CHAPTER VIII

LEGISLATIVE PRIVILEGES AND IMMUNITIES

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INTRODUCTION

This chapter contemplates various state privileges and immunities afforded to the legislators and legislative staff. This chapter discusses such privileges and immunities relating to actions taken in the legislative arena and other conduct not involving a legislative action.

LEGISLATIVE PRIVILEGES AND IMMUNITY GENERALLY

The doctrine of legislative privilege and immunity has been an established part of English and American common law and constitutional law for centuries. (Luther S. Cushing, *Elements of the Law and Practice of Legislative Assemblies,* Sec. 601-603 (Boston, Mass., Little, Brown and Co., 1856) (Cushing's Legislative Assemblies)) The doctrine has its origins in the Parliamentary struggles of the 16th and 17th centuries when the English monarchs used civil and criminal proceedings to harass, intimidate, and suppress members of Parliament who were critical of the Crown. (*Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)) The doctrine was first codified in the English Bill of Rights of 1689, which provided: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." Like many other practices and customs of Parliament, legislative privilege and immunity was adopted by the American colonial legislatures where "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." (*Id.*)

The doctrine of legislative privilege and immunity is codified in the Speech or Debate Clause of the United States Constitution, which provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." (U.S. Const. Art. I, Sec. 6) Even though the Nevada Constitution does not contain a provision that is similar to the federal Speech or Debate Clause, Nevada's legislators are protected by legislative privilege and immunity as a state constitutional right under separation of powers provision in the Nevada Constitution. (Nev. Const. Art. 3, Sec. 1; *Guinn v. Legislature*, 119 Nev. 460, 472, 76 P.3d 22, 30 (2003); *Cushing's Legislative Assemblies*, Sec. 602; 1 Joseph Story, *Commentaries on the Constitution of the United States*, Sec. 866 (Boston, Mass., Little, Brown, and Co., 5th ed., 1905); 2 Thomas M. Cooley, *A Treatise on Constitutional Limitations*, at 929-31 (Boston, Mass., Little, Brown, and Co., 8th ed., 1927)) As observed by the Nevada Supreme Court, "[u]nder the separation of powers doctrine, individual legislators cannot, nor should they, be subject to fines or other penalties for voting in a particular way." (*Guinn v. Legislature*, 119 Nev. 460, 472, 76 P.3d 22, 30 (citing

Supreme Ct. of Va. v. Consumers Union, 446 U.S. 719, 731 (1980)), and *Gravel v. United States*, 408 U.S. 606, 616-18 (1972))

To further implement the constitutional doctrines of separation of powers and legislative privilege and immunity in Nevada, the Legislature enacted NRS 41.071, which provides that "[f]or any speech or debate in either House, a State Legislator shall not be questioned in any other place." (NRS 41.071; *Legislature v. Settelmeyer*, 137 Nev. 231, 238-39, 486 P.3d 1276, 1282-83 (2021)) When the Legislature enacted NRS 41.071, it provided that in interpreting and applying legislative privilege and immunity in Nevada, "the interpretation and application given to the constitutional doctrines of separation of powers and legislative privilege and immunity under the Speech or Debate Clause of Section 6 of Article I of the Constitution of the United States must be considered to be persuasive authority." Therefore, the protection afforded to Nevada's legislators by legislative privilege and immunity under state law is equivalent to the protection afforded to members of Congress by legislative privilege and immunity under the federal Speech or Debate Clause. (*Id.*)

