

MINUTES OF THE 2019-2020 INTERIM LEGISLATIVE COMMISSION

February 6, 2020

The meeting of the Legislative Commission was called to order by Chair Cannizzaro at 1:11 p.m. at the Grant Sawyer Building, Room 4401, 555 East Washington Avenue, Las Vegas, Nevada, and via videoconference at the Legislative Building, Room 4100, 401 South Carson Street, Carson City, Nevada.

Exhibit A is the Agenda, and Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT (LAS VEGAS):

Senator Nicole Cannizzaro, Senatorial District No. 6; Chair
Senator Moises Denis, Senatorial District No. 2
Senator Scott Hammond, Senatorial District No. 18
Senator Joseph Hardy, Senatorial District No. 12
Senator James Settlemeyer, Senatorial District No. 17
Assemblywoman Teresa Benitez-Thompson, Assembly District No. 27
Assemblywoman Maggie Carlton, Assembly District No. 14
Assemblyman Skip Daly, Assembly District No. 31
Assemblyman Jason Frierson, Assembly District No. 8

COMMITTEE MEMBERS PRESENT (CARSON CITY):

Senator Julia Ratti, Senatorial District No. 13; Vice Chair
Assemblywoman Alexis Hansen, Assembly District No. 32 (Alternate for Assemblyman Jim Wheeler)
Assemblywoman Lisa Krasner, Assembly District No. 26

STAFF MEMBERS:

Brenda Erdoes, Legislative Counsel, Legal Division, Legislative Counsel Bureau
Kevin Powers, Chief Litigation Counsel, Legal Division, Legislative Counsel Bureau
Risa Lang, Chief Deputy Legislative Counsel, Legal Division, Legislative Counsel Bureau
Mark Krmpotic, Senate Fiscal Analyst, Fiscal Division, Legislative Counsel Bureau
Dan Crossman, Legislative Auditor, Audit Division, Legislative Counsel Bureau
Marshellah Lyons, Deputy Research Director, Research Division, Legislative Counsel Bureau
Angela Hartzler, Secretary, Legal Division, Legislative Counsel Bureau
Jordan Haas, Secretary, Legal Division, Legislative Counsel Bureau

OTHERS PRESENT:

J. David Wuest, R.Ph., CPM, Executive Secretary, Nevada State Board of Pharmacy
Teri Baltisberger, Management Services Manager, Department of Motor Vehicles

Senator Nicole Cannizzaro (Senatorial District No. 6; Chair):

Good afternoon, everybody, and welcome to the Legislative Commission. I want to thank everyone for being available for this meeting this afternoon. The first thing that we will open up with is public comment. For anyone in Carson City or anyone here in Las Vegas, now would be the time if you have comments on any of the regulations that are on our agenda items for today. Now would be the appropriate time to come and give those comments, or if there's any other public comment that is wished to be made at this time, we'll go ahead and open up the floor for that. I don't see anybody making any fast moves to the witness table, so we will move on from item II on the agenda, public comment, and we will move to item III, the review of administrative regulations ([Agenda Item III A](#)). Members of the Commission, you will note that you have copies of those regulations in front of you and also were provided those ahead of time, but at this point in time, if there are any regulations that members would like to have some additional testimony on, I would be happy to go ahead and single those out. Senator Settlemeyer, please.

Senator James Settlemeyer (Senatorial District No. 17):

Thank you, Madam Chair. Regulation R097-19 dealing with the DMV (Department of Motor Vehicles).

Senator Joseph Hardy (Senatorial District No. 12):

Thank you, Madam Chair. R072-19.

Chair Cannizzaro:

Any additional regulations wish to be pulled? Any from members in Carson City? Okay, so the two that we have had asked to be pulled for some additional testimony is R072-19 for the State Board of Pharmacy and R097-19 for the Department of Motor Vehicles. The remaining regulations on our agenda have not been requested to be pulled for additional testimony, so at this time I would ask for a motion to approve the regulations that were not pulled.

SPEAKER FRIERSON MOVED TO APPROVE REGULATIONS R149-16, R150-16, R008-19, R012-19, R028-19, R033-19, R035-19, R064-19, R070-19, R071-19 AND R089-19.

SENATOR DENIS SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Chair Cannizzaro:

At this time, we will open up a hearing on R072-19 for the State Board of Pharmacy ([Agenda Item III A](#)), if we could have individuals come on up for that regulation and identify yourselves and then proceed when you are ready to give us just a brief overview of the regulation, and then we'll go ahead and turn it over to Senator Hardy for some questions.

J. David Wuest, R.Ph., CPM (Executive Secretary, Nevada State Board of Pharmacy):

This is a regulation that addresses technicians. It's only talking about technicians that come in front of the Board and have a history of a conviction of a misdemeanor or some history of drug abuse. Currently the way the regulation—the statute would allow the Board to give the license after reviewing the conditions of that and weighing if, say, for the public. This regulation prevents the Board of Pharmacy from doing that in all cases, so the Board was asking to change it from that they must deny it, that they may deny it, and it would still, I'm sure, deny some, but just the people that have a history that was a long time ago and didn't really relate to potentially drugs would still be able to get their license, for technicians. It's already allowed with all the other classes. So, if there's a physician or a pharmacist that has these things in their history, they come in front of the Board and then they weigh if they're safe for the public. This was something they put upon themselves years ago, to not give out the license.

