. It is in the new section you mentioned, section 11.5. I want to make sure because I read it two times and I read it differently two different times, but I think I understand it now. There is a provision in the NRS under, I think it was 281A.500, that says people have to submit that disclosure, and I think you make it electronic in this bill. Then 281A.500 tells each agency that has employees who are subject to the statute to tell the employees that they have to comply. If I read section 11.5 of the bill right, the agency needs to then also tell you the names of the people who have to submit it. Is that because a great number of people are not, and you have no idea who is supposed to and who is not? I am assuming that is it, but I wanted to make sure. When I read it that way the second time—the first time, I was questioning—but the second time, I want to make sure that is the intent and that is what you are doing, and then that will help with compliance on both sides. I think I am probably okay with that.

Yvonne Nevarez-Goodson:
Yes, your reading of that particular statute is accurate. The original iteration of the bill had us changing acknowledgment from penalties from a violation of the Ethics in Government Law to the imposition of sanctions, much like the Secretary of State imposes for public officers who fail to file or who fail to timely file their financial disclosure statements. The original goal of the bill was to mirror those sections with financial disclosure statements so that we could simply impose those fines rather than go through the entire process of an ethics

complaint and an investigation. When the Commission looked at that issue, there was a significant fiscal impact so we removed that section out of the bill. But we thought that the appropriate compromise for the Commission's purposes was to, in fact, be able to evaluate the number of public officers who we are being informed of to determine the level of compliance. At this point, we simply do not know. Unless someone files a complaint alleging someone failed to file, we have no master list to compare those who are filing versus those who fail to file. You are right. That is the goal of the Commission with this section.

Chair Jauregui:
I have a question on this section as well. How do you know who is a public officer now?

Yvonne Nevarez-Goodson:
Under current law, a public officer for purposes of the ethics law is defined in NRS 281A.160 and 281A.182. This is a person whose position is established by law.

Chair Jauregui:
But how do you know? Currently, these heads of departments are not sending you lists, so how do you do your job now?

Yvonne Nevarez-Goodson:
Currently, collecting the form is essentially what we do. We have no ability to go out there and inform people who otherwise are public officers that they are failing to file the form. When we receive requests for advisory opinions and ethics complaints, we undertake an initial evaluation of every case that comes through to determine whether the person at issue is a public officer. We go through the analysis under our law about if this person's position is created in law and whether they carried out a public power, trust, or duty. We go through the painstaking effort right now in every single case that is presented to us about who qualifies as a public officer or public employee. With respect to the acknowledgement forms, at this point compliance is solely based upon those who file, and we do not have a master list to compare to determine whether every public officer in the state is filing.

Assemblyman Daly:
I have an issue with section 14. Again, that starts out, "Notwithstanding any other provisions of NRS 281A.700 to 281A.790." I know you changed a lot of those sections, so I read those last because they take them in order. My problem is this—and maybe I am off base and maybe I am just paranoid—but I know NRS 281A.715, subsection 2, currently says that you have to determine if you have jurisdiction and if you do not have jurisdiction, you have to dismiss that. I know that legislators and the rest of the public employees are in separate boxes, if you will, and there are some of the provisions under the ethics standards that we are all subject to and then there are some that are outside your jurisdiction. So I have problems with section 14 when you say notwithstanding this, we can do all of these other things, and then you want to do a bunch of extra steps, do preliminary investigations, and then notify the house after you have made some sort of preliminary finding or whatever. Under the current statute—which is where I am going to ask you to stay and that is probably going to be my position on the Committee—if it is not your jurisdiction, then you have to stop and dismiss.

You can report if you would like and say, Hey, we have this and maybe you want to look into it. But if it is out of your jurisdiction, I am not looking to expand your jurisdiction.

