2022 Nevada Government Civil Attorneys' Conference

September 15, 2022

7.5 CLE hours



 3100 W. Charleston Blvd., Ste. 100 Las Vegas, NV 89102
 702-382-2200

 9456 Double R Blvd. Suite B Reno, NV 89521
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Jordan Walsh- Jordan is adept at representing public and private entities in collective bargaining with employee organizations, including achieving and maintaining compliance with collective bargaining agreements, personnel policies, labor and employment law, and state benefit programs. She advises clients on compliance with municipal law, such as the Nevada Open Meeting Law and the Nevada Public Records Act. In addition, Jordan manages and conducts grievance mediation and grievance arbitration. She advises clients on state and federal employment law including: local wage and hour laws; the Fair Labor Standards Act; the Family and Medical Leave Act; the Americans with Disabilities Act; the Age

Discrimination in Employment Act; Title VII; the Pregnant Workers Fairness Act; the EMRA (Nevada); the Affordable Care Act; Public Employees' Benefits Program; Public Employees' Retirement System of Nevada; as well as state-specific laws relating to law enforcement and school district personnel.



Scott Davis - Scott is the Litigation/Human Resources team chief for the civil division of the Clark County District Attorneys office, where he handles labor and employment issues for the county. Previously he was a Deputy Attorney General and represented the EMRB and the Labor Commissioner's office.



Marisa Rodriguez- Marisa is an attorney at the City of North Las Vegas, where she practices transactional and employment law and litigation. She serves on the State Bar of Nevada board of governors, the Legal Aid Center of Southern Nevada board of directors, the Justice Michael L. Douglas PreLaw Fellowship Program advisory board, and the Access to Justice Commission. Marisa obtained her B.S. and J.D. from the University of Nevada, Las Vegas, where she is currently an adjunct professor in the externship program. Marisa enjoys mentoring students and young attorneys and has a robust pro bono practice.



Jennifer Richards- Jennifer is a native Nevadan and a firstgeneration college graduate. In January 2020, she was appointed by Governor Sisolak to serve as the Attorney for the Rights of Older Persons and Persons with a Physical Disability, an Intellectual Disability or a Related Condition under NRS 427A. Prior to her appointment, she worked at a non-profit legal services provider representing older adults and persons with disabilities. She serves on the Nevada Supreme Court Guardianship Commission, the Hillside Cemetery Preservation Foundation Board of Directors, the Mothers Esquire national committee, and as secretary for the National Association of Legal Service Developers. Jennifer obtained her B.S. from the University of Nevada, Reno and her J.D. from Gonzaga University School of Law. She enjoys

spending time outdoors in Northern Nevada with her husband, son, and rescue dog, Penny Lane.



Kristine M. Kuzemka- Ms. Kuzemka is the Director of the Nevada Lawyers Assistance Program (NLAP) with the State Bar of Nevada, and a member of Lawyers Concerned for Lawyers. She has been involved in the recovery field for more than 30 years with a commitment to helping judges, attorneys and other legal professionals. Ms. Kuzemka is currently working with the State Bar of Nevada and outside professionals to advance judicial well-being by addressing stress issues such as the effects of secondary and vicarious trauma in both the civil and criminal justice systems. Ms. Kuzemka is a Nevada Supreme Court Settlement Judge and a Private Mediator with Advanced Resolution Management in Las Vegas with a focus on Business/Commercial, Real Estate, Product Liability, Wrongful Death, and Personal Injury matters. Prior to entering the private sector, Ms. Kuzemka litigated complex civil matters

on behalf of Nevada consumers as a Senior Deputy Attorney General in the Nevada Attorney General's Office, Bureau of Consumer Protection. She started her legal career as an attorney in the Clark County Public Defender's Office and has practiced in both State and Federal Courts.



Jordan Savage- Jordan has been licensed to practice in Nevada since 1994. He started his career at Nevada Legal Services before embarking on a 27-year career as a Public Defender. He was the Training Director for the Clark County Public Defender's Office from 2005-2018. He designed an 8-week training program for new Public Defenders. He also coordinated the summer internship program at the office. He was the team chief of the Sexual Assault defense team. He also served on the Homicide defense team handling death penalty cases. In 2018, he became a Deputy Special Public Defender and now serves as the Assistant Special Public Defender. Jordan graduated from the University of the South in Sewanee, Tennessee in 1989 and California Western School of Law in 1994.



Caryn Tijsseling – Caryn is an attorney at the firm of Lemons, Grundy & Eisenberg in Reno, Nevada. She practices in the areas of Civil Litigation, Professional Negligence and Construction Law. Caryn graduated from the University of Nevada, Reno in 1994 and California Western School of Law in 1997. Caryn is also a certified Nutrition Coach and is working toward a certification in Sleep, Stress-Management and Recovery.



Ross E. Armstrong- Ross was born and raised in Reno, graduating from the University of Nevada, Reno and then Willamette University College of Law. Before joining the ethics commission, he was as a special prosecutor in rural Nevada and then general agency attorney at the Nevada Attorney General's Office and held executive positions at the Nevada Department of Health and Human Services. He has served on multiple public Commissions including the Juvenile Justice Oversight Commission, the Coalition to Prevent the Commercial Sexual Exploitation of Children, and the Nevada Attorney General's Committee on Domestic Violence.



Chief Justice Ron D. Parraguirre- Chief Justice Parraguirre is a fourth-generation Nevadan and a second-generation judge. His family emigrated from the Basque country to western Nevada in the 1870's to ranch the country south of Carson City. However, law was in the family's blood. Chief Justice Parraguirre's great aunt was a law school graduate, although she did not practice law. The Chief's father, Paul, and his two uncles all graduated from the University of Denver School of Law. Paul Parraguirre eventually became a Fifth Judicial District Court Judge. Chief Justice Parraguirre graduated from the University of San Diego School of Law. After law school, he went to work in Washington, D.C. for then U.S. Senator Paul Laxalt and soon became counsel to the Senate Judiciary Committee, subcommittee on criminal law. Chief Justice Parraguirre returned to Nevada two years later to join his father in private practice. He became managing partner and took over the practice when Paul Parraguirre was appointed to the District Court bench. Chief Justice Parraguirre's judicial career

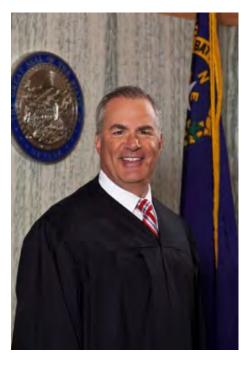
began in 1991 when he won a seat on the Las Vegas Municipal Court. He was reelected twice and served until Governor Kenny Guinn appointed him in 1999 to a seat on the Eighth Judicial District Court. Throughout his tenure on the bench, Chief Justice Parraguirre has received, and maintained, some of the highest ratings in judicial performance evaluations. As a district judge, Chief Justice Parraguirre worked tirelessly, not only on his own caseload, but also while serving on more than a dozen commissions and committees to improve the efficiency and effectiveness of the judiciary. Those included the Nevada State-Federal Judicial Council, the Supreme Court Funding Commission, the Access to Justice Resource Center, the Supreme Court Jury Improvement Implementation Committee, the District Court Settlement Conference Committee, the State Bar of Nevada Task Force on Multi-Jurisdictional Practice, the State Bar of Nevada Civil Pattern Jury Instructions Committee, Medical Malpractice Rules Committee, the Supreme Court Judicial Election Practices Committee, and he initiated the Eighth Judicial District Court Bench-Bar Committee. Prior to his election to the high court, Chief Justice Parraguirre was the presiding Civil Judge in the Eighth Judicial District Court. During 2004, he served as President of the Nevada District Judges Association. Since his election to the Supreme Court, he served as Supreme Court Liaison on the Article 6 Commission, serves on the Judicial Council of the State of Nevada, is currently in charge of the Senior Judge program, as well as the Supreme Court Settlement Conference program, and chairs the Commission to Study the Rules and Statutes relating to Judicial Discipline and Update the Nevada Code of Judicial Conduct. He also serves on the Court's recently formed Commission to Study the Adjudication of Water Law Cases. Chief Justice Parraguirre won his seat on the Nevada Supreme Court in 2004. His current term ends in 2023.