Chair Cannizzaro:

Okay, thank you. Senator Hardy, please.

Senator Hardy:

Thank you, Madam Chair. I have no problems with the intent. From a logistical standpoint, in the world of medicine, we've moved away from drug abuse to substance use disorder, opioid use disorder, tobacco use disorder, alcohol use disorder, so I suspect if we had substance use disorder, it would cover an umbrella big enough to describe what we used

to describe as drug abuse, and that would be the suggestion I would make. Thank you, Madam Chair.

Mr. Wuest:

We appreciate that. Yeah, I think that's old terminology and I don't think staff picked that up, but I think you're exactly right, Senator Hardy.

Senator Hardy:

Could you repeat that?

Mr. Wuest:

You're exactly right, Senator Hardy.

Senator Hardy:

I would move to pass with that appropriate bringing up to date language.

SENATOR HARDY MOVED TO APPROVE R072-19.

Risa Lang (Chief Deputy Legislative Counsel, Legal Division, Legislative Counsel Bureau):

We can change that in codification because that was something that they voted on during the last session. We changed it throughout NRS (Nevada Revised Statutes) as well, so we can fix that.

Chair Cannizzaro:

So, I do have a motion, then, to approve the regulation with the understanding that it would include the broader use of the substance abuse disorder, which was in align with legislation we passed last legislative session, and my understanding via counsel is that that will be done through codification.

SENATOR DENIS SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Chair Cannizzaro:

We will move on to the next regulation pulled for further discussion, and that is R097-19 for the Department of Motor Vehicles ([Agenda Item III A](#)). Once you are all settled, please go ahead and identify yourself for the record and then give us just a very brief overview of the regulation, and we'll turn it over to Senator Settlemeyer for questions.

Teri Baltisberger (Management Services Manager, Department of Motor Vehicles):

These regulations basically were to just do some clarification of the vehicle body types that were put out in statute and then to also institute what we define as undue hardship for gathering or reporting the odometer reading. I will take any questions.

Senator Settlemeyer:

Thank you, Madam Chair. When we originally had this bill being discussed, it was going to be a pilot project, but it seems that basically that, if I'm reading this correctly, anyone who basically drives on asphalt, unless they fall within the undue hardship, if they are registering a new vehicle or renewing an old vehicle, if they do not qualify for the hardship, they need to give the odometer reading, correct?

Ms. Baltisberger:

That is correct. But it's only until 2026.

Senator Settlemeyer:

I appreciate that information. Thank you, Madam Chair.

Senator Moises Denis (Senatorial District No. 2):

My question on the odometer thing, with this being a pilot, what happens if someone shows up and their odometer's not working, because this has to be done when they register, right? Are they still just allowed to report?

Ms. Baltisberger:

We have put in some requirements or some allowances for a broken odometer, or if somebody absolutely does not want to put into—give us their odometer reading, it will take a zero, basically, but we have exception reports so we know how many vehicles are being reported that way.

Senator Denis:

So, if they're doing it on the kiosks, if they don't want to answer, they just have to put a zero in. Is that the workaround for doing it on the kiosk?

Ms. Baltisberger:

Yes.

Senator Denis:

Okay.

Senator Settelmeyer:

Thank you, Madam Chair, for a second time. Just so you know, I tried to enter zero-zero-zero. It doesn't work.

Chair Cannizzaro:

Any additional questions from members of the Commission? I would accept a motion.

SENATOR DENIS MOVED TO APPROVE R097-19.

SPEAKER FRIERSON SECONDED THE MOTION.

THE MOTION PASSED (SENATOR SETTELMAYER VOTED NO).

Chair Cannizzaro:

Thank you very much for being here. That concludes our review of regulations for this Legislative Commission meeting. We will go ahead and move then to item number IV on our agenda, the progress report for litigation in progress, and I will turn it over to, I believe Ms. Erdoes is there in Carson City or Mr. Powers, for a walkthrough of that item.

Senator Julia Ratti (Senatorial District No. 13; Vice Chair):

Madam Chair, could I have a brief recess?

Senator Cannizzaro:

Yes, we will be in just a brief recess at the call of the Chair.

THE CHAIR CALLED FOR A BRIEF RECESS.

Senator Ratti:

We're ready to go. Thank you.

Senator Cannizzaro:

Thank you. Please, Mr. Powers or Ms. Erdoes, whenever you're ready.

Kevin Powers (Chief Litigation Counsel, Legal Division, Legislative Counsel Bureau):

Thank you, Madam Chair. Before you on the agenda today in the progress report with litigation currently in progress are two cases that are related, and then a resolution that's for possible action by the Legislative Commission that is also related to those two cases ([Agenda Item IV](#)). Because the resolution relates to the authorization of the Legislative Commission that it gave for the litigation at the last meeting on December 30, it involves jurisdictional issues, and so I'm going to need to provide an additional background and describe the cases in detail to explain why the resolution is being presented and how it affects those jurisdictional issues.