Yvonne Nevarez-Goodson:
First of all, for the record, the Commission is certainly not intending, nor does this bill expand our jurisdiction with regard to state legislators. There are some issues that the Ethics Commission has concurrent jurisdiction over involving a state legislator that the house ethics committee may also have jurisdiction over, and then separately, there are some issues that the Ethics Commission would not have jurisdiction over with regard to a state legislator, primarily those being core legislative functions and conduct which is protected by legislative privilege and immunity. In those cases, this statute is aimed at where it is obvious to us, we receive a complaint, and we know that we do not have jurisdiction over it, we will dismiss it and we will often refer the requestor or the complainant to the house ethics committee and sometimes they will ask us to refer it over. Right now, we do not have the authority to refer it over to the respective house ethics committee because our ethics complaints are deemed confidential, and we do not have the authority to refer that over.

Second, one of the processes in our complaint process is that we can protect the identity of a requestor who is alleging conduct against someone within their own agency. For us to be able to refer that over and continue to protect that confidentiality, we do not currently have the authority to do that. So the goal of this bill is certainly not to expand our jurisdiction, but in the appropriate cases where we have received a complaint, and we have determined that we do not have jurisdiction, this bill gives us the authority to refer it over and also to maintain the confidentiality of that referral and underlying information that we present to the house ethics committee. Does that answer your question?

Chair Jauregui:
I am going to have our legal counsel, Mr. Powers, jump in.

Kevin Powers, Committee Counsel:
I am in agreement with the executive director's interpretation of this provision. This does not expand the Commission's jurisdiction over state legislators, nor could it because that would be an unconstitutional delegation of power to the Commission on Ethics. The language of this section does not expand the jurisdiction, nor could it constitutionally do so. What this section does, as the executive director mentioned, is give the Commission a procedural mechanism when they are confronted with an ethics complaint where the claims are not within the jurisdiction of the Commission, but are within the jurisdiction of the house for the executive director to file those claims with the house and the house would proceed under its applicable standing rules. This does not expand the jurisdiction of the Commission over legislators. The reason for the "notwithstanding" clause at the beginning of the section is to say that notwithstanding all these other procedures that the Commission normally has to follow when it has jurisdiction, when it does not have jurisdiction, this is the procedure the Commission follows. It refers the complaint to the house. All this does is give a procedural mechanism for the Commission to refer the complaint to the house when it is outside the jurisdiction of the Commission, but within the jurisdiction of the house.

Assemblyman Daly:
Thank you for the interpretation on that. Again, we can disagree or agree however we want, but I do know—and if you go right to the home page of the Nevada Legislature, there is that complaint box that you can use. Anyone can go there to make a complaint. I know it is titled harassment, or whatever, but they will take any complaint—in my understanding—that comes through. You could just as easily, without all of this language and without disclosing any confidentiality, tell that person who is calling and making a complaint to you to go to the website and file a complaint there. It is my opinion.

Chair Jauregui:
I want to jump ahead to section 27; I have some questions there under subsection 3. As I read this, it sounds as if you are giving authority to the Commission counsel to act without having to seek approval of the Commission, and I feel as though the Commission was put there in place for these protections. So now the Commission counsel can file an appeal and right now they cannot do that. Right now the Commission as a whole has to vote to do that. So can you walk me through the thought process behind this because I do not feel comfortable taking that authority away from a Commission and giving it to a single person to act without the Commission's approval.

Yvonne Nevarez-Goodson:
Under existing law, the Nevada Supreme Court recently issued an opinion finding that the Commission had an obligation to meet as a public body to direct its staff to make various decisions in litigation. In that particular case, it happened to be a notice of appeal. What that case also mentioned was that there was no avenue in statute or regulation for the Commission to have delegated that. There was no authority at that time for the Commission to do that. This bill would authorize the Commission to delegate those litigation decisions, as I said, to either the chair, executive director, or both, in an appropriate circumstance, or to authorize the Commission counsel to do so upon the consent or ratification of the Commission.

Now that delegation itself must be done in an open public meeting. So the Commission's decision to delegate a litigation decision can be as broad or as narrow as it wants to be for any given case, but that delegation decision must be made in an open public meeting by the Commission. From that perspective, that does not overcome the Open Meeting Law with regard to that particular issue.