Chief Judge Michael P. Gibbons- Chief Judge Gibbons was one of the three judges Governor Brian Sandoval selected to form the inaugural Nevada Court of Appeals in December 2014. Judge Gibbons was elected to serve a second term on the Court of Appeals in November 2016. He was appointed as the first Chief Judge of the court and reappointed twice. Before his appointment to the Court of Appeals, he served as a District Judge in the Ninth Judicial District Court in Minden for twenty years. He was first elected to the district court bench in 1994 and was consecutively reelected four times. During his 20-year tenure on the district court, Judge Gibbons presided as a visiting judge in nine different counties, including ten appointments by the Nevada Supreme Court to district court in Clark County, and two temporary appointments by the governor to the supreme court. In his more than 26-year judicial career, he has always received a retention rating of 80% or higher by members of the Nevada bar. Judge Gibbons has an extensive record of leadership in organizations dedicated to improving the bench and bar. Judge Gibbons served as

President of the Nevada District Judges' Association in 2004 and 2005; Sierra Region district court representative for the State Judicial Council for twelve years and Court of Appeals representative since 2019; an inaugural member of the Nevada Committee on Judicial Ethics and Election Practices with eight years of service; a member of the Nevada Court Improvement Project for Children for fourteen years; and was elected to the governing board of the National Council of Juvenile and Family Court Judges for six years, where he received the President's Award in 2008. He is one of the few District Judges to have ever received the Outstanding Achievement Award in judicial education from the Nevada Supreme Court (more than 1,000 hours of education). Judge Gibbons has also mentored more than 20 judicial law clerks as they began their legal careers. Judge Gibbons received his bachelor's degree from the University of California at Los Angeles and his law degree from the University of Idaho College of Law. Judge Gibbons was the only member of his law school class to be selected both as an editor for the Law Review and for the Northwest States Regional Moot Court competition. Judge Gibbons began his Nevada legal career in 1980 as a law clerk for District Judge Howard D. McKibben. Judge Gibbons was hired as a Douglas County Deputy District Attorney in 1981 and promoted to Chief Criminal Deputy in 1984. He prosecuted many high-profile criminal cases such as the extortion bombing of Harvey's Hotel Casino in Lake Tahoe. He was elected the second President of the Douglas County Bar Association in 1987. Throughout his career, Judge Gibbons has advocated for victims' rights and endeavored to help the vulnerable through legislation and court programs. He was a founding board member of the Nevada State CASA Association (Court Appointed Special Advocates for Children) and the co-founder of the Douglas County SAFE Program (Special Advocates for Elders). He served on the Nevada Guardianship Commission from

2015-16, which successfully proposed legislation and court reforms to protect the elderly and the vulnerable. In his personal life, Judge Gibbons enjoys spending time with his wife, three daughters, and three grandsons (he is the brother of retired Nevada Supreme Court Chief Justice Mark Gibbons). Judge Gibbons enjoys supporting youth athletics and engaging in philanthropic efforts. Judge Gibbons is a certified youth soccer coach and actively coached for twelve years. He was selected in 2008 by People to People to coach a United States youth soccer team in the Youth Friendship Games in Holland. He has been a certified soccer referee for nineteen years and continues to officiate for high school and youth leagues. He was named Carson Valley Citizen of the Year in part for his support of youth athletics. Judge Gibbons was also a member of the Tahoe-Douglas Rotary Club for 22 years and received the inaugural Quiet Rotarian award for unheralded excellence as a Rotarian.



Judge Scott N. Freeman- Judge Freeman was appointed by Governor Sandoval to serve as the Presiding Judge in Department 9 in 2012. In 1995, he was appointed to serve as a Pro Tem Judge up to and including the time he was appointed to the Second Judicial District Court by Governor Sandoval. In 1993, Judge Freeman was appointed Pro Tem Family Court Master and Pro Tem Juvenile Court Master by the Second Judicial District Court. He received his J.D. from Southwestern University School of Law, Los Angeles, California and began his law career in 1984. Judge Freeman graduated from Ithaca College, Ithaca, New York, with a degree in Politics and a minor in Economics. He was a permanent member of the Commission for Judicial Selection for the NV Bar from 2008-2011 and served on the Nevada Law Foundation Chairman of the Board of Trustees from 1998-2000. He has been the criminal justice representative on numerous law related committees, including the Washoe County Public Defender Selection Committee, Washoe County Alternative Public Defender Selection

Committee, Nevada Criminal Jury Instructions Committee, Washoe District Court Pattern Criminal Jury Instructions Committee, Washoe District Court Criminal Rules Committee, and the Nevada Mandatory Sentencing Review Commission. Judge Freeman has also been a lecturer of numerous topics at seminars sponsored by the State Bar of Nevada, Washoe County Bar Association and local universities and high schools. Judge Freeman formerly co-hosted the weekly television show Lawyers, Guns & Money on KRNV TV, an NBC Network affiliate, with an interview format of notable personalities in the legal, cultural, and charitable communities.



Judge Kathleen E. Delaney- Judge Delaney has been a practicing attorney since 1990. She was elected to the District Court in 2008 and took the bench in Department 25 on January 5, 2009. Judge Delaney is currently assigned to hear Criminal and Civil matters. She is one of 6 Judges who conduct Business Court settlement conferences, and she is designated as the Alternative Judge for Business Court matters. Prior to joining the bench, Judge Delaney worked as a Senior Deputy Attorney General in the Bureau of Consumer Protection for the Nevada Attorney General's Office, where she enforced consumer protection laws in criminal, civil and administrative law cases. Prior to her tenure as a Senior Deputy Attorney General, Judge Delaney served as the Vice President and General Counsel for Treasure Island Corp. from 1998 to 2001 and the Assistant General Counsel for The Mirage Casino-Hotel from 1991 to 1998. In addition, Judge Delaney spent her first year of practice as an associate with the Los Angeles-based firm of Hill, Farrer & Burrill. Judge

Delaney earned her Bachelor of Arts degree in English from The Colorado College in 1987 and her Juris Doctorate from the University of North Carolina at Chapel Hill in 1990.



Judge Ellie Roohani- Judge Roohani serves on the Eighth Judicial District Court, Department XI, in Las Vegas, Nevada. Her case assignments include both civil and criminal matters. Governor Steve Sisolak appointed Judge Roohani in December 2021. A resident of Las Vegas since she was a baby, Judge Roohani received all of her education through Nevada institutions. First, Judge Roohani graduated with honors from Clark High School's AMSAT magnet program. Next, Judge Roohani obtained a bachelor's degree in psychology from the University of Nevada, Las Vegas graduating with honors distinction. Finally, Judge Roohani obtained her Juris Doctorate from the William S. Boyd School of Law at UNLV, where she was a dean's award recipient. While attending law school, Judge Roohani served as the Editor in Chief of the Nevada Law Journal. Following admission to the bar, Judge Roohani taught Advanced Legal Analysis and Judicial

Writing at Boyd School of Law and assisted students with bar exam preparation. Judge Roohani also

served as a law clerk to federal judges Roger Hunt (District of Nevada) and Johnnie Rawlinson (Ninth Circuit Court of Appeals). Following her clerkships, Judge Roohani served for more than five years as an Assistant United States Attorney where she prosecuted violent crime and child sexual exploitation cases in the trial and appellate units. Judge Roohani argued several cases before the Ninth Circuit Court of Appeals, including the published cases United States v. Jazzmin Dailey, United States v. Cole Lusby, and United States v. Gregory Olson. During her time as an AUSA, Judge Roohani reviewed clemency applications for the Attorney General's Clemency Project, and served as the Black Affairs Special Emphasis Coordinator, Project Safe Childhood Coordinator, U.S. Attorney's Office Anti-Harassment Coordinator, and as a Law Enforcement Officer Mentor and Training Officer. The FBI and Las Vegas Metropolitan Police Department have recognized Judge Roohani for her commendable performance in prosecuting large-scale multi-defendant child exploitation cases. Judge Roohani is actively involved in the community and serves as a member of the Las Vegas Chamber of Commerce Leadership Las Vegas program, Kiwanis Club of Southwest Las Vegas, Interfaith Council of Southern Nevada, Latino Bar Association, and Howard D. McKibben American Inn of Court.



Bryan K. Scott- Bryan has resided in North Las Vegas and Las Vegas since April 1970. He earned a Bachelor of Science degree in Business Administration (Management) from the University of Nevada, Las Vegas in 1988 and a Juris Doctorate degree from Northwestern School of Law, Lewis and Clark College in 1991. An Attorney since October 11, 1991, he has worked for the City of Las Vegas since August 5, 1996 and is currently the City Attorney for the City of Las Vegas. During his time with the City of Las Vegas, Scott has practiced in the areas of General Civil Litigation, Special Improvement Districts, Condemnations, Land Use, Zoning and Planning, Ethics, Marijuana Regulation, Public Records and the Open Meeting Law. From 1996 to 2005 he served as a Deputy City Attorney. From 2005 to 2016 he served as the Assistant City Attorney. From 2016 to 2020 he served as the Senior Assistant City Attorney. On June 17, 2020, Scott was unanimously

ratified by the Las Vegas City Council as the 23rd and first African-American City Attorney for the City of Las Vegas in the city's history (119 years). From 1991-1993, Scott was an Associate Attorney for Donald J. Campbell & Associates (NKA Campbell & Williams) and an Associate Attorney for Rawlings, Olson, Cannon, Gormley & Desruisseaux (NKA Olson Cannon Gormley & Stoberski) from 1993-1996. From 2006 to 2009 and from 2010 to 2018 Scott was a member of the State Bar of Nevada Board of Governors. He was the 88th and first African-American President of the State Bar of Nevada in 2016-2017. He was a member of the Nevada Board of Continuing Legal Education from 2011-2014.