So, we start with *Settlemeyer v. State*, and that is in the First Judicial District Court in Carson City, and I did last Legislative Commission meeting on December 30 provide an extensive explanation of the case. I will try to narrow that a little for our purposes today, but it's still going to require some significant detail. On July 30, 2019, the plaintiffs filed a complaint challenging the constitutionality of Senate Bill 542 and 551 of the 2019 Legislative Session. The plaintiffs claim that those bills created, generated or increased public revenue and that the bills violated article 4, section 18 of the Nevada Constitution because the bills did not receive a two-thirds majority vote in the Senate.

There are several plaintiffs. One is a group of businesses that pay or whose members pay fees and taxes under those pieces of legislation. In addition, the plaintiffs include eight State Senators known in the litigation as the plaintiff Senators who voted against that legislation during the 2019 Legislative Session. The defendants include both executive and legislative branch defendants. The executive branch defendants are the Lieutenant Governor, Kate Marshall, the Governor, Steve Sisolak, the Nevada Department of Taxation and the Nevada Department of Motor Vehicles because those two state agencies administer the statutes that are being amended by SB (Senate Bill) 542 and SB 551. The two legislative defendants in the case are Senator Nicole Cannizzaro in her official capacity as Senate Majority Leader and Claire Clift in her official

capacity as the Secretary of the Senate, and those legislative defendants from the onset of this litigation have been represented by LCB (Legislative Counsel Bureau) Legal Division as their statutorily authorized counsel under NRS 218F.720.

The issues that are involved in the litigation report today are not the merits of the two-thirds constitutional issue, but in fact the issues are the right of LCB Legal to represent the legislative defendants in their official capacity in that litigation as their statutorily authorized counsel under NRS 218F.720. During the litigation while the parties were briefing dispositive motions, the plaintiff Senators filed a motion to disqualify LCB Legal as the counsel for the legislative defendants. Because that motion to disqualify was filed, all proceedings in the District Court on the merits were stayed until resolution of the motion to disqualify. On December 19, 2019, the District Court entered an order which disqualified LCB Legal from representing the legislative defendants in their official capacity, and it also required the legislative defendants to obtain their own separate outside counsel to represent them in their official capacity. At the December 30, 2019 meeting of the Legislative Commission, LCB Legal presented to the Legislative Commission an action item with regard to the disqualification of LCB Legal. What LCB Legal presented to the Legislative Commission is that, unless appellate review was sought of the disqualification order, the disqualification order would be binding on LCB Legal and therefore they would be disqualified from representing the legislative defendants in their official capacity. As a result, LCB Legal presented an action item to the Legislative Commission at its December 30 meeting, and the action item was as follows, and I quote: the item would be that, to protect the official interests of the Legislature, the Legislative Commission directs the Legislative Counsel and LCB Legal under NRS 218F.720 to take all actions necessary to seek, commence, prosecute a mandamus appellate review action in the Nevada Supreme Court to seek appellate review of the District Court's disqualification order in the case of *Settelmeyer v. State*. After consideration and discussion of that action item at the December 30 meeting, the Legislative Commission approved a motion to direct LCB Legal to take whatever legal action necessary to represent the Legislature in this action as set forth by the Chief Litigation Counsel. The actual motion was a motion to direct the LCB Legal to take whatever legal action necessary to represent the state and the Legislature in this action as set forth by Mr. Powers, and that of course, that is myself as your Chief Litigation Counsel. Because the Legislative Commission approved the motion, which expressly incorporated the action item as set forth by the Chief Litigation Counsel, we believe the Legislative Commission clearly approved the action item and authorized LCB Legal under NRS 218F.720 to take all actions necessary to seek, commence and prosecute a mandamus appellate review action in the Nevada Supreme Court to seek appellate review of the District Court's disqualification order in the case of *Settelmeyer v. State*. As a result of the Legislative Commission's action at the December 30 meeting, on January 3, 2020, LCB Legal filed a petition for writ of mandamus with the Nevada Supreme Court in the case of *State ex rel. Cannizzaro v. First Judicial District Court*, case number 80313, asking for appellate review of the District Court's disqualification order. In addition to the mandamus petition, LCB Legal also filed a motion to stay all District Court proceedings pending resolution of the mandamus action.

LCB Legal filed a mandamus action on behalf of the following petitioners who have the necessary jurisdictional standing to bring the mandamus action. First, because the District Court's disqualification order deprived the legislative defendants of their right to the counsel of their choice, the legislative defendants have that necessary jurisdictional standing. Therefore, the petitioners include Senator Cannizzaro in her official capacity as Senate Majority Leader and Claire Clift in her official capacity as Secretary of the Senate. In addition, because the District Court's disqualification order inflicts significant reputational harm on the disqualified attorneys, those disqualified attorneys have their own independent jurisdictional standing separate from their clients to bring the mandamus action. Therefore, the petitioners in the mandamus action also include LCB Legal in its official capacity as the legal agency of the legislative department, Brenda Erdoes in her official capacity as Legislative Counsel and in her professional capacity as an attorney and licensed member of the State Bar, and finally, Kevin Powers in his official capacity as the Chief Litigation Counsel of LCB Legal and also in his professional capacity as an attorney and licensed member of the State Bar.