Under both federal and state law, the doctrine of legislative privilege and immunity protects legislators "from having to defend themselves, from being held liable and from being questioned or sanctioned in administrative or judicial proceedings for speech, debate, deliberation and other actions performed within the sphere of legitimate legislative activity." (NRS 41.071; *Legislature v. Settelmeyer*, 137 Nev. 231, 238, 486 P.3d 1276, 1282 (2021); *Supreme Ct. of Va. v. Consumers Union*, 446 U.S. 719, 731-34 (1980); *Tenney v. Brandhove*, 341 U.S. 367, 376-79 (1951)) As part of the constitutional system of checks and balances, the doctrine facilitates the autonomy of the Legislative Department by curtailing intrusions by the Executive or Judicial Department into the sphere of protected legislative activities. (*United States v. Helstoski*, 442 U.S. 477, 491 (1979)) In this way, the doctrine serves an important governmental function by "reinforcing the separation of powers so deliberately established by the Founders." (*United States v. Johnson*, 383 U.S. 169, 178 (1966))

At the same time, the doctrine of legislative privilege and immunity is also an important individual right which is designed to "protect the integrity of the legislative process by insuring the independence of individual legislators." (*United States v. Brewster*, 408 U.S. 501, 507 (1972)) The doctrine fosters individual independence by shielding each legislator from any "executive and judicial oversight that realistically threatens to control his conduct as a legislator." (*Gravel v. United States*, 408 U.S. 606, 618 (1972)) In this way, the doctrine serves an important function for individual legislators by ensuring that they "are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." (*Powell v. McCormack*, 395 U.S. 486, 503 (1969))

The protection afforded by the doctrine of legislative privilege and immunity "will be read broadly to effectuate its purposes." (*United States v. Johnson*, 383 U.S. 169, 180 (1966)) The protection extends to all actions that are "integral steps in the

legislative process." (*Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998)) This includes all actions that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." (*Gravel v. United States*, 408 U.S. 606, 625 (1972); *Legislature v. Settelmeyer*, 137 Nev. 231, 238, 486 P.3d 1276, 1283 (2021))

For example, legislators are protected by the doctrine of legislative privilege and immunity when "performing basic legislative functions—proposing, amending, voting on, and passing legislation—such that their actions [fall] within the sphere of legitimate legislative activity." (*Id.*; *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998)) However, the doctrine is not limited in scope to activities associated with the processing of legislation, but it extends to other types of legislative activities, such as chairing or serving on a committee; preparing committee reports or other documents; issuing subpoenas; undertaking investigations, studies, inquiries, or information-gathering; requesting, seeking, or obtaining any form of aid, assistance, counsel, or services from legislative staff; conducting disciplinary or impeachment proceedings; or taking any other actions regarding matters within the jurisdiction of either house. (NRS 41.071; *Tenney v. Brandhove*, 341 U.S. 367, 376-79 (1951); *Gravel v. United States*, 408 U.S. 606, 616 (1972); *Doe v. McMillan*, 412 U.S. 306, 312-13 (1973); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 507-11 (1975); *Larsen v. Senate of Pa.*, 152 F.3d 240, 248-52 (3d Cir. 1998))

The doctrine of legislative privilege and immunity also provides testimonial and evidentiary privileges which prevent compelled disclosure of legislative materials when it would intrude on, interfere with, or pry into the legislative process. (*Gravel v. United States*, 408 U.S. 606, 616-17 (1972); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007); *In re Hubbard*, 803 F.3d 1298, 1307-15 (11th Cir. 2015); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1186-88 (9th Cir. 2018); *Am. Trucking Ass'ns v. Alviti*, 14 F.4th 76, 86-90 (1st Cir. 2021)) The doctrine prevents such disclosure because "the legislative process is disrupted by the disclosure of legislative material, regardless of the use to which the disclosed materials are put." (*United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. Cir. 2007); *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 528-31 (9th Cir. 1983); *MINPECO, S.A. v. Conticommodity Servs., Inc.*, 844 F.2d 856, 859-61 (D.C. Cir. 1988); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 415-21 (D.C. Cir. 1995))

For example, the doctrine of legislative privilege and immunity "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts." (*United States v. Brewster*, 408 U.S. 501, 525 (1972)) The doctrine protects against those inquiries because it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." (*Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *Eastland U.S. Servicemen's Fund*, 421 U.S. 491, 508-09 (1975); *Bogan v. Scott-Harris*, 523 U.S. 44, 54-56 (1998); *Legislature v.*