Scott was the first African-American President of the Clark County Law Foundation in 2006 and was elected as the first African-American President of the Clark County Bar Association in 2005. He served as a Board Member/Secretary-Treasurer/President-Elect of the Clark County Bar Association from 2000 to 2004. In 1996 Scott was elected as the President of the Las Vegas Chapter of the National Bar Association. He served in that position until 1999. Scott is the past Chairman of the State Bar of Nevada's Diversity Committee and served on the Nevada Supreme Court's Bench-Bar Committee for three years. He has won a number of awards and accolades for his community service work. Scott sits on the Board of the Justice Michael L. Douglas Pre-Law Fellowship Program which seeks to introduce students from underrepresented communities to the rigors of law school and the benefits of having a legal education. In May 2019, he was awarded the James M. Bartley Distinguished Public Lawyer Award by the Public Lawyers Section of the State Bar of Nevada. Additionally in 2019 he was named as the Trailblazer of the Year by the Nevada Association of Real Estate Brokers. In September 2018, he was recognized by the Las Vegas Chapter of the National Bar Association as The Attorney of the Year and by the Asian American Advocacy Clinic as an "Unsung Hero". Scott was honored by the Las Vegas Chapter of the National Bar Association in 2019 by the establishment of the Bryan K. Scott Book Scholarship. He was the Keynote Speaker and awarded the Educational Pioneer Award by the University of Nevada, Las Vegas' Center for Academic Enrichment and Outreach in 2017. He has been recognized as a "Legal Elite: Nevada's Top Attorneys (Government) by Nevada Business Magazine in 2012, 2015, 2016 and 2017. Scott was honored by the Las Vegas Chapter of the National Bar Association during its 2006 annual Scholarship Gala. In 2005, he received the Martin P. Dowling Volunteer of the Year award from the Clark County Bar Association and the Clark County Bar Association's Circle of Support Award in 2002. Prior to college, Scott attended school in North Las Vegas at Marion E. Cahlan Elementary School, Lincoln Elementary School, Jim Bridger Junior High School, The Area Technical Trade Center (Class of 1984) and Rancho High School (Class of 1984).



HOLD ON, WHAT!?!

IMPORTANT CHANGES IN LABOR AND EMPLOYMENT LAW FOR PUBLIC EMPLOYERS - 2022

PRESENTED BY:

SCOTT DAVIS, LITIGATION/HUMAN RESOURCES TEAM CHIEF CIVIL DIVISION OF THE CLARK COUNTY DISTRICT ATTORNEYS OFFICE

AND

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- CHANGES IN NEVADA LABOR LAW
 - OVERVIEW OF PUBLIC SECTOR COLLECTIVE BARGAINING
 - HISTORY
 - THEORETICAL FOUNDATIONS
 - PUBLIC EMPLOYER BARGAINING OBLIGATIONS
 - MANDATORY SUBJECTS OF BARGAINING
 - EMPLOYER RIGHTS
 - TEST TO DIFFERENTIATE
 - HOT TOPICS
 - COVID-19 RELATED MEASURES
 - DECERTIFICATION
 - 288 AND OTHER STATUTE
- CHANGES IN EMPLOYMENT LAW
 - CHANGES TO EMPLOYEE SPEECH PROTECTIONS
 - CHANGES TO PROTECTED CLASSIFICATIONS
 - CHANGES TO LAW CONCERNING MARIJUANA USAGE BY EMPLOYEES
 - THE EXTENDED APPLICATION OF THE "CHECK THE BOX LAW"
 - CHANGES IN THE LAW DEALING WITH EMPLOYMENT CONTRACTS
 - AB 248 / NRS 50.069 CONFIDENTIALITY CLAUSES IN PUBLIC SETTLEMENT AGREEMENTS
 - THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND HARASSMENT ACT
 - EXPRESS WAIVERS AND ARBITRATION CLAUSES

OUTLINE OF DISCUSSION



FIRST, SOME HISTORY

"ALL GOVERNMENT EMPLOYEES SHOULD REALIZE THE PROCESS OF COLLECTIVE BARGAINING, AS USUALLY UNDERSTOOD, CANNOT BE TRANSPLANTED INTO THE PUBLIC SERVICE."

-PRESIDENT FRANKLIN

ROOSEVELT

PRIVATE LETTER AUG. 16, 1937

THE SIXTIES - UNIONS MOVE INTO PUBLIC SECTOR

- POST WORLD WAR II UNIONS TURN TO PUBLIC SECTOR EMPLOYEES
- JANUARY 17, 1962 : PRESIDENT KENNEDY ISSUES EXECUTIVE ORDER 10988
 - ALLOWED FEDERAL WORKERS TO JOIN
 UNIONS
 - ALLOWED FEDERAL AGENCIES TO BARGAIN
 - RESERVED STRONG "MANAGEMENT RIGHTS" TO EMPLOYERS
- STATE PUBLIC SECTOR BARGAINING LAWS.
 E.G. TAYLOR LAW (N.Y. 1967)





EXPANDED BY PRESIDENT RICHARD M. NIXON

- EXECUTIVE ORDER 11491 (1969)
 - SETS FORTH SPECIFIC UNFAIR LABOR PRACTICES;
 - AUTHORIZED THE USE OF BINDING ARBITRATION;
 - CREATES FEDERAL LABOR RELATIONS
 COUNCIL

RESISTANCE IN NEVADA

- 1965 NEV. ATTORNEY GENERAL OPINION 233
 - "POLITICAL SUBDIVISIONS OF THE STATE CANNOT ENTER INTO COLLECTIVE BARGAINING AGREEMENTS AFFECTING PUBLIC EMPLOYERS"
 - LEGISLATIVE POWERS CANNOT BE DELEGATED AWAY

- 1968 NEV. ATTORNEY GENERAL OPINION 494
 - GOVERNMENT EMPLOYEE STRIKE IS AN AFFRONT TO THE PUBLIC
 - PUBLIC SECTOR COLLECTIVE BARGAINING IS ILLEGAL IN THE ABSENCE OF SPECIFIC LEGISLATION

THE DODGE ACT (1969)

- GRANTED LOCAL GOVERNMENT EMPLOYEES RIGHT TO BARGAIN
- STRONG PENALTIES AGAINST ANY STRIKE
 - INJUNCTIVE RELIEF
 - FINES ON UNIONS AND INDIVIDUALS
 - TERMINATION OF PARTICIPATING EMPLOYEES
 - NRS 288.700-.715
- STRONG MANAGEMENT RIGHTS SECTION
 - MAY BE EXERCISED WITHOUT NEGOTIATION.
- BARGAINING OVER "WAGES, HOURS AND OTHER CONDITIONS OF EMPLOYMENT"



Sen. Carl Dodge (R) Churchill

DODGE ACT TODAY

- FORMAL TITLE IS GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS ACT
- 2019- AMENDED TO INCLUDE STATE CLASSIFIED EMPLOYEES
 - SIMILARITIES
 - SAME MANDATORY SUBJECTS OF BARGAINING
 - EMPLOYER RIGHTS
 - DIFFERENCES
 - STATE EMPLOYEES HAVE THE RIGHT TO "ENGAGE IN OTHER CONCERTED ACTIVITIES"
 - SUPPLEMENTAL BARGAINING
 - EMPLOYEE ELECTION OF REMEDIES FOR CHALLENGING DISCIPLINE
- EMRB ADMINISTERS THE ACT
 - ISSUES ADMINISTRATIVE REGULATIONS (NAC 288)
 - ISSUES DECLARATORY AND ADVISORY OPINIONS
 - HEARINGS TO DETERMINE PROHIBITED LABOR PRACTICES

THE BASIC BARGAINING CONCEPT

- EMPLOYEES ORGANIZED INTO GROUPS CALLED "BARGAINING UNITS"
- UNITS SELECT THEIR OWN REPRESENTATIVE MAJORITY SUPPORT MEASURED BY AN ELECTION IF NECESSARY
- REPRESENTATIVE ENJOYS EXCLUSIVE RIGHT TO REPRESENT EMPLOYEES IN MATTERS OF
 - **BARGAINING**
 - "A METHOD OF DETERMINING CONDITIONS OF EMPLOYMENT BY NEGOTIATION BETWEEN REPRESENTATIVES OF THE EXECUTIVE DEPARTMENT OR LOCAL GOVERNMENT EMPLOYER AND AN EMPLOYEE ORGANIZATION OR LABOR ORGANIZATION" - NRS 288.032
 - <u>DISCIPLINE</u> (POST-1975)
 - BUT A NON-UNION MEMBER CAN ACT FOR THEMSELVES NRS 288.140(2); 288.505(3)

THE BASIC BARGAINING PROCESS

- UNION INITIATES BY REQUESTING TO BARGAIN DEADLINE IS FEBRUARY 1
- MINIMUM OF SIX BARGAINING SESSIONS TO TRY TO REACH AN AGREEMENT
 - BARGAINING SESSIONS CAN BE CLOSED TO THE PUBLIC. NRS 288.220(1)
- IF NO AGREEMENT, EITHER SIDE CAN DECLARE "IMPASSE"
 - IMPASSE RESOLVED BY BINDING BASEBALL-STYLE OR "LAST BEST OFFER" FACT-FINDING - NRS 288.200
 - OPTIONAL NON-BINDING MEDIATION NRS 288.190
 - IT IS A PROHIBITED LABOR PRACTICE TO DECLARE IMPASSE OVER NON-MANDATORY SUBJECTS OF BARGAINING
- UPON REACHING AN AGREEMENT, PROPOSED AGREEMENT MUST BE RATIFIED BY RULING BOARD OF A LOCAL GOVERNMENT EMPLOYER OR STATE BOARD OF EXAMINERS - NRS 288.153 AND 288.555

A ROCKY START...