After LCB Legal filed a mandamus action, the Nevada Supreme Court issued an order on January 10, 2020 which (1) stayed all District Court proceedings pending resolution of the mandamus action, (2) directed the plaintiff Senators to file their answer to the mandamus petition, (3) directed the petitioners to file their reply in response to the answer, and (4) scheduled oral argument in this case before the 7-member Supreme Court on February 11, 2020 in Las Vegas. On January 24, 2020, the plaintiff Senators filed their answer, in which they suggested that the mandamus action has potential jurisdictional defects due to improper authorization by the Legislative Commission at the meeting on December 30, 2019. It should be noted that the jurisdictional issues were presented in a footnote of the answer without any argument and were supported by a citation to a single case that does not apply to mandamus actions. Ordinarily under the Nevada Supreme Court's rules of acceptable appellate practice, arguments that are raised only in a footnote and presented without cogent argument or citation to relevant authority may be summarily rejected by the Supreme Court. However, with regard to jurisdictional issues, the Nevada Supreme Court has an independent obligation to determine whether it has jurisdiction in every case, even when counsel does not adequately argue the jurisdictional issues. Consequently, when LCB Legal filed its reply on January 31, 2020, LCB Legal comprehensively responded to the jurisdictional issues and argued with extensive citation to relevant authorities that the Legislative Commission clearly approved the action item as set forth by Chief Litigation Counsel Kevin Powers at the December 30 meeting and thereby clearly authorized LCB Legal to seek, commence and prosecute the mandamus action on behalf of the petitioners.

That's where we stand right now in the Nevada Supreme Court. We have that jurisdictional issue before the court, and at the same time we have the issue on the disqualification, and that brings us then to the resolution that's included in the meeting materials under agenda item IV ([Agenda Item IV](#)). The purpose of the resolution is to remove any doubts regarding the Legislative Commission's authorization at the December 30 meeting. Therefore, the legislative resolution from the Commission ratifies

the Legislative Commission's approval of the action item as set forth by the Chief Litigation Counsel at the December 30 meeting and it also ratifies the petition for writ of mandamus filed on behalf of the petitioners and all other actions taken by LCB Legal on behalf of the petitioners in the case of *State ex rel. Cannizzaro v. First Judicial District Court*. Furthermore, under well-established rules, a legislative body may ratify any action that it had the power to authorize in the first instance and the ratification dates back to the action that was originally taken. Therefore, the resolution relates back to the date of the Legislative Commission's approval of the action item as set forth by the Chief Litigation Counsel at the December 30, 2019 meeting which authorized LCB Legal to seek, commence and prosecute the mandamus action on behalf of the petitioners in the case of *State ex rel. Cannizzaro v. First Judicial District Court*. Finally, therefore, Madam Chair, the action item that is being brought before the Legislative Commission today is to approve the resolution that is set forth in the meeting materials under agenda item IV. Thank you, Madam Chair, for the Committee's indulgence. I am certainly open for any questions.

Senator Cannizzaro:

Thank you, Mr. Powers. Senator Hardy, please.

Senator Hardy:

Thank you, Madam Chair. I almost want to go backwards a little bit. I enjoyed the comment there is not any doubt when I do have doubts. There's a footnote and the footnote can't be counted, and if that were the case, we probably wouldn't have the Affordable Care Act because it was, quote, a tax by one single person, and therefore it passed, and December 30 it goes back to, and that means that if we vote on this motion to say it was what it was then, then I suspect everybody has to keep their same vote, otherwise it's not the same motion and the same voting or abstaining in the same motion is one of your phrases that you used is what I call problematic. When a group of people in the Legislature is interested in protecting the constitutionality of something and they are not represented by the LCB, it flies in the face of rational reasoning that why would one person—I'll put person—be protected by the LCB and not other person be protected by the LCB in representation. So, the motion that you accurately quoted was to direct the LCB to take whatever legal action necessary to represent the state and represent the Legislature in this action as set forth by Mr. Powers, not to protect the legislator but the Legislature, and not to protect anybody else and not to say a stay, didn't say a mandamus action, didn't say a resolution, didn't say a directive and didn't say a schedule, so there are things in the motion—and that was what concerned me back in the day and that's why I wanted this to be in the minutes verbatim when I said, I mean, I understand why, but this is the first time I'm voting on a motion where I don't have a clue what the, quote, take away action is, and I think it's the wrong way to make a motion, and I would love to see if Legal has, quote, whatever action they want to take has a voice and what action they want to take in order to have a vote that is clear on what we're voting for, and that's why we are having a doubt. And by the way, if we go backwards and say it's okay for

December 30, why don't we just have the vote again instead of a resolution saying, well, that's what the vote was, when in actuality, the vote wasn't what you just described at some great length. Thank you, Madam Chair.

Mr. Powers:

Thank you, Madam Chair. LCB Legal Division believes, based on the record that was clear from December 30, that the Legislative Commission approved the action item, and the action item directed LCB Legal to take whatever legal action necessary to protect the official interests of the Legislature under NRS 218F.720. Because the legislative defendants are being sued in their official capacity as constituents of the Legislature as an organization, it is in the interest of the Legislature to represent those legislative defendants in the legislation because they are protecting and defending the constitutionality of legislation that is presumed to be constitutional. Just so you see as a contrast, in comparison, the legislative defendants, because they are defending legislation that is presumed to be constitutional, they are acting as duly authorized constituents of the Legislature as an organizational client, and therefore, because the LCB represents the Legislature as an organizational client, LCB has been directed under NRS 218F.720 to represent the legislative defendants. By contrast, the plaintiff Senators who are challenging the validity of legislation that is presumed to be constitutional are not acting as duly authorized constituents of the Legislature as an organization. They may be acting in their official capacity, but not as duly authorized representatives of the Legislature as an organization because they are challenging the constitutionality of legislation that is presumed to be constitutional. The Legislature doesn't sue itself. That's against the interest of the organization. Nothing stops the plaintiff Senators from bringing the lawsuit, but when they do so, they are not acting as duly authorized constituents of the Legislature as an organizational client.