Chair Jauregui:
But is it not the job of the Commission to make the decision, and not to delegate the authority to someone else to make the decision? It is the job of the Commission to make those decisions.

Yvonne Nevarez-Goodson:
Madam Chair, I think I would argue that in any particular given case, under the existing law, the attorney for an agency has an obligation to keep his or her client informed about what is going on. So certainly the public body is in charge of making decisions with regard to particular issues. But I think the Commission, or any public body, also has the ability to

understand what is going on with its particular caseload and delegate various decisions to its staff and counsel in appropriate circumstances. It may be that the Commission is aware that we are defending a particular case. In litigation, the Commission may say, Okay, we understand that we are defending this litigation. We want to authorize our Commission counsel to file any notices in pursuit of defense of this litigation up through the Nevada Supreme Court, for example. So presumably, the Commission is informed by virtue of its attorney-client privilege with its counsel knowing what a case entails, that it has the ability to make those decisions about what delegations are appropriate, and the scope of those delegations as well.

Chair Jauregui:
I want to jump ahead to section 32, subsection 7, paragraph (a), subparagraph (1) where it says, "At the time that the use occurs, the use is." Can you give me a specific example? You are saying that now in sub-subparagraph (I) that "Authorized by a written policy which was adopted before the use occurs by the public officer." Can you give me an example of a time when this has happened?

Yvonne Nevarez-Goodson:
The most recent example I would have—again, this is the limited-use exception which authorizes certain limited uses of governmental resources for personal purposes, things such as picking up the telephone and making a personal call during work hours are presumably going to be authorized by your supervisor pursuant to some agency policy. What we have seen at the Commission are circumstances whereby we have either had elected officials or high-level agency directors, et cetera, who have instituted a policy and said that it is their right to institute a policy at their whim. Because he or she is the head of the agency, he or she has had the ability to implement a policy, so therefore satisfied that criteria. What we have said as an evidentiary matter, it is very difficult to prove the existence of a policy before someone engages in something if they have the ability to create that policy on their own whim. We wanted to make sure the policy had to be created before they acted and that it was in writing so that we had some evidentiary support that such a policy existed.

Chair Jauregui:
I need a real-life case example, such as this was an elected official using a state car to drop off his dry cleaning and then saying I have the authority to do that. Can you give me an example of when this would be?

Yvonne Nevarez-Goodson:
I just wanted to check and make sure this case is public before I refer to it on the record. We had a case involving a sheriff with the allegation being that there had been a use of government facilities to carry out a personal child visitation issue in the government facility during off-hours on a weekend. One of the defenses that was levied in that particular case was that the sheriff in the case had indicated that he was the sheriff, he was in charge of implementing his own policies, and he had a policy whereby he could use the facility or any member of the staff could use the facility during off-hours on a weekend for child custody visitation even if it involved their own family members. Our position in that particular case

had been that there was no evidence of any policy that existed or any such use that it existed to authorize the use of government facilities and, therefore, we found that the exception to the limited use had not been applied. But we wanted to clarify, again, that someone could not just assert that a policy existed because he or she was the individual who had the authority to create one.

Assemblyman Daly:
I think the next question I have is a clarifying question. We are changing some of the language in section 24, subsection 4 where it used to say "render an opinion" and now it says "render a decision and issue an opinion." I am not really seeing the distinction there because in later sections you say that we are going to make a decision, then we are going to issue an opinion, and then it gets into the whole thing of judicial review and some of that. There is some potentially conflicting language later. I will get to those other questions. To me the decision and the opinion are almost the same thing. You are not going to have one without the other. The decision is what the body made, and then you have to convert it to an opinion and that sets all the machinery in motion to appeal or go to judicial review. I know that is throughout on that. I am curious on the distinction there. Why is one better than the other or why do you need both?