- <u>1974</u> CCSD V. EMRB, 90 NEV. 442
 - PRECISE LINE CANNOT BE DRAWN BETWEEN NEGOTIABLE
 TOPICS AND MANAGEMENT RIGHTS
 - THE EMRB DECIDES WHAT IS NEGOTIABLE
- <u>1975</u>- MASSIVE LEGISLATIVE CHANGES
 - A SPECIFIC LIST OF MANDATORY SUBJECTS OF BARGAINING
 - A NEW SECTION STATING THAT MANAGEMENT RIGHTS SHALL BE DISCUSSED BUT NOT NEGOTIATED (NRS 288.150(12))
- "SIGNIFICANTLY RELATED" TEST REAPPEARS
 - INITIAL EMRB REACTION WAS STRICT APPLICATION. E.G. WHITE PINE ASSOC. V. WPCSD, ITEM # 36 (1975)
 - 1984 "DIRECTLY AND SIGNIFICANTLY RELATED" WASHOE COUNTY V. WCEA, ITEM NO. 159 (1984)
 - 1993 TRUCKEE MEADOWS APPROVES OF "SIGNIFICANTLY RELATED" TEST WHEN "REASONABLY APPLIED"



SCOPE OF BARGAINING

MANDATORY SUBJECTS

- EMPLOYER SHALL NEGOTIATE IN GOOD FAITH
- SUBJECT TO IMPASSE PROCEDURES
- SUBMITTED TO FACT-FINDING TO RESOLVE DISPUTES
- CANNOT BE UNILATERALLY CHANGED
 MID-TERM

How do you know whether bargaining is required or not?

PERMISSIVE SUBJECTS

- OPTIONAL, NEED NOT BE INCLUDED IN AN AGREEMENT
- EMPLOYER "SHALL DISCUSS"
 - "DISCUSSION ALONE DOES NOT GUARANTEE ADOPTION"
 - CCSD V. CCEA, 90 NEV. AT 449
- CANNOT DECLARE IMPASSE
- NEED NOT BE CARRIED OVER TO NEXT TERM OF AGREEMENT

THE EMRB'S TWO-STEP NEGOTIABILITY TEST

- NAC 288.100
 - UNION MAKES WRITTEN REQUEST TO BARGAIN
 - EMPLOYER MAKES THE INITIAL NEGOTIABILITY DETERMINATION

<u>STEP 1</u>-

IS THE REQUEST "SIGNIFICANTLY RELATED" TO A MANDATORY SUBJECT OF BARGAINING?

<u>STEP 2</u>-

IS THE MATTER RESERVED TO EMPLOYER AS AN "EMPLOYER RIGHT"?

THE MANDATORY SUBJECTS OF BARGAINING

- NRS 288.150(2): "THE SCOPE OF MANDATORY BARGAINING IS LIMITED TO..."
 - 23 TOPICS, INCLUDING:
 - SALARY WAGE RATES AND OTHER FORMS OF MONETARY COMPENSATION
 - EMPLOYEE LEAVE (OF ALL SORTS)
 - DISCHARGE AND DISCIPLINARY PROCEDURES
 - DEDUCTION OF UNION DUES
 - GRIEVANCE AND ARBITRATION PROCEDURES
 - SAFETY OF THE EMPLOYEE
 - PROCEDURES FOR A REDUCTION IN FORCE

STEP 1 - THE "SIGNIFICANTLY RELATED" TEST

- NOT REASONABLE TO APPLY WHEN OTHER STATUTES ARE ON POINT
 - WASHOE ED. ASS'N V. WCSD, ITEM NO. 778 (2012)
 - TEACHER PERFORMANCE EVALUATIONS ADDRESSED UNDER EDUCATION LAW
 - 2017 NEV. OP. ATT'Y GEN. # 13
- EMRB MAY HAVE ALREADY ADDRESSED THE ISSUE
 - E.G. DIRECT DEPOSIT IS SIGNIFICANTLY RELATED TO SALARY AND WAGE, WCSD V. WASHOE ED. ASS'N ITEM 626C (2009)
 - TAKE-HOME VEHICLES ARE NOT SIGNIFICANTLY RELATED TO EMPLOYEE SAFETY. PERSHING COUNTY LEA V. PERSHING COUNTY, ITEM NO. 725A (2010)
- OTHER JURISDICTIONS? KANSAS HAS SAME TEST
 - "RELATED IN KIND" STATE V. PERB, 257 KAN. 275 (1995)

STEP 2 - EMPLOYER RIGHTS NOT SUBJECT TO BARGAINING - NRS 288.150(3)

- RIGHT TO HIRE, DIRECT, ASSIGN OR TRANSFER AND EMPLOYEE (EXCEPT DISCIPLINARY TRANSFER)
- RIGHT TO LAYOFF AN EMPLOYEE DUE TO LACK OF \$\$\$ OR LACK OF WORK
- RIGHT TO DETERMINE
 - APPROPRIATE STAFFING LEVELS AND WORK PERFORMANCE STANDARDS
 - CONTENT OF THE WORKDAY (INCLUDING WORKLOAD)
 - QUALITY AND QUANTITY OF SERVICES OFFERED TO THE PUBLIC
 - MEANS AND METHODS OF OFFERING THOSE SERVICES
- SAFETY OF THE PUBLIC
- THE "ULTIMATE RIGHT" EFFICIENCY AND BEST INTEREST OF THE TAXPAYERS

- NRS 288.150(7)

EMPLOYER RIGHTS – DIGGING DEEPER

LEGAL FICTION: CHAPTER 288 WAS MODELED AFTER NATIONAL LABOR RELATIONS ACT TO OVERCOME RIGHT TO STRIKE, IT WAS DRAWN UPON STATE LAWS, MOST NOTABLY NEW YORK.

- STATEMENT OF SEN. CARL DODGE, MINUTES OF JOINT MEETING OF SENATE COMMITTEE ON FEDERAL STATE AND LOCAL GOVERNMENTS, (55th LEG. FEB. 25, 1969).
- MANAGEMENT RIGHTS SECTION WAS MODELED AFTER PRES.
 KENNEDY'S EXECUTIVE ORDER
 - EXECUTIVE ORDER FOUND ITS WAY INTO U.S CODE. 5 U.S.C. § 7106
 - FLRA EXTENSIVE BODY OF DECISIONS ON MEANING OF MANAGEMENT RIGHTS SECTION

APPEAL OF NEGOTIABILITY DETERMINATION

 UNION CAN APPEAL ADVERSE DETERMINATION TO EMRB – NRS 288.110(3)



- IF EMRB HAS NOT PREVIOUSLY ADDRESSED THE TOPIC, THEN IS HAS EXCUSED PRIOR FAILURE TO NEGOTIATE
 - E.G. IAFF LOCAL 2487 V. TRUCKEE MEADOWS FIRE PRO. DIST., ITEM NO. 267 (1991)

SOME SAMPLES

NEGOTIABLE

- STAFFING LEVELS FOR EMERGENCY RESPONDERS
- OVERTIME ALLOCATIONS
- CRITERIA FOR DISCIPLINING OFF-DUTY EMPLOYEES
- CASH OUTS FOR UNUSED LEAVE
- LAW ENFORCEMENT AGILITY
 TESTING