Furthermore, Madam Chair, at the December 30 meeting, I think it is essential to point out some of the words that were actually spoken on the record to clarify that the Legislative Commission was provided with extensive detail as to exactly the type of action that was going to be filed and the purpose of that action. For example, on the record, and this is verbatim testimony, twice the Chief Litigation Counsel stated the action item before the Legislative Commission is for LCB Legal to take all actions necessary to seek, commence and prosecute the mandamus appellate review action, and that would include seeking a stay of the District Court proceedings while the appellate review is being conducted. So, the mandamus action was specified and the stay was specified as part of the action item. It was clear that those were the actions that LCB Legal was going to take. In addition, because LCB Legal was directed to prosecute the mandamus action, it could only prosecute a mandamus action on behalf of petitioners who had the necessary jurisdictional standing. Those petitioners were the Legislative defendants Senator Cannizzaro in her official capacity as Senate Majority Leader and Claire Clift in her official capacity as the Secretary of the Senate. In addition, necessary jurisdictional standing was also held by LCB Legal as the disqualified essentially legal firm or law firm, and also as the disqualified attorneys Petitioner Erdoes and Petitioner Powers had that independent

jurisdictional standing to bring the mandamus action. So, since the Legislative Commission directed LCB Legal to bring a mandamus action, as a matter of law they could only bring that mandamus action on behalf of petitioners who had the necessary legal standing. Therefore, LCB Legal was authorized and directed under NRS 218F.720 to bring the mandamus petition on behalf of the petitioners.

Finally, Madam Chair, I would like to point out some basic rules of parliamentary law governing action items. Under well-established rules of parliamentary procedure, before a legislative body votes, it only needs a clear statement of the action item that is before it for decision. Thus, the action item does not have to be presented in any particular form. Instead, any language that clearly expresses the intent of the action item is sufficient. In their answer to the petition for writ of mandamus, although the counsel for the plaintiff Senators makes no argument at all so we only can glean from a footnote what their potential objections are, they appear to be objecting that the Legislative Commission was authorizing LCB Legal to represent only the Legislature, but the fact of the matter is LCB Legal, and in the motion it stated this, it was to represent the Legislature and its official interests as set forth by the Chief Litigation Counsel. So, once again, because representing the legislative defendants protects the official interest of the Legislature, under NRS 218F.720, it is LCB's position that the Legislative Commission clearly authorized the mandamus action at the December 30 meeting. However, to remove any possible shadow of a doubt, to be acting out of an overabundance of caution and to ensure that the Nevada Supreme Court gets to the merits of the disqualification issue instead of being sidetracked by jurisdictional issues that were argued without any citation to authority, the goal here is to simply ratify the clear action that occurred on December 30 at the Legislative Commission meeting, thereby removing any doubt and forcing the issues to be proceeded on the merits of the disqualification issue instead of any jurisdictional issues. Thank you, Madam Chair. I am open for any questions.

Chair Cannizzaro:

Thank you. Senator Hardy, please.

Senator Hardy:

Thank you, Madam Chair. It was interesting when you reread the motion, you used the word protect, and protect's not in the motion. When you're talking about removing a shadow of a doubt, it certainly removes a shadow of a doubt in somebody who didn't have a doubt what there was, but certainly doesn't remove a doubt in somebody that has a doubt about what there is. So, I think the intent is there to justify what the vote was about, but the motion, albeit short and sweet, certainly wasn't quite as verbose and lengthy as what you've just said, so I appreciate the legalese that says you can make a short and sweet motion that includes everything else, but usually when you do that, you have some idea of what that includes, and I don't think we actually had an idea what was going to be included in that. Thank you, Madam Chair.

Senator Cannizzaro:

I believe Assemblywoman Krasner has a question.

Assemblywoman Lisa Krasner (Assembly District No. 26):

Yes, I do. Thank you very much, Chair Cannizzaro. So, bear with me please. I'm looking at NRS 218F.720, (1) and (2), (a) and (b), and I'm just going to read it just to help me to organize my thoughts and so you know where I'm at. when deemed necessary or advisable to protect the official interests of the Legislature in any action or proceeding, the Legislative Commission, or the Chair of the Legislative Commission in cases where action is required before a meeting of the Legislative Commission is scheduled to be held, may direct the Legislative Counsel and the Legislative division to appear in, commence, prosecute, defend or intervene in any action or proceeding before any court, agency or officer of the United States, this state or any other jurisdiction, or any other political subdivision. In any such action or proceeding, the Legislature may not be assessed or held liable for, then it states—skipping forward to (2) (a) and (b), if a party to any action or proceeding before any court, agency or officer alleges that the Legislature, by its actions or failure to act, has violated the Constitution, treaties or laws of the United States or the Constitution or laws of this state or challenges, contests or raises as an issue, either in law or in equity, in whole or in part , or facially or as applied, the meaning, intent, purpose, scope, applicability, validity, enforceability or constitutionality of any law, resolution, initiative, referendum or any other legislative or constitutional measure, including, without limitation, on grounds that it is ambiguous, unclear, uncertain, imprecise, indefinite or vague, is preempted by federal law or is otherwise applicable, invalid, unenforceable or unconstitutional, the Legislature may elect to intervene in the action or proceeding by filing a motion or request to intervene in any form required by the rules, laws or regulations applicable to the action or proceeding. So my question is, the Legislature, what constitutes the Legislature? Is it just the Democrats or just the Republicans? Is it just the majority at the time? Who may be the client of the LCB when we're talking about defending and upholding the Nevada Constitution? That's my question. Is there some case law in point, because this is vague. Thank you.