Settelmeyer, 137 Nev. 231, 239 n.5, 486 P.3d at 1283 n.5 (2021)) Consequently, the application of legislative privilege and immunity to particular acts does not turn on the subjective motivations or intent behind those acts because "[w]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." (*Bogan v. Scott-Harris*, 523 U.S. 44, 45 (1998); *Legislature v. Settelmeyer*, 137 Nev. 231, 238-39, 486 P.3d 1276, 1283 (2021))

Therefore, in determining whether a particular act is protected, courts ask whether, "stripped of all considerations of intent and motive," the act is taken or performed within the sphere of legitimate legislative activity. (*Bogan v. Scott-Harris*, 523 U.S. 44, 45 (1998)) If the act meets this standard, the protection of legislative privilege and immunity is absolute, thereby protecting legislators from having to defend themselves, from being held liable, and from being questioned or sanctioned in administrative or judicial proceedings regarding their protected legislative activity. (NRS 41.071; *Legislature v. Settelmeyer*, 137 Nev. 231, 238-40, 486 P.3d 1276, 1282-84 (2021); *Supreme Ct. of Va. v. Consumers Union*, 446 U.S. 719, 731-34 (1980)) This protection includes absolute immunity from damages, declaratory and injunctive relief, and attorney's fees and costs. (*Id.*)

Although the doctrine of legislative privilege and immunity protects legislators from improper intrusions by the other departments of state government into the legislative sphere, it does not protect legislators from accountability before their own house of the Legislature. (Nev. Const. Art. 4, Sec. 6; NRS 41.071; *United States v. Helstoski*, 442 U.S. 477, 489 n.7 (1979); *Whitener v. McWatters*, 112 F.3d 740, 742-45 (4th Cir. 1997); *State v. Neufeld*, 926 P.2d 1325, 1339 (Kan. 1996); James Wilson, *Lectures on Law* (1791), reprinted in 2 *The Founders' Constitution*, at 331 (Philip B. Kurland & Ralph Lerner eds., 1987)) Therefore, even when legislators are protected from having their legislative conduct scrutinized by the other departments of state government, legislators remain subject to scrutiny and punishment by their own house of the Legislature. (Nev. Const. Art. 4, Sec. 6; *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 293-97, 212 P.3d 1098, 1104-07 (2009))

In addition to protecting legislators, the doctrine of legislative privilege and immunity also protects members of legislative staff who take or perform actions within the sphere of legitimate legislative activity that would be protected if taken or performed by legislators. (NRS 41.071; *Legislature v. Settelmeyer*, 137 Nev. 231, 238-40, 486 P.3d 1276, 1282-84 (2021); *Gravel v. United States*, 408 U.S. 606, 616-18 (1972); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 507-10 (1975); *Bogan v. Scott-Harris*, 523 U.S. 44, 45 (1998)) As observed by the United States Supreme Court:

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that

> the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.
>
> (*Gravel v. United States*, 408 U.S. 606, 616-17 (1972) (internal citations omitted))

The doctrine of legislative privilege and immunity is not limited to legislators and legislative staff because "officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions." (*Bogan v. Scott-Harris*, 523 U.S. 44, 45 (1998); *Supreme Ct. of Va. v. Consumers Union*, 446 U.S. 719, 731-34 (1980)) For example, the Nevada Constitution expressly gives the Governor and the Lieutenant Governor, as the President of the Senate, specific constitutional powers to exercise certain limited legislative functions appertaining to the legislative process. (Nev. Const. Art. 4, Secs. 6, 18, and 35; Art. 5, Secs. 10 and 17; Art. 19, Sec. 2) Because the Governor and the Lieutenant Governor are exercising legislative functions under such circumstances, they are protected by legislative privilege and immunity in the same manner as legislators who take or perform actions within the sphere of legitimate legislative activity, even though the Governor and the Lieutenant Governor are members of the Executive Department. (NRS 41.071; *Legislature v. Settelmeyer*, 137 Nev. 231, 238-40, 486 P.3d 1276, 1282-84 (2021))