NON-NEGOTIABLE

- RULES AND REGULATIONS
- JOB DESCRIPTIONS
- TAKE HOME VEHICLES
- DRESS CODE
- PROMOTIONAL OPPORTUNITIES

EMERGENCY SITUATIONS

- PUBLIC EMPLOYER MAY "TAKE WHATEVER ACTIONS ARE NECESSARY TO CARRY OUT ITS RESPONSIBILITIES IN SITUATIONS OF "EMERGENCY" - NRS 288.150(6)(B)
- CAN INCLUDE SUSPENSION OF COLLECTIVE BARGAINING AGREEMENTS FOR THE DURATION OF THE EMERGENCY
- AFSCME LOCAL 4041 V. NEV. SYSTEM OF HIGHER ED., ITEM 874 (2021)
 - UNLV REDUCES HOURS OF CERTAIN EMPLOYEES DUE TO COVID PANDEMIC
 - UNION ASSERTS THAT UNLV MUST BARGAIN TO CHANGE STAFFING
 - UNLV INVOKES EMERGENCY SUBSECTIONS
 - <u>ISSUE</u>: WAS THE PANDEMIC AN EMERGENCY?
 - YES.
 - NOT MERELY A FINANCIAL EMERGENCY
 - TEMPORARY MEASURES TIED TO THE "DURATION OF THE EMERGENCY"

UNION DECERTIFICATION

- EMRB V. ESEA, 134 NEV. 716 (2018)
- LONG-RUNNING DISPUTE BETWEEN TWO RIVAL UNIONS OVER REPRESENTATION
- ELECTION AND RUN-OFF ELECTION
- <u>ISSUE</u>: WHAT THRESHOLD OF SUPPORT IS NECESSARY IN A REPRESENTATION ELECTION?
 - MAJORITY OF VOTES CAST? TEAMSTERS LOCAL 14 WINS
 - MAJORITY OF ALL EMPLOYEES IN THE UNIT? NOT ENOUGH TO DISLODGE ESEA

"PER THE STATUTE'S PLAIN LANGUAGE, THE STANDARD IS SUPPORT BY A MAJORITY OF EMPLOYEES IN A BARGAINING UNIT."

UNION DECERTIFICATION

- OP. ENGINEERS LOCAL 501 V. ESMERALDA COUNTY, ITEM 876 (2022)
- EMPLOYER REQUESTS TO DE-CERTIFY UNION DUE TO LACK OF MAJORITY SUPPORT
- EMRB HOLDS AN ELECTION
 - 13-MEMBER BARGAINING UNIT
 - APPLIES ESEA DECISION, I.E IT WOULD REQUIRE MAJORITY OF ALL 13 POSITIONS TO RETAIN UNION
- IN A DECERTIFICATION PROCEEDING LESS THAN 50% PARTICIPATION IN AN ELECTION WILL AUTOMATICALLY RESULT IN DECERTIFICATION.

REPRESENTATION IN DISCIPLINARY MEETINGS

- WEINGARTEN/CAVARICCI RIGHTS
 - EMPLOYEE HAS RIGHT TO REPRESENTATION WHEN REASONABLE FEAR OF DISCIPLINE
- REPRESENTATION IS EXCLUSIVE RIGHT OF RECOGNIZED UNION

- LVPPA V EIGHTH JUD. DIST. CT., 128 NEV. ADV. OP. 59 (2022)
- <u>ISSUE</u>: CAN A RIVAL UNION REPRESENT A PEACE OFFICER IN A DISCIPLINARY PROCEEDING?
 - RIGHTS TO CHOOSE A REPRESENTATIVE UNDER NRS 289.080 INCLUDED RIGHT TO CHOOSE A RIVAL UNRECOGNIZED UNION.
 - BIGGER PICTURE: CHAPTER 288 IS SUBORDINATE TO OTHER SPECIFIC STATUTES.

DISCRIMINATION OF THE UNUSUAL SORT

NRS 288.270 (1)(F) AND (2)(E) PROHIBIT DISCRIMINATION "BECAUSE OF PERSONAL OR POLITICAL REASONS OR AFFILIATIONS"

- DIFFERENT DECISIONAL FRAMEWORK MOTIVATING FACTOR ANALYSIS PER BISCH V LVMPD, 129 NEV. 328 (2013)
- PERSONAL REASONS

"THE PROPER CONSTRUCTION OF THE PHRASE 'PERSONAL REASONS OR AFFILIATIONS' INCLUDES NON-MERIT OF FITNESS FACTORS AND WOULD INCLUDE THE DISLIKE OR BIAS AGAINST A PERSON WHICH IS BASED UPON AN INDIVIDUAL'S CHARACTERISTICS, BELIEFS, AFFILIATIONS OR ACTIVITIES THAT DO NOT AFFECT THE INDIVIDUAL'S MERIT OR FITNESS FOR A PARTICULAR JOB."

- KILGORE V. CITY OF HENDERSON, ITEM NO 550F.

- POLITICAL REASONS
 - RUNNING FOR OFFICE BISCH
 - MEMBER OF A PARTICULAR PARTY
 - SUPPORTING OR OPPOSING A CANDIDATE
 - LIKELY NOT JUST GENERAL POLITICAL SENTIMENTS GREENBERG V. CLARK COUNTY, ITEM NO. 577-C (GENERAL STATEMENTS ABOUT SYMPATHY FOR WORKING POOR WAS INSUFFICIENT).

QUESTION NO. 1:

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MAY A PUBLIC EMPLOYER DISCIPLINE AN EMPLOYEE FOR CONDUCTING A RELIGIOUS WHILE AT WORK AND IN UNIFORM?

- DOES YOUR ANSWER CHANGE IF THE EMPLOYEE IS A PUBLIC SCHOOL TEACHER AND THE SERVICE IS
 CONDUCTED IN THE MIDDLE OF A SCHOOL EVENT?
- DOES YOUR ANSWER CHANGE IF THE EMPLOYEE INVITES OTHER STAFF, CLIENTS, AND MEMBERS OF THE PUBLIC TO JOIN IN THE SERVICE?

CHANGES TO PROTECTIONS FOR EMPLOYEE SPEECH

- KENNEDY V. BREMERTON SCHOOL DISTRICT, 142 S. CT. 2407 (2022).
- BACKGROUND:
 - KENNEDY, A FOOTBALL COACH, REPEATEDLY CONDUCTED MID-FIELD PRAYER SESSIONS WITH HIS PLAYERS AFTER GAMES. HE INVITED HIS PLAYERS AND OTHER STUDENTS TO JOIN. AS THE PRAYER SESSIONS GREW, HE INVITED PARENTS AND OTHER TEAMS TO JOIN IN.
 - A COACH FROM AN OPPOSING COMPLAINED ABOUT THE PRACTICE TO KENNEDY'S HIS SCHOOL. IN RESPONSE, THE SCHOOL DISTRICT TOLD KENNEDY TO CEASE THE PRAYER SESSIONS, OR TO PRAY IN A PRIVATE SPACE AWAY FROM PLAYERS AND STUDENTS. HE REFUSED TO FOLLOW THE DIRECTIVE AND WAS FIRED.
 - HE FILED A SUIT AGAINST THE SCHOOL DISTRICT ALLEGING THAT HIS TERMINATED VIOLATED HIS 1ST AMED. AMENDMENT RIGHTS TO SPEECH AND FREE EXERCISE OF RELIGION.
 - ALTHOUGH THE 9TH CIR. AGREED WITH THE SCHOOL DISTRICT, UPHOLDING THE TERMINATION, THE U.S. SUPREME COURT <u>AGREED</u> WITH KENNEDY.
- TAKE AWAY:
 - THE COURT OVERTURNED THE DECADES OLD "LEMON" AND "ENDORSEMENT" TESTS.
 - PUBLIC EMPLOYEES ENJOY MORE PROTECTION FOR RELIGIOUS BASED SPEECH AT WORK.
 - PUBLIC EMPLOYERS MUST BE VERY CAREFUL BEFORE DISCIPLINING EMPLOYEES BASED ON THE EMPLOYEES' SPEECH OR THEIR EXERCISE OF RELIGION.
 - I RECOMMEND SEEKING LEGAL ADVICE WHERE THERE IS A QUESTION ABOUT AN EMPLOYEE'S SPEECH OR EXERCISE OF RELIGION BECAUSE THE KENNEDY CREATES MANY QUESTIONS ABOUT WHERE THE LINE FOR PROTECTED SPEECH IN A GOVERNMENT SETTING LIES.

THE STATUS OF THE PICKERING-GARCETTI BALANCING TEST

• TEST ESTABLISHES THE THRESHOLD FOR PROTECTION OF A PUBLIC EMPLOYEE'S SPEECH.