Yvonne Nevarez-Goodson:
Under current law with our advisory opinion process and our ethics complaint process, we are under statutory deadlines to issue decisions of the Commission. If a person requests an advisory opinion, the individual is entitled to that opinion within 45 days of the filing of the request. With an ethics complaint, although there are many stages that go on, the individual is entitled to a decision within 60 days of a panel decision if there had been no waivers. As a practical matter, when the Commission has the opportunity to get together, hold a hearing, and render a decision, sometimes all they can do within those 45 days is get all of the information together, collect the witnesses, the individuals, hold a hearing, and render its decision. We refer to that in our current regulations as an oral decision.

At a hearing or in response to a written submission, the individual will get an oral decision from the Commission, what the Commission has decided in a particular case. The Commission will then direct its Commission counsel to prepare a written opinion outlining the findings, facts, and conclusions of law of their decision. It is that written opinion that becomes the basis for, or subject to, judicial review. Our opinions in contested cases are subject to judicial review. As a practical matter, we were concerned that it would be virtually impossible for the Commission to hold a hearing, render a decision, and also put it together in writing within 45 days, particularly given some of the confines of some of the existing requirements under the statute so we wanted to make a distinction. We currently have that distinction in our regulations between what it means to render a decision in a case within the statutory deadline, and then direct Commission counsel to issue a written opinion.

Most of the changes you will see in the bill are conforming changes to authorize that distinction between what it means to render its decision and subsequently reduce that decision into its written opinion. I think what you will see for both advisory opinions and

ethics complaints is, there is a timeline for the Commission counsel if she is so directed to put the decision in writing within 90 days unless there is good cause shown for an extension or unless there is a meeting that occurs, whichever is later in that instance, 90 days or the next Commission meeting.

Assemblyman Daly:
I will skip over my question in section 25 and go to section 26 because it relates to the same thing and it is along those same lines. Section 26, subsection 1, paragraph (f), line 44, refers to the published opinion. Do you have unpublished opinions?

Yvonne Nevarez-Goodson:
Yes, we do. In fact, the Commission has the authority for which cases it will direct its Commission counsel to issue written opinions. Some advisory opinions are contested cases, but not all advisory opinions are contested cases. When it is contested, we are required to reduce that opinion to writing. The Commission may not decide to publish all of the opinions that it directs to be in writing.

Assemblyman Daly:
I know there is some further language that you take out and then add back in regarding the Legislative Counsel Bureau adding it into the NRS so only the published decisions would go in those annotations, I believe it was.

Yvonne Nevarez-Goodson:
Yes, that is correct.

Assemblyman Daly:
Going back to section 25 where you are changing the executive director to someone who must be an attorney—not being an attorney, why am I being discriminated against? I am just kidding. Why do we want an attorney? I understand that it may be useful, but there a lot of others—a labor commissioner does not have to be an attorney. There are several other areas. I just do not know that it needs to be [an attorney], because there are plenty of competent people who may not be attorneys, but who can do the work.

Yvonne Nevarez-Goodson:
The Commission took a look at this particular issue for a couple of reasons. Under the current statutory obligations of the executive director, the executive director is charged under statute with providing outreach and education to all of Nevada's public officers and public employees in the interpretation and application of the Nevada Ethics in Government Law. In addition, the executive director under our ethics complaint process now takes on party status whereby there is an obligation to not only investigate the complaints, but if those complaints move forward to adjudication, the executive director is charged with the responsibility of presenting evidence and questioning witnesses in an evidentiary hearing to the Nevada Commission on Ethics. Now, as a matter of course under the current status of our budget, we do have the authorization to hire an associate counsel who does represent the executive director. With current budgetary restraints, there are situations in which our staff members

have conflicts of interest. The Commission will delegate those internal conflicts to other members of the staff. If my associate counsel has a conflict of interest or is otherwise unable to act in a particular matter, I will take on the case myself and I will represent my own interests in presenting a case to the Commission on Ethics. That is the practice of law and the Commission was more comfortable making sure that the person carrying out those responsibilities was a licensed attorney.