If legislators are prosecuted in state court for violating state criminal statutes prohibiting bribery, corruption, or other misuse of office, the doctrine of legislative privilege and immunity generally does not prohibit the prosecution by the state, provided that the prosecution does not rely on evidence of legislative acts or the motivation for legislative acts to prove its case. (*State v. Chvala*, 678 N.W.2d 880, 891-94 (Wis. Ct. App. 2004), *aff'd*, 693 N.W.2d 747 (Wis. 2005); *State v. Neufeld*, 926 P.2d 1325, 1332-41 (Kan. 1996); *State v. Dankworth*, 672 P.2d 148, 149-52 (Alaska Ct. App. 1983); *Blondes v. State*, 294 A.2d 661, 662-68 (Md. Ct. Spec. App. 1972), *overruled on other grounds*, 330 A.2d 169 (Md. 1975)) For example, because the crime of bribery occurs when a legislator makes the corrupt promise to perform acts in exchange for payment, regardless of whether the acts are actually performed, the prosecution can prove its case without introducing evidence of legislative acts or the motivation for legislative acts because the prosecution "need not show any act of [the legislator] subsequent to the corrupt promise for payment, for it is taking the bribe, not performance of the illicit compact, that is a criminal act." (*United States v. Brewster*, 408 U.S. 501, 526 (1972); *United States v. Helstoski*, 442 U.S. 477, 488-90 (1979))

If state legislators are prosecuted in federal court for violating federal criminal statutes prohibiting bribery, corruption, or other misuse of office, the protections that state legislators ordinarily receive in federal civil actions under the doctrine of

legislative privilege and immunity are not extended to federal criminal prosecutions. (*United States v. Gillock*, 445 U.S. 360, 368-74 (1980)) Consequently, when the federal government prosecutes state legislators in federal court for violating federal criminal statutes prohibiting bribery, corruption, or other misuse of office, the prosecution may rely on evidence of legislative acts or the motivation for legislative acts to prove its case. (*Id.*)

STATE LEGISLATIVE PRIVILEGE AND IMMUNITY FROM ARREST ON CIVIL PROCESS DURING SPECIFIED SESSION PERIODS

Under the Nevada Constitution, legislators are privileged from arrest on civil process for 15 days before the commencement of a legislative session and during the session. (Nev. Const. Art. 4, Sec. 11) In interpreting a similar provision in the Federal Constitution, the United States Supreme Court has determined that this legislative privilege is limited to exemption from arrest in civil actions, explaining that "[w]hen the Constitution was adopted, arrests in civil suits were still common in America." (*Long v. Ansell*, 293 U.S. 76, 83 (1934)) However, the United States Supreme Court has determined that this legislative privilege was not intended to provide legislators with immunity from being served with a summons or other civil process requiring them to file an answer or raise defenses in civil actions. (*Id.* at 80-83) Nevertheless, even when legislators are properly served with a summons or other process in civil actions, legislators would be entitled to raise legislative privilege and immunity in the civil actions, and they would be exempt "from having to defend themselves, from being held liable and from being questioned or sanctioned in administrative or judicial proceedings for speech, debate, deliberation and other actions performed within the sphere of legitimate legislative activity." (NRS 41.071; *Legislature v. Settelmeyer*, 137 Nev. 231, 238, 486 P.3d 1276, 1282 (2021); *Supreme Ct. of Va. v. Consumers Union*, 446 U.S. 719, 731-34 (1980); *Tenney v. Brandhove*, 341 U.S. 367, 376-79 (1951))