- BALANCES THE EMPLOYEE'S INTEREST IN SPEECH AGAINST THE EMPLOYER'S INTEREST IN THE EFFICIENT, DISRUPTION FREE, ADMINISTRATION OF ITS WORKPLACE.
- THE TEST:
 - WEIGHS THE VALUE OF THE EMPLOYEE'S SPEECH VS. THE ADVERSE IMPACT OF THE SPEECH IN THE WORKPLACE.
 - GENERALLY, ABSENT A SHOWING THAT THE EMPLOYEE KNOWINGLY OR RECKLESSLY MADE A FALSE STATEMENT, A STATEMENT MADE ABOUT MATTERS OF PUBLIC CONCERN IS CONSTITUTIONALLY PROTECTED UNLESS THE STATEMENT IS MADE PURSUANT TO THEIR OFFICIAL DUTIES.
 - THAT SAID, THERE IS A SLIDING SCALE APPLIED WHERE THE VALUE OF SPEECH IS OUTWEIGHED BY THE IMPACT TO THE OFFICE.
- AFTER KENNEDY, WE JUST DON'T KNOW WHAT LEVEL OF PROTECTION EMPLOYEE SPEECH ENJOYS THESE DAYS SEEMS LIKE THE COURT MAY BE EXPANDING PROTECTIONS. ALL WE DO KNOW IS THAT ANY RESTRICTION MUST SURVIVE A STRICT SCRUTINY REVIEW.
 - THE EMPLOYER MUST SHOW THAT IT HAS A COMPELLING INTEREST TO RESTRICT THE SPEECH AT ISSUE, AND THAT ITS RESTRICTIONS ARE NARROWLY TAILORED TO PROTECTING THAT INTEREST. SEE KENNEDY AT 2426.
- ADDITIONALLY, THE CASE RAISES THE BAR FOR FINDING PUBLIC EMPLOYEE ENDORSEMENT OF RELIGION, PRAYER MUST BE DIRECTED AT STUDENTS OR HE MUST REQUIRE PARTICIPATION TO TRIGGER IMPROPER ENDORSEMENT. ID. AT 2429-30.

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QUESTION NO. 2:

MAY YOU DISCIPLINE AN EMPLOYEE FOR WEARING LONG DREADLOCKS, IF YOUR DRESS CODE REQUIRES MEN TO MAINTAIN A SHORT HAIR CUT?



SB 327 PROTECTION FOR RACE-BASED TRAITS

- EFFECTIVE OCTOBER 1, 2021, SB 327 ADDED DISCRIMINATION ON THE BASIS OF TRAITS ASSOCIATED WITH RACE TO THE LIST OF PROTECTED CLASSIFICATIONS. '
 - THIS PROTECTION EXTENDS TO "NATURAL HAIRSTYLES"
- EMPLOYERS ARE ENCOURAGED TO REVIEW THEIR DRESS CODES AND ACCOMMODATION POLICIES TO ENSURE THEY ARE IN COMPLIANCE THE NEW LAW.

QUESTION NO. 3:

MAY A NON-SAFETY SENSITIVE EMPLOYEE BE DISCIPLINED FOR TESTING POSITIVE FOR MARIJUANA, WHEN THE EXPOSURE RESULTS FROM OFF DUTY USE?



CHANGES TO THE LAW CONCERNING MARIJUANA USAGE

• CEBALLOS V. NP PALACE, LLC, NO. 82797 (EV. AUG. 11, 2022)

- THE NEV. SUPREME COURT CONCLUDED THAT "OFF-DUTY" MARIJUANA USE IS NOT PROTECTED UNDER NRS 613.333.
 - BECAUSE MARIJUANA REMAINS ILLEGAL UNDER FEDERAL LAW, THE EMPLOYEE'S OFF-DUTY USE OF THE DRUG CANNOT BE CONSIDERED A "LAWFUL USE."
 - ON THIS BASIS, THE COURT UPHELD THE TERMINATION OF CEBALLOS' EMPLOYMENT AFTER HE TESTED POSITIVE FOR MARIJUANA AFTER AN ON-DUTY SLIP AND FALL ACCIDENT.
- THIS DECISION CLARIFIES THAT THE DECRIMINALIZATION OF THE DRUG IN 2017 DOES NOT RENDER IT USE PROTECTED.
 - 1. THERE IS NO PROTECTION FOR EMPLOYEES WHO FAIL A DRUG TEST BASED ON THEIR USE OF RECREATIONAL MARIJUANA.
 - 2. EMPLOYERS MAY CONTINUE TO IMPLEMENT ANTI-MARIJUANA USAGE POLICIES.
 - 3. *EMPLOYERS SHOULD BE COGNIZANT THAT THIS CASE ONLY RELATES TO RECREATIONAL USEAGE.
 - 1. WHILE THE ADA DOESN'T APPLY TO REASONABLE ACCOMMODATIONS CONCERNING MARIJUANA, NEVADA'S MEDICAL MARIJUANA LAW CAN REQUIRE EMPLOYERS TO ACCOMMODATE THE USE OF MEDICAL MARIJUANA.

QUESTION NO. 4:

CAN A SETTLEMENT AGREEMENT WITH A PUBLIC EMPLOYER INCLUDE A CONFIDENTIALITY CLAUSE THAT RESTRICTS A PARTY FROM TESTIFYING A JUDICIAL/ADMINISTRATIVE PROCEEDING?



AB 248 / NRS 50.069 CONFIDENTIALITY CLAUSES IN PUBLIC SETTLEMENT AGREEMENTS

- IN 2021, THE LEGISLATURE ADOPTED AB 248 (NOW NRS 50.069) WHICH MAKES CERTAIN TERMS IN A CONTRACT RELATED TO "CONFIDENTIALITY" VOID.
 - SPECIFICALLY, PARTIES TO A CONTRACT ARE PROHIBITED FROM ENFORCING A TERM IN A SETTLEMENT AGREEMENT OR CONTRACT WHICH PREVENTS A PARTY FROM TESTIFYING IN A JUDICIAL OR ADMINISTRATIVE PROCEEDING IF THEIR TESTIMONY RELATES TO:
 - A PARTY TO THE CONTRACT'S COMMISSION OF:
 - A. A CRIMINAL OFFENSE;
 - B. AN ACT OF SEXUAL HARASSMENT;
 - C. AN ACT OF DISCRIMINATION; AND/OR
 - D. AN ACT OF RETALIATION.



QUESTION NO. 5:

MAY A PUBLIC EMPLOYER REQUIRE ALL CLAIMS ARISING OUT OF AN EMPLOYEE'S EMPLOYMENT TO BE LITIGATED THROUGH BINDING ARBITRATION?



THE ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND HARASSMENT ACT (THE ACT)

- IN MARCH 2022, PRESIDENT BIDEN SIGNED THE ACT INTO LAW.
- THE ACT AMENDS THE FEDERAL ARBITRATION ACT (FAA) BY PROHIBITING EMPLOYERS FROM ENFORCING ARBITRATION AGREEMENTS AGAINST EMPLOYEES FORWARDING CLAIMS OF SEXUAL ASSAULT AND/OR SEXUAL HARASSMENT.
 - NOW EMPLOYEES MAY ELECT TO BRING CLAIMS OF SEXUAL ASSAULT AND/OR HARASSMENT IN A JUDICIAL FORUM, EVEN IF THE EMPLOYEE IS SUBJECT TO AN ARBITRATION AGREEMENT WHICH REQUIRES THEM TO BRING THEIR CLAIMS IN ARBITRATION.
 - THE LAW ALSO APPLIES TO CLASS / COLLECTIVE ACTION WAIVERS IN ARBITRATION AGREEMENTS / EMPLOYMENT CONTRACTS.
 - THE ACT ONLY APPLIES TO CLAIMS ARISING ON OR AFTER MARCH 3, 2022.
 - THE ACT DOES NOT VOID OTHERWISE VALID ARBITRATION AGREEMENTS FOR CLAIMS THAT ARE UNRELATED TO SEXUAL ASSAULT AND HARASSMENT.



- BACKGROUND:
 - PUBLIC EMPLOYER HAS A COLLECTIVE BARGAINING AGREEMENT WITH ITS STAFF.
 - A PROVISION IN THE CBA FORBIDS THE EMPLOYER FROM ENGAGING IN DISCRIMINATION OR RETALIATION AGAINST EMPLOYEES BASED ON AN EMPLOYEE'S GENDER, SEXUAL IDENTITY AND ORIENTATION, RACE, NATURAL HAIRSTYLE, RELIGION, COUNTRY OF ORIGIN, ETC.
 - FINALLY, THE CBA CONTAINS A GRIEVANCE PROCEDURE THAT REQUIRES ALL SUBJECT EMPLOYEES TO GRIEVE ANY DISPUTES THEY MAY HAVE OVER THE INTERPRETATION OR APPLICATION OF THE CBA.
 - THE FINAL LEVEL OF THE GRIEVANCE PROCEDURE IS ARBITRATION, THE EMPLOYEE IF DISSATISFIED WITH THE INFORMAL RESOLUTION PROCESS – MAY ELECT TO OBTAIN A BINDING DECISION ON HER DISPUTE THROUGH ARBITRATION.
- ISSUE:
 - MAY EMPLOYEE A FILE A SUITE IN THE LOCAL COURT ALLEGING THAT HER SUPERVISOR DISCRIMINATED AGAINST HER BASED ON HER GENDER IN VIOLATION OF HER RIGHTS UNDER TITLE VII, AND AS A RESULT, SHE WAS NOT GIVEN A PROMOTION?