Chair Jauregui:
If the Commission wants to hire an attorney, they can do so now. They do not need it in statute to minimize the pool. It is not just saying it is an attorney, you are saying an attorney licensed to practice law in Nevada. So you are limiting the pool of people who could be qualified for this job. If it is the Commission's wish to hire a Nevada licensed attorney, they can do so now; there is nothing prohibiting them from doing that now. I think adding it in statute is making it too narrow of a pool of people who would be available.

Yvonne Nevarez-Goodson:
You are correct that it would certainly limit the pool of people qualified to serve in the position. That is true. I think what the Commission was concerned about, frankly, is that the statutory duties of the executive director do require the practice of law in the state of Nevada. The Commission's opinions as a party status require the executive director also to pursue cases up through judicial review including potentially defending cases on judicial review which would put the executive director in the position of defending cases in court as well. When the Commission looked at that, they thought it was prudent for the protection of the interests of the executive director that they be a licensed attorney.

Chair Jauregui:
I have a question on section 44 regarding your open meeting laws. Again, it is still saying that you are required to have open meeting laws, but that the meeting or hearing is not subject to the provisions of NRS Chapter 241. Every other agency or entity that is subject to open meeting laws is subject to the provisions of Chapter 241 of NRS. What is so burdensome that you need your own regulations?

Yvonne Nevarez-Goodson:
For clarification purposes, the Nevada Commission on Ethics is subject to the Nevada Open Meeting Law. All of our meetings are subject to the Open Meeting Law (OML). Under existing law, there are current exemptions under OML, for our advisory opinion process, our review panel process, and our ethics complaint process. The only portion of our ethics complaints that is subject to OML at this juncture is to have a final decision rendered in an open, public meeting. Under current law, deliberations, receipt of information, evidence, and everything else is exempt from OML.

The problems the Commission has run into in terms of having its final decisions rendered in an open, public meeting include things such as the following: Open Meeting Law requires certain things to go on an agenda, certain matters to be noticed differently, and supplemental materials to be provided to the public at the same time they are provided to the Commission.

A couple of examples I could give you that we have been burdened by with those confines of OML are as follows: A stipulated agreement—for example, under existing law, if I negotiate a stipulated, negotiated agreement with a subject of an ethics complaint, I have a responsibility to present that stipulated agreement along with the subject to the Commission. If the Commission is going to make a final decision regarding that stipulated agreement, that stipulated agreement has to go on a notice, on an agenda, and the supplemental materials have to be provided to the public at the same time that they are provided to the Commission. At the meeting, the Commission very well could decide that it is not going to approve that settlement agreement, but the public, nevertheless, has access to all of the underlying documentation because of compliance with OML.

Separately, in terms of notice burdens, this is not an issue of due process to the subject. The subjects before our Commission under ethics complaints are provided every level of appropriate notice of anything that is happening in a particular case with regard to their issues in terms of notices of hearings, notices of any decisions that will be made by the Commission, and all of those opportunities.

For example, we just had a training with the Office of the Attorney General that presented OML training to the Commission, and one of our commissioners asked a question about the requirement under OML for the separate notice of character and competence to be presented to somebody whose actions could cause his or her character and competence to be considered by the Commission. The Commission was concerned that that notice would be required for any witness who might appear before the Commission, and the Attorney General's advice was that it would be a good idea for us to provide separate notice of character and competence of any witness who might appear before the Ethics Commission because, again, many of them are public officers and public employees whose character and competence could be under review by the Commission at a Commission hearing.

There are a number of other issues, but I would like to say that this is not an effort or an intent to subvert any sort of transparency about the Commission's process or its final decisions. That is why we put the language in there to say the burdens that we endure under OML for the notice, the agenda, and the separate requirements for the meetings are very difficult for us. But we will, nevertheless, develop a process whereby the Commission's decisions are rendered in an open process, open meeting.