Senator Cannizzaro:

Mr. Powers or Ms. Erdoes, if you have any answers, or...

Mr. Powers:

Thank you, Madam Chair. Under the statute NRS 218F.720, the power to direct the Legal Division to commence, prosecute, intervene or defend in any action is given to—I'm sorry, let me start again. So, under the statute, there is a power to direct LCB Legal to represent the Legislature, and the Legislature's defined in the statute to include not only the Legislature, both of its houses and any member, officer or employee of the Legislature as part of the Legislature as an organization, and that's what's going on here is that there's

the difference between an organizational client and an individual client, and the statute provides that the Legislative Commission, or the Chair when action is required before the Legislative Commission meeting is scheduled to be held, they may direct LCB Legal to intervene, defend, prosecute in any action or proceeding on behalf of the Legislature, but because the Legislature's defined in the statute to include its officers, members and employees as well, then when representation is necessary to protect, and the statute says when deemed necessary or advisable to protect the official interests of the Legislature, the Legislative Commission or its Chair may direct LCB Legal to then provide that defense. The discretion on whether or not to prosecute an action is given to the Legislative Commission or its Chair. They have discretion whether or not to direct LCB Legal to provide a defense. Once the chair or the Legislative Commission exercises that discretion, LCB Legal has a legal duty to provide that defense. The word is direct. Direct means to give an authoritative instruction or command or order, so direct, command and order are all synonyms. So, the statute gives discretion to the Legislative Commission or the Chair to direct LCB Legal. Once they exercise that discretion, LCB Legal has a legal duty to provide a defense. Now, the defense must be to protect the official interests of the Legislature, and as I mentioned before, the Legislature is represented as an organizational client, and what an organizational client is, it's an entity that can only act through its duly authorized members, and when those members are conducting business on behalf of the Legislature, they are represented by LCB Legal because they are part of the organizational client. However, when individual members of the Legislature take actions against the institution and against the organizational clients, which they have every right to do, but when they do that, they're not acting as duly authorized constituents of the Legislature as an organizational client, and since they are not acting as duly authorized constituents as the Legislature as an organizational client, they are not entitled to representation under the statute, because again, the Legislature doesn't provide counsel so it can sue itself. It provides counsel to defend its legislative acts.

Finally, we must focus on the presumption of constitutionality. Under constitutional government, all acts are presumed to be constitutional until their invalidity is clearly established by a court of law. So, until a final court decision, in this case by the Nevada Supreme Court, the highest court of the state and the arbitrator of the Nevada Constitution, until that court determines that these laws are unconstitutional, and we believe they're not, but until the Court were to determine that the laws are unconstitutional, the Legislature has an interest in defending those laws because they are presumed to be constitutional and it was presumed to be enacted by the Legislature as authorized by the Constitution. So, as long as the Legislative Counsel Bureau Legal Division is representing legislative clients who are acting to defend the constitutionality of statutes, then it falls within the clear language of statute. The statute does not authorize LCB Legal to sue the Legislature on behalf of clients who are not acting as duly authorized constituents of the Legislature as an organizational client. Thank you, Madam Chair.

Assemblywoman Teresa Benitez-Thompson (Assembly District No. 27):

Thank you, Madam Chairwoman. I just want to state clearly for the record that I

understood the vote at the last Legislative Commission hearing. I didn't want any comments on the record to be a representation of all members, just that personally I understood the vote I was taking. Thank you.

Assemblyman Jason Frierson (Assembly District No. 8):

Thank you, Madam Chair. I wanted to make sure that that record was clear, that I don't think that it's fair or accurate for a member to speak for other members. I certainly understood my vote, and I don't believe that when counsel comes to a conclusion that some disagree with it means that they were not in their official capacity represented. It just means that legal counsel disagrees. As an attorney, I frequently have clients request things that I can't do or that I disagree with, and I do my job as an attorney to advocate in that capacity. So again, I think just because we disagree doesn't mean that we were not represented. It means that counsel gave us legal advice based on their interpretation and review of a certain set of facts and circumstances.

Senator Hardy:

Thank you, Madam Chair. One of the things that's a conundrum for me is to listen to the presumed constitutional when the vote that we had for two bills was according to a two-thirds vote that died, and then within some not short time afterwards, we voted as a majority vote, so the presumed constitutionality was presumed initially and then was un-presumed later, which kind of negates the presumed constitutionality that we heard an argument just recently. Thank you.