EXPRESS WAIVERS AND ARBITRATION CLAUSES

- NEVADA'S FEDERAL COURTS ARE REQUIRING JUDICIAL FORUM WAIVERS TO BE "EXPRESS" IN ORDER TO COMPEL THE ARBITRATION OF CERTAIN CLAIM ARISING OUT OF STATUTES WHICH CONFER A PERSONAL RIGHT TO SUE ON THE COMPLAINING PARTY.
 - COURTS NO LONGER ACCEPT BROAD WAIVERS
 - WAIVERS LIKE LIKELY WON'T WORK TO COMPEL ARBITRATION OF TITLE VII, ADA, ADEA, AND §1983 CLAIMS:
 - "ALL CLAIMS ARISING OUT OF EMPLOYEE'S EMPLOYMENT,"
 - "ALL CLAIMS ARISING FROM THE INTERPRETATION AND APPLICATION OF THE CBA," OR
 - "CLAIMS ARISING FROM ALLEGED VIOLATIONS OF FEDERAL AND/OR STATE LAW."
 - WITHOUT AN EXPRESS WAIVER, EMPLOYEES ARE BEING ALLOWED TO INITIATE PARALLEL LITIGATION AND ARBITRATION, OR TO SIMPLY FOREGO ARBITRATION IN FAVOR OF A JUDICIAL VENUE OF THEIR CLAIMS.
 - THIS CREATES A SITUATION WHERE AN EMPLOYER MUST WAIT FOR RESOLUTION, AND/OR ENDS UP RECEIVING CONFLICTING DECISIONS.
 - STATUTES CONFERRING A PERSONAL RIGHT TO SUE:
 - TITLE VII
 - ADA
 - ADEA
 - 42 USC §1983
 - FORBUSH V. CITY OF SPARKS, CASE NO. 3:21-CV-00163-MMD-WGC. 2021 US DIST. LEXIS 251304, (D. NEV. DEC. 21, 2021)
 - SIFRE V. CITY OF RENO, CASE NO. 3:14-CV-00060-RCJ-WGC, 2014 WL 4232570 (D. NEV. AUG. 26, 2014)
- EMPLOYERS ARE ENCOURAGED TO REVIEW THEIR AGREEMENTS TO DETERMINE WHETHER THEY CONTAIN AN EXPRESS WAIVER.
 - EMPLOYERS ARE ENCOURAGED TO SEEK LEGAL ADVICE WHEN REVIEWING THEIR WAIVERS.



OPEN MEETING LAW UPDATE

Sarah A. Bradley, Esq.

AB253, 2021 Legislative Session

• <u>https://www.leg.state.nv.us/Session/81st2021/Bills/AB/AB253_EN.pdf</u>.

- Removes requirement for at least one physical location for a public meeting, removes requirement to post meeting notices at meeting location (if no principal office for public body) and <u>removes requirement for posting at three other</u> <u>separate, prominent places within the public body's jurisdiction</u>.
 - **PLEASE NOTE:** If all members of the public body are required to be elected officials, at least one physical location must be designated. For other public bodies, the requirements for NRS 241.020(11) must all be satisfied before the meeting may be conducted without designating a physical location (see next slide).
- Defines "remote technology system" in NRS 241.015 and adds "by remote technology system" to the definition of "meeting."
 - Includes both teleconference and videoconference systems.
 - Quorum can be established whether in person, by using a remote technology system, or by means of electronic communication.

NRS 241.020(11) Requirements If No Physical Location

• If no physical location:

- Notice of meeting must include <u>information</u> about how a member of the public may use the remote technology system to hear and observe the meeting, participate in the meeting by telephone (in case the person does not have video capability), and provide live public comment during the meeting, which can include providing pre-recorded public comment, if the public body authorizes that. (See NRS 241.020(3)).
 - Need to include telephone number that a member of the public can use if a member of the public is having technical difficulties joining the meeting via the web-based link to the remote technology system.
- Must post notice of meeting on public body's website not later than 9 a.m. three working days prior to the meeting.
- Public body must have a website.
- Public body must post supporting materials on the public body's website not later than the time the material is provided to members of the public body.
- Exceptions for posting on website if technical problems with website.

AB253, 2021 Legislative Session

• New Meeting Notice Requirements/Clarifications:

- Contact information for person with supporting materials must now include "business address" for that person.
- List of locations where supporting material is available <u>or</u> information about how the supporting material may be found on the public body's website.
- Need (1) contact information for person and (2) either the list or information for online access.
 - Not fully doing away with physical locations and addresses.
- Qualified privilege when testifying before a public body with regard to defamatory matter.
 - Prior language provided for absolute privilege.

State Agency Regulation Process Amended in AB253 (Big Change!)

- Amends NRS 233B.0607: No longer required to send the proposed regulation and notice of intent to act upon a regulation to every public library in counties where the public body does not have an office.
 - The agency must provide a copy in print or electronically to any person asking for a copy.

SB77, 2021 Legislative Session: NRS 241.028

• <u>https://www.leg.state.nv.us/Session/81st2021/Bills/SB/SB77_EN.pdf</u>.

- Closed meetings are authorized if a public body "has entered into a memorandum of understanding or other agreement with a federal agency for the purpose of engaging with the federal agency on an action under the National Environmental Policy Act of 1969, 42
 U.S.C. § § 4321 et seq." and purpose of meetings must be to "engage in predecisional and deliberative discussions on the subject of the memorandum or agreement."
 - Must occur prior to public comment period and before the federal agency publicly releases the document addressing the action under the National Environmental Policy Act.
 - The federal agency must require the public body to keep the meetings confidential under the memorandum or other agreement.
 - \circ This is the only topic that may be discussed during a closed meeting held pursuant to NRS 241.028.

OML Attorney General Opinions

• Available at <u>https://ag.nv.gov/About/Governmental_Affairs/OML_Opinions/</u>.

- $\circ~23$ issued so far in 2022.
- 9 in 2021, 42 in 2020.

Public Comment Periods

- <u>https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/AG%20File%20N</u>
 <u>0.%2013897-414.pdf</u>
- $\circ\,$ Three separate meeting agend as posted for May 18, 2021.
- $\circ\,$ Special meeting agenda with two items listed and no public comment period.
- $\circ~$ Complainant was eventually able to provide public comment, but agenda was still deficient on its face.
- Corrective action taken on June 15, 2021 to redo action taken at the special meeting on May 18, 2021.
- <u>Reminder</u>: Some time before adjournment of a meeting, public comment must be allowed on any item that is not included on the agenda as an action item.
 - Only a technical violation in this case. Complainant's public comment was regarding an agenda item. But the meeting ended without a general public comment period.
 - Public body can require comments be related to public body during non-general public comment period.
 - Chair may also allow additional comment at his/her discretion.

Multiple OML Violations

- <u>https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/AG%20File</u> <u>%20No.%2013897-416.pdf</u>
- Notices were <u>not</u> sent to individuals on the public body's email list to receive Board agendas which was a violation of the OML.
- Allegations made in complaint about using third-parties to deliver messages to public body members. Not found proven in this case, but using third-party members as conduits between public body messages to circumvent the OML would result in a violation of the OML. Opinion references "constructive or walking quorums."
- Allegations made that supporting materials were not provided to members of the public. These must be REQUESTED and are not required to be provided automatically.
- Additional violations: Action taken on item not noted as "for possible action" and failure to draft and maintain meeting minutes—detail in meeting minutes was not sufficient for May 13, 2021 meeting and minutes for multiple meetings were not available/missing.

Failure to Provide Supporting Materials and to Follow the OML

- $\circ \ \underline{https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/AG\%20File\%20No.\%2013897-\underline{413.pdf}$
- No response to the OAG from the public body. Therefore, the complainant's statements are undisputed.
- Complainant requested that the public body's meeting agendas and supporting materials be sent to him by mail.
- Public body responded that agenda was available online and that he was not entitled to receive supporting materials.
- Complainant sent a copy of the OML (NRS Chapter 241) to the public body and received no further response.
- OML violated by failure to provide supporting materials upon request.
- Complainant made a second complaint regarding subcommittees that were created by the public body and not following the OML.
- Opinion Findings: Committees formed by the public body on June 17, 2021 are subject to the OML and failing to follow it. A majority of the membership of each Committee is members or staff members of the public body and the Committees are charged with discussing and making suggestions to the public body to improve the public body. Committees are required to follow the OML and violated the OML for failure to do so.

Discussion of Public Comment?