Chair Jauregui:
It is in both sections, section 48 and section 50, where the Commission is able to determine from good cause to extend this time limitation. So in section 48, you are required to make determinations within 45 days and the changes will allow the Commission to extend this time limit. In section 50, you are required to have a recommendation within 70 days, and then again there can be an extension granted. I have an issue with there not being a cap on an extension. I think everyone would like unlimited time to do their job, so I am uncomfortable with the fact that it can be an unlimited extension, that there are no caps. I would feel more comfortable if it was a 45-day extension and then you could come back and ask for another

one, but there would be some sort of cap. What was the thought process with not adding a cap and letting these extensions be indefinite?

Yvonne Nevarez-Goodson:
I think the Commission's position here was that by virtue of the word "extension," it would not be open-ended. It would be that there would have to be a showing of good cause to the Commission that there was a need to extend the deadline. It is not a waiver, which is the other terminology that is otherwise used in the statute whereby the subject of a complaint or an advisory opinion in any of these processes may waive the statutory timelines, and that is indefinite. If there is a waiver, that is an indefinite period of time. If there is an extension, in my mind, by definition that implies that the Commission will grant an extension based upon the good cause shown and will provide the appropriate time frame.

There could be a number of reasons why it would be very difficult for the Commission to decide in every case, 45 days or 30 days would be enough. For example, if the good cause shown for an extension is that I have had to issue a subpoena to a major corporation for evidence and that corporation is having difficulty compiling those records and getting that information back to me, it may be that 30 days is not sufficient. Maybe it needs to be 60 days. I will not know until I am in a particular case, and I have information to present to the Commission that says, for example, We issued this subpoena, this corporation is telling me it needs 90 days. And the Commission could then say, Okay, then we will grant an extension for 90 days. I think the goal there was to be flexible in statute for the Commission to be able to make those decisions in appropriate cases.

Chair Jauregui:
Committee, do you have any other questions? Do you have a couple of more questions, Assemblyman Daly? You can ask another question or two, but maybe not all of them. Maybe you could take the rest of them offline.

Assemblyman Daly:
Let me go to section 34 and maybe you could tell me if I am reading it incorrectly. I read through that one a couple of times as well. If I read it correctly, it speaks to a person who needs to disclose a potential conflict and then under section 34, subsection 2, paragraph (b), subparagraph (2), it says—the way I read it is—where the employee "Abstains from advocating the passage or failure of and from approving, disapproving, voting or otherwise"—basically if they make the disclosure, they cannot vote, is the way I am reading it. Then in the other sections that say, Hey, you have to do the same analysis similar to what we have to do—if it does not affect you any more or less than a person in a similar situation, then you can vote and you do not have a conflict. But this seems to take away the ability to make that judgement, still disclose, and still vote.

Then, of course, in section 34, subsection 4, if I read it, it says it should be interpreted to allow a person to vote if they do not actually have the conflict. The way I am reading this—tell me if I am wrong—is that you have to determine if you have a potential conflict, you have to then disclose and if you disclose, even though you do not really have a conflict, you

cannot vote. It then overrides subsection 4 that says, Hey, the policy is that they should be able to vote if they are not actually conflicted.

Yvonne Nevarez-Goodson:
Let me see if I can provide some clarification to this particular statute. Let me know if it is more confusing. Under current law, a public officer or public employee is required to disclose a conflict of interest which in this case is a pecuniary interest, a commitment in a private capacity, or a gift or a loan. If those issues affect a matter that is before the public officer, they are required to disclose the conflict of interest. What we are trying to outline in this particular bill is an exception to disclosure or a limitation on disclosure if the nature of that conflict involves a confidential relationship.