STATE LEGISLATIVE PRIVILEGE AND IMMUNITY FROM ADMINISTRATIVE SUBPOENAS DURING SPECIFIED SESSION PERIODS

If authorized by a statute, an administrative body may issue subpoenas to compel a person, as a witness, to attend and give testimony or to produce materials in any administrative proceedings, so long as the evidence sought is pertinent and relevant to the administrative proceedings. (*Nev. Comm'n on Equal Rights of Citizens v. Smith*, 80 Nev. 469, 473-75, 396 P.2d 677, 679-80 (1964); *Andrews v. Nev. State Bd. of Cosmetology*, 86 Nev. 207, 208-10, 467 P.2d 96, 96-98 (1970)) However, an administrative body cannot issue a subpoena to a legislator, or the Lieutenant Governor as President of the Senate, if the subpoena compels the legislator or Lieutenant Governor, during a legislative session, to attend and give testimony or to produce materials in any administrative proceedings. (NRS 218A.440) Additionally, even when an administrative body properly issues a subpoena to any legislators or the

Lieutenant Governor, they would be entitled to raise legislative privilege and immunity in any administrative proceedings, and they would be exempt "from having to defend themselves, from being held liable and from being questioned or sanctioned in administrative or judicial proceedings for speech, debate, deliberation and other actions performed within the sphere of legitimate legislative activity." (NRS 41.071; *Legislature v. Settelmeyer*, 137 Nev. 231, 238, 486 P.3d 1276, 1282 (2021); *Supreme Ct. of Va. v. Consumers Union*, 446 U.S. 719, 731-34 (1980); *Tenney v. Brandhove*, 341 U.S. 367, 376-79 (1951))

STATE LEGISLATIVE PRIVILEGE AND IMMUNITY REQUIRING CONTINUANCE OF CERTAIN JUDICIAL OR ADMINISTRATIVE PROCEEDINGS DURING SPECIFIED SESSION PERIODS

If, during a legislative session, a legislator, or the Lieutenant Governor as President of the Senate, is a party to an action or proceeding in a court or before an administrative body, or is an attorney for a party to an action or proceeding in a court or before an administrative body and was employed as the party's attorney before the commencement of the session, such a party or attorney may file with the court or administrative body a motion or request for a continuance of the action or proceeding. (NRS 1.310) With certain limited exceptions, the court or administrative body must grant the continuance of the action or proceeding, including, without limitation, any discovery or other pretrial or posttrial matter involved in the action or proceeding. The continuance must be effective for the duration of the session and an additional 7 calendar days following the session, or for a shorter period if requested by the person who filed the motion or request for the continuance, and it must be granted without the imposition of any bond, costs, or other terms. If a party objects to the continuance, the court or administrative body cannot deny the continuance, in whole or in part, unless the objecting party satisfies the burden to prove that, as a direct result of emergency or extraordinary circumstances, the objecting party: (1) has a substantial existing right or interest that will be defeated or abridged if the continuance is granted; and (2) will suffer substantial and immediate irreparable harm if the continuance is granted. (*Id.*)

STATE LEGISLATIVE PRIVILEGE AND IMMUNITY FOR CERTAIN MATTERS ENTRUSTED TO OR WORK PRODUCED BY THE LEGISLATIVE COUNSEL BUREAU

With certain limited exceptions, the Legislative Counsel Bureau's staff members are prohibited from disclosing to any person outside the LCB the nature or content of any matter entrusted to the Legislative Counsel Bureau, and the matter is confidential and privileged and is not subject to discovery or subpoena, unless the person entrusting the matter to the Legislative Counsel Bureau requests or consents to the disclosure. (NRS 218F.150) Additionally, the nature and content of any work produced by the staff members of the Legal Division and Fiscal Analysis Division of the Legislative Counsel Bureau, and any matter entrusted to those staff members to produce such

work, are confidential and privileged and are not subject to discovery or subpoena. However, the nature or content of any work produced by the staff members of the Research Division of the Legislative Counsel Bureau may be disclosed if or to the extent that the disclosure does not reveal the identity of the person who requested it or include any matter submitted by the requester which has not been published or publicly disclosed. (*Id.*)