Senator Cannizzaro:

Any other questions or comments, anyone? Senator Hammond, and then we'll check up in Carson City.

Senator Scott Hammond (Senatorial District No. 18):

Thank you, Madam Chair. I'll keep sort of a layman's perspective on this because there's a lot of legal talk, and although I sat in a classroom and taught, I didn't go to law school, and sometimes I get the arguments for and against, but from my perspective as in my—again, I understand that when we brought suit, I wasn't acting in the official capacity that I have as a public official, but I think that the last 20, 25 minutes, 30 minutes that we've been talking, I think this is exactly why the lower court ruled the way it did. As I understand it, this is the first time in our history that one party has brought suit against another party, an official—and I could be wrong, on an official vote that was taken during the legislative session, and so I can understand the lower court saying that, in this case, legal representation is conflicted and should be separated in some capacity, because we keep hearing these arguments. I'm just sitting here listening to the lawyer for one side tell us in a meeting why we shouldn't be represented and why that we should be prosecuting with all deliberate speed and with all power and capacity to try and represent one side, and I

go back to the comment from one of our colleagues in the last meeting that there was a worry that we really are tearing at the fabric of the Legislative Counsel Bureau, principally the legal department, and just in the last 25 minutes, I felt the reality of that comment. So again, I just feel like the lower court made that decision because they saw that there is probably a time and a space where maybe there is a mandamus, maybe there is a need for or there is a legal avenue that you should pursue, but in this case, perhaps to maintain the fabric of the Legislative Counsel Bureau, at this point maybe we should listen to the lower court, and I just have a hard time with this argument. We had it on the 30th. We took a vote, there was a motion, we took a vote, it was done, it was over with. Now we're bringing it back for clarification, and yet the resolution states almost the same thing, but it's obviously a little bit more verbose, but we're doing the same thing and we're making it retroactive back to December 30. I know this is—I wanted to keep it brief, and I'll just stop right there, but I almost feel as if this is the reason why the lower court reached the decision that they reached.

Assemblywoman Maggie Carlton (Assembly District No. 14):

Thank you, Madam Chair. I am well aware of the vote that I took. In the 20 years I've served in the Legislature, I've taken some good ones, some bad ones, and a couple I had to rethink back on, but you do what you think is right at that moment. The concern that I have is a comment that I just heard from the Senator at the end of the dais, that one side, I believe he used, I find that quite insulting to our Legislature. I've been in the minority and the majority in both houses. I have always received excellent advice and a lot of help with all of my legislation. It has never been held against me what side of the aisle I was on or what end of the building I was on. If I needed help from our Legislative Counsel Bureau, I got it. This is about the institution. That was drilled into me when I was first elected. No matter what you do, you have a title in front of your name and you are to respect the institution. I believe in the recent history, a couple members of our institution have lost that perspective, and to say that the LCB is taking one side over another I find quite insulting to our institution. They're there to protect the Constitution and to implement the laws that we all work very hard on for the constituents of this state, so I just wanted to make sure that that was on the record. There is no sides on this, and for someone to have that perspective, we can disagree, but please stop being disagreeable.

Senator Cannizzaro:

Any other comments, questions from members of the Commission? Anyone in Carson City? Senator Ratti.

Senator Ratti:

Assemblywoman Krasner, actually.

Assemblywoman Krasner:

Thank you, Chair Cannizzaro. I don't think anybody is saying anything about sides. I think maybe we all believe that the Legislative Counsel Bureau attorneys are the best attorneys in the whole state. They're great. They always help everyone. They've always helped me. That's not what's at issue here. When I brought it up, I went right back to the NRS 218F.720 and said, who is the Legislature, because that's the term used, and if the Legislature is—is it the party in control at the time? I don't know. That was the question. Should it be both parties? If one party is saying we think this is constitutional and the other says no, it violates the Nevada Constitution, shouldn't both the people, both parties in the lawsuit both be represented by the Legislative Counsel Bureau? I think that is more where I'm coming from, because in my mind they are the best attorneys in the state, so who wouldn't want the best attorneys in the whole state representing them if they feel like they're either saying something is constitutional or saying no, this violates the Nevada Constitution? That's where I'm coming from. Thank you.

Senator Cannizzaro:

Any other comments or questions? Please, Senator Ratti.

Senator Ratti:

I'm sorry, I believe Assemblywoman Hansen also has a comment.

Assemblywoman Alexis Hansen (Assembly District No. 32):

Good afternoon, Chair and members of the Committee. I'm honored to be able to be a substitute today, although this subject puts me in a difficult position, so I just wanted to put on the record that I think that I need to abstain according to Assembly Standing Rules 23, being married to a Senator involved in the lawsuit, so I will be abstaining.

Assemblyman Frierson:

If there are no other comments, I would be prepared to make a motion to adopt the resolution as explained by legal counsel.

SPEAKER FRIERSON MOVED TO ADOPT THE RESOLUTION AS EXPLAINED
BY LEGAL COUNSEL.

SENATOR DENIS SECONDED THE MOTION.

Senator Cannizzaro:

I have a motion from Speaker Frierson, a second from Senator Denis. Yes, comments, questions on the motion? Senator Settelmeyer.