For example, if I am an attorney in private practice and I have a client and it is a confidential client in a confidential representation, but that client is now appearing before me in my public body, I have a conflict because I have a business relationship with my client who is appearing before me. My confidentiality laws would say that I am not allowed to disclose the nature of my confidential relationship with my client. So what this law is getting at is recognizing those legally recognized confidential relationships such that you are not going to be required to disclose them as long as you disclose sufficient information about how this matter affects the nature of private representation I have. The law does not require me to disclose the name of my client or the underlying nature of the representation in detail. But if you are going to avail yourself of that exception and not disclose the full nature and extent of your conflict, then you must abstain from voting because the public simply would not know what the nature and scope of the conflict is if you are saying, I cannot disclose it because it is confidential.

In that particular instance, we are making a change to the abstention requirements which is to say that if you choose to avail yourself of this exception in the law that says I cannot disclose a confidential relationship, you must then abstain because then the public would not be able to know whether or not you are conflicted out of a particular situation. That is a separate standard that we are not putting into the law with regard to disclosure and abstention.

Assemblyman Daly:
Thank you for the explanation. That does make it slightly clearer. At least, my understanding of it for when I have to make those decisions from here is, I have to determine if it is going to affect me any more or less if I actually have a conflict. If I do not have a conflict, then I have no duty to disclose, but according to this provision, I do have the duty, right? Now, because I do have the duty and I am not conflicted, and then I have to not disclose some of that stuff, you are saying I cannot vote if I avail myself to that. It seems to be a no-win situation for that person. And still, I would say it runs contrary to subsection 4 of section 34 that it is presumed that if they do not have the conflict, that we should act in the interest of allowing that person to do their job and not disrupt that continuity. I believe those are all the words that are in the statute. To me it is still a conflict. If he does not actually have a conflict and he is not going to be affected, and his judgment is not going to be

impaired, and he is not going to benefit any more or less than anybody else—under our house ethics rules, from what I understand, we do not have to disclose.

Yvonne Nevarez-Goodson:
If I may, there are two points to note. There is a presumption under the law—outside of what I have just discussed—for normal conflicts that require disclosure. There is a presumption that even if you have a conflict of interest, if the matter before you does not affect you or your interests any more or less than the general group to be affected by the matter, then you can go ahead and vote. But notably, for you to avail yourself of that presumption in the law, you must disclose the conflict of interest. That is a mandatory prerequisite to availing yourself of that presumption in the law. But as I noted in my earlier comments, this separate section about abstention when you cannot, in fact, disclose the conflict because it is confidential, you must then abstain because, again, there are two separate requirements in the law. You must disclose your conflict of interest to the public and the purpose of disclosure is to inform the public of the nature and extent to which you could be or are conflicted. The abstention analysis is separate in that you would make a determination about whether or not your independence of judgment of a reasonable person in your situation would be materially affected. There is a presumption saying that most people could be independent in their judgment if it does not affect them any more or less, but they still must, nevertheless, disclose the interest that they have in the matter. But again, this issue set forth in section 34, subsection 2, paragraph (b), subparagraphs (1) and (2) are a separate standard altogether. If you choose not to disclose because it is a confidential relationship, then you must abstain under this law.

Chair Jauregui:
Thank you. We are going to wrap up the presentation and open it up for testimony in support. Seeing no one, we are going to open it up to testimony in opposition. Seeing no one, we are going to move to testimony in neutral. Seeing no one, Ms. Nevarez-Goodson, did you want to make any final remarks? [She declined to do so.] With that, we will close the hearing on Senate Bill 129 (1st Reprint).

The next item on our agenda is public comment. If you are here to make public comment, please approach the witness table. Seeing no one, Committee, I will see you next Thursday at 4 p.m. Our meeting is adjourned [at 5:20 p.m.].

RESPECTFULLY SUBMITTED:

_____
Catherine Bodenstein
Committee Secretary

APPROVED BY:

_____
Assemblywoman Sandra Jauregui, Chair

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a document titled "SB 129 (R1) Summary," dated May 1, 2019, submitted by the Commission on Ethics, presented by Yvonne M. Nevarez-Goodson, Esq., Executive Director, Commission on Ethics.