Unless one of the limited exceptions is applicable, this state legislative privilege and immunity applies to any matter or work in any form, including, without limitation, in any oral, written, audio, visual, digital, or electronic form, and the matter or work includes, without limitation, any communications, information, answers, advice, opinions, recommendations, drafts, documents, records, questions, inquiries, or requests in any such form. (*Id.*)

STATE LEGISLATIVE PRIVILEGE AND IMMUNITY RELATING TO PUBLIC AND PRIVATE EMPLOYMENT

If a private employer employs a person who is a legislator, the private employer cannot enforce any terms of an employment contract that provide for a loss of job seniority of the employee by reason of the employee's absence from the employee's regular duties or place of employment while: (1) attending a legislative session in the employee's official capacity as a legislator; or (2) attending, during the legislative interim, certain committee meetings in the employee's official capacity as a legislator if the private employer is required by law to grant leave to the employee for those committee meetings. (NRS 218A.300) If a private employer has more than 50 employees and employs a person who is a legislator, or if any public employer employs a person who is a legislator, the employer must grant leave to the employee, with or without pay at the discretion of the employer, for the employee's attendance, during the legislative interim, at certain committee meetings in the employee's official capacity as a legislator. (*Id.*)

OTHER STATE PRIVILEGES AND IMMUNITIES RELATING TO PUBLIC OFFICERS AND EMPLOYEES GENERALLY

A public officer cannot be examined as a witness for communications made to the public officer in official confidence when the public interests would suffer by the disclosure. (NRS 49.285) Under the privilege, communications made to a public officer may be protected from disclosure on grounds of public policy when the communications were made in official confidence and their disclosure would prejudice the public interests. (*Madsen v. United Television, Inc.*, 801 P.2d 912, 915 (Utah 1990)) Application of the privilege requires balancing the competing interests in confidentiality and transparency and weighing the relative merits of the interests at stake. (*Hawk Eye v. Jackson*, 521 N.W.2d 750, 753 (Iowa 1994); *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 225 (Iowa 2019))

The deliberative process privilege "protects materials or records that reflect a government official's deliberative or decision-making process." (*DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 623, 6 P.3d 465, 469 (2000)) Those materials or records include documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." (*Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal citations omitted)) The deliberative process privilege has been adopted because "public disclosure of certain communications would deter the open exchange of opinions and recommendations between government officials, and it is intended to protect the government's decision-making process, its consultative functions, and the quality of its decisions." (*City of Colorado Springs vs. White*, 967 P.2d 1042, 1047 (Colo. 1998); *Dep't of Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8-9 (2001)) To warrant protection under the deliberative process privilege, the materials or records must be "part of a predecisional and deliberative process that led to a specific decision or policy." (*Clark County Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 705, 429 P.3d 313, 318 (2018); *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021))

Public officers and employees acting in their official capacities are immune from liability for money damages based on any acts or omissions in their execution and administration of statutory provisions which have not been declared invalid by a court of competent jurisdiction. (NRS 41.032; *Hagblom v. State Dir. of Mtr. Vehs.*, 93 Nev. 599, 603, 571 P.2d 1172, 1175 (1977)) Additionally, public officers and employees acting in their official capacities are immune from liability for money damages based on the performance of official duties which involve an element of official discretion or judgment and are grounded in the creation or execution of social, economic, or political policy. (NRS 41.032; *Martinez v. Maruszczak*, 123 Nev. 433, 445-47, 168 P.3d 720, 728-29 (2007)) The reason for providing this "discretionary-act immunity" under these circumstances is to protect the policy-making functions of the Legislative and Executive Departments from "judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." (*Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984))