Senator Settelmeyer:

Thank you. I appreciate it, and I agree with some of the previous discussions that we kind of got into the weeds a little bit about the constitutionality issue, because that was an issue that, to me, was settled in 1994 when the citizens of the State of Nevada clearly put it in the Constitution that to raise revenue in any form required a two-thirds, but I understand the legal argument that anything that Legal does is automatically deemed constitutional. It doesn't mean it is. It's just deemed constitutional. We'll let the courts unfortunately have to hammer that out, but the issue that, to me, is properly before us, the underlying issue, is this resolution, and just like before, the concept of voting on a resolution now that dates back to the approval of an action of a previous meeting bothers me, trying to solidify or justify something that was done in a previous meeting, and in that meeting I stated that I felt that the motion was way too broad, so in that respect I'm still in opposition to that, and just like the previous time, the fact that the Senate Republicans have gone out and retained our own counsel at our own expenses, according to our legal counsel that we paid for, not LCB, our own paid legal counsel, has indicated we do not have a conflict of interest. The argument that was raised last time saying that it could cost us pecuniarily and therefore we should have to theoretically think about abstaining to me is ludicrous, because that means that there isn't an issue in the Legislative Building that anyone who owns a business or lives in the State of Nevada should be voting yea or nay upon. I will be opposing this motion. Thank you, Madam Chair.

Senator Cannizzaro:

I would reflect back on my prior abstention and will be abstaining from this vote as well. Any other comments, questions from members of the Commission on the motion?

THE MOTION PASSED (SENATORS SETTELMEYER, HARDY AND HAMMOND AND ASSEMBLYWOMAN KRASNER VOTED NO; SENATOR CANNIZZARO AND ASSEMBLYWOMAN HANSEN ABSTAINED).

Chair Cannizzaro:

We will go ahead and move to the next item on our agenda. It's item V, appointments of members to committees and similar entities, and we will take them in order. Item A is the

Committee to Conduct a Study of the Working Conditions at Licensed Brothels ([Agenda Item V-A](#)). Assemblywoman Heidi Swank, who was appointed to this particular interim committee, indicated that she will not be running for reelection later this year, and she has asked to resign her seat on the Committee to Conduct a Study of the Working Conditions at Licensed Brothels. With that, it leaves a vacancy for this Commission to appoint another legislator. It would be another member of the Assembly, a Democrat. Speaker Frierson, if you would, please.

Speaker Frierson:

Thank you, Madam Chair. I would put forth Assemblywoman Shannon Bilbray-Axelrod to replace Assemblywoman Swank.

SPEAKER FRIERSON MOVED TO APPOINT ASSEMBLYWOMAN BILBRAY-AXELROD TO THE COMMITTEE TO CONDUCT A STUDY OF THE WORKING CONDITIONS AT LICENSED BROTHELS.

SENATOR DENIS SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Chair Cannizzaro:

Moving on to item B, the Legislative Committee on Public Lands ([Agenda Item V-B](#)). Similar to the previous item, we did speak with Assemblywoman Swank but have received since then indication that she has withdrawn her resignation from the Committee on Public Lands, and so therefore will remain a member of that Committee. At this point in time, we will not be seeking action on that particular item.

We are going to move on to item C, the Nevada Commission on Minority Affairs. Emily Ku, Management Analyst for the Commission on Minority Affairs, did notify the Legislative Commission of the resignation of Michael Flores from the Nevada Commission on Minority Affairs and submitted a recommendation for José Meléndrez to be appointed to serve the remainder of that particular term on that Commission. Members of the Commission should have received materials regarding that recommendation prior to the meeting as part of your meeting materials ([Agenda Item V-C](#)). With that, if there is a motion, I would entertain a motion to appoint Mr. Meléndrez to fill out the remainder of Mr. Flores' term.

SENATOR DENIS MOVED TO APPOINT JOSÉ MELÉNDREZ TO THE NEVADA COMMISSION ON MINORITY AFFAIRS.

SPEAKER FRIERSON SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Chair Cannizzaro:

We will be replacing Mr. Flores' position on the Commission on Minority Affairs with Mr. Meléndrez to fill out the remainder of that term. Thank you, members of the Commission.

That concludes our business under item V. The next item on our agenda is item VI, which is public comment. If there's anyone here in Las Vegas or anyone in Carson City wishing to give public comment? Again, no one rushing up to these witness tables, so we will go ahead and close public comment at this time. Thank you all for being here with us this afternoon, and the Commission is adjourned at 2:09 p.m.

RESPECTFULLY SUBMITTED:

Jordan Haas, Secretary

APPROVED BY:

Senator Nicole Cannizzaro, Chair

Date: _____

Agenda Item	Witness/Agency	Description
A		Agenda
B		Attendance Roster
<u>Agenda Item III A</u>	Brenda J. Erdoes, Legislative Counsel	Administrative Regulations for Review
<u>Agenda Item III B</u>	Terry Reynolds, Director, Department of Business and Industry	Overview of R089-19
<u>Agenda Item IV</u>	Kevin C. Powers, Chief Litigation Counsel	Resolution Regarding Litigation
<u>Agenda Item V-A</u>		Appointment to the Committee to Conduct a Study of the Working Conditions at Licensed Brothels
<u>Agenda Item V-B</u>		Appointment to the Legislative Committee on Public Lands
<u>Agenda Item V-C</u>		Appointment to the Nevada Commission on Minority Affairs