- <u>https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/AG%20File%20No.%2013897-375.pdf</u>
- $\circ~$ No OML violation, but a careful balance and a reminder...
- Public body's clerk reads the following statement at public meetings "Any comments or questions cannot be addressed or answered by the [public body] if the topics have not been agendized." Agenda for public body's "Restrictions on Public Comments" states that "No topics may be discussed unless they are on the agenda . . ."
- The OML requires that a public notice agenda include: "Periods Devoted to comments by the general public, if any, and discussion of those comments." NRS 241.020(3)(d)(3) (emphasis added).
- From the OAG's OML Manual, § 7.04: A public body may not inform the public that it legally is prohibited from discussing public comments, either among themselves, or with speakers from the public. NRS 241.020[(3)](d)(3) clearly allows discussion with members of the public. Of course, no matter raised in public comment may be the subject of either deliberation or action. AG File No. 10-037 (October 19, 2010); see § 4.01 for definition of "deliberation." (emphasis supplied).
- There is a fine line between "discussion" with the public and "deliberation", which is prohibited during public comment periods. Indeed, the definition of "deliberate" contained in the OML includes "the collective discussion or exchange of facts preliminary to the ultimate decision." NRS 241.015(2) (emphasis added). This lack of clarity between the terms is ripe for confusion by public body members looking to avoid violations of the OML.

(More) Discussion of Public Comment?

- The public body may not to state or imply in its public comment statements that it is prohibited from discussing items brought up during public comment. NRS 241.020(3)(d)(3) is clear in its intent to encourage discourse between public bodies and the public they serve.
- <u>**Rule</u>**: Public body is not required to discuss public comment, but it is not prohibited as long as it does not become deliberation.</u>
- <u>https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/AG%20File</u> <u>%20No.%2013897-409.pdf</u>
 - The public body discussed a complaint made during the Public Comment Period during its meeting, but did not deliberate or vote and no commitment or promise regarding the complaint was made.
 - The extent of the public body's "action" was to inform the complainant of the requirement that he submit a written and signed complaint so that they could take action on it.
 - No OML violation.

Multiple Briefings...

- <u>https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/AG%20File</u> <u>%20No.%2013897-378.pdf</u>
- Three briefings were held for public body members. A quorum was not present at any of the briefings.
- No evidence of serial communications occurring. Members provided signed declarations stating that they did not discuss opinions, or weigh or reflect upon reasons for or against approval of the project, with any other members during the time period at issue.
- No evidence that intent of briefings was to circumvent the OML. Stated purpose was for public body members to receive information regarding the development proposal. Proposal was discussed in detail at the public deliberations and subsequent public meeting prior to voting on the proposal.
- No violation found. The OAG references similar facts in *Dewey v. Redevelopment Agency of* City of Reno, 119 Nev. 87, 94 (2003).

Public Comment By Email and Summarized

- $\circ \ \underline{https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/AG\%20File\%20N}_{0.\%2013897-379.pdf}$
- The Governor's Emergency Directive 006 due to COVID allowed public bodies to forego having a physical location for public meetings.
- The Directive allowed for the receipt of public comment by email.
- $\circ~$ The Directive did not require in-person or real-time online public comment, as asserted in the Complaint.
- Public comment received was summarized and not read in full at the meeting. (400 letters were received.)
- Well-settled that reasonable rules and regulations during public meetings are allowed to ensure the orderly conduct of those meetings.
- $\circ~$ The public body members were provided copies of all the public comments received.
- $\circ\,$ Meeting minutes included four pages summarizing public comment received.
- $\circ~$ No OML violations found.

Is it a Public Body?

- $\circ \ \underline{https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/AG\%20File\%20No.\%2013897-395.pdf$
- Previous OML Opinion held that the Board at issue here was not a public body. See OML Opinion No. 2017-03, dated March 7, 2017.
- Two essential attributes required:
 - The Board must be an "administrative, advisory, executive or legislative body of the State or local government consisting of at least two persons" and created by one of the means enumerated in NRS 241.015(4).
 - The Board must either (1) expend, disburse, or be supported in whole or in part by tax revenue, or (2) advise or make recommendations to any entity which expends, disburses, or is supported in whole or in part by tax revenue.
- Specifically, the Board must be created in a manner listed in NRS 241.015(4)(a)(1)-(7).
 - Nevada Constitution, Nevada statute, City charter or City ordinance, Nevada Administrative Code, resolution or formal designation by body created by State statute or local government ordinance, an Executive Order issued by the Governor, or a resolution or an action by the governing body of a political subdivision of this State.
- <u>https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/06132022_AG%20File%20No.%</u> 2013897-397.pdf
 - Budget Committee created by School Superintendent is <u>not</u> a public body. Two Board members are on Committee, though, so be wary of possible future violation of the OML. Also, if the Board begins to treat the Committee as a subcommittee, the Committee will need to comply with the OML.
 - Created by individual not subject to OML and not given authority to make recommendations to the Board.

Viewpoint Restrictions on Public Comment (1)

- <u>https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/AG%20File%20No.%2013897-405.pdf</u>
- Meeting of public body on January 26, 2021 was held virtually due to the COVID-19 pandemic, and meeting agenda stated that public comments were to be sent to public body by email.
- Complainant's public comment was received but not read at the meeting.
 - Complainant's comments related to her opinion that the Superintendent's requirement for teachers and staff to travel to school sites when a snow day is called is unsafe. She concluded her remarks by stating "I would hope you would encourage [the Superintendent] to rethink his actions if a snow day is indeed called. Thank you."
- All other public comment received by email was read and included in the meeting record.
- Board staff stated the decision to not include Complainant's public comment was due her comment containing inappropriate comments regarding an employee.
- The OML does not allow restrictions on public comment based on viewpoint.
- The Board's public comment statement on the agenda for its January 26 meeting prohibited comments that were "willfully disruptive, slanderous, amount to personal attacks or interfere with the rights of other speakers." The Board contends that it refused to read and include Complainant's email because it was "derogatory towards [the Superintendent] and contain[ed] information which was not accurate." While a public body may disagree with the factual basis of the comment, should a matter be within the authority of the public body, the issue could have received discussion or rebuttal from staff.

Viewpoint Restrictions on Public Comment (2)

- Complainant's comments addressed an action taken by the Superintendent in his professional capacity, which is squarely within the authority of the Board. Moreover, if the Board ever intends to discuss the Superintendent's professional competence at a meeting, such as for an annual performance review, the OML requires that discussion to occur in open session in front of the public. NRS 241.031(1)(b).
- Complainant's comments consisted of a recitation of two statements by the Superintendent, her belief that following the Superintendent's directions may not be safe and may be in contravention to statements by the Governor, and her request to the Board to address the issue.
- While the Board's public comment statement does not violate the OML on its face, if it is applied in such a way that comments critical of any Board employee are deemed "derogatory" and prohibited, it is not being applied in a viewpoint-neutral fashion.
- $\circ\,$ The OAG finds that, in this instance, the Board's application of its public comment restrictions violated in the OML.

Discussion of Character or Professional Competence?

- <u>https://ag.nv.gov/uploadedFiles/agnvgov/Content/About/Governmental_Affairs/06132022_A</u> <u>G%20File%20No.%2013897-406.pdf</u>
- One public body member expressed displeasure with out-of-town companies bidding on a project.
- $\circ~$ Instead of approving project quote on agenda, public body asked staff to go through a bidding process for the project.
- The meeting discussion centered around the process for obtaining the quote, the age of the quote, and whether the Board should approve it. There was a general discussion about the use of local contractors, but its brevity and relation to the agenda item kept it within the scope.
- $\circ\,$ No violation of the OML.
- Maybe similar to "casual or tangential references to a person or the name of a person" in NRS 241.033(7)(b).

Questions?

"The Path To Lawyer Well-Being"

The American Bar Association's Practical Recommendations for Positive Change (2017)

"For too long, the legal profession has turned a blind eye to widespread health problems." (p.12)

What is "Lawyer Well-Being"?

- "Well-Being": A continuous process toward thriving across all life dimensions.
 - Emotional health .
 - Occupational pursuits.
 - Creative or intellectual endeavors.
 - Sense of spirituality or greater purpose in life.
 - Physical health.
 - Social connections with others.
- "It includes lawyers' ability to make healthy, positive work/life choices to assure not only a quality of life within their families and communities, but also to help them make responsible decisions for their clients." (p. 9)

<u>Reasons To Improve Attorney Well-Being:</u>

• Organizational Effectiveness.

 "Lawyer well-being contributes to organizational success—in law firms, corporations, and government entities." (p.8)

• Ethical Integrity.

- "Lawyer well-being influences ethics and professionalism." (p. 8).
- Rule 1.1- Competence.
- Rule 1.3- Diligence in representation.
- Rules 4.1 through 4.4- regulate working with people other than clients.

• Humanitarian concerns.

• "...promoting well-being is the right thing to do." (p. 9).



"The benefits of increased lawyer well-being are compelling, and the costs of lawyer impairment are too great to ignore." (p.10).

The Call to Action:

- 1. Identifying stakeholders and the role each can play in reducing the level of toxicity in our profession.
- 2. Ending the stigma around help-seeking behaviors.
- 3. Emphasizing that well-being is an indispensable part of a lawyer's duty of competence.
- 4. Expanding educational outreach and programming on well-being issues.
- 5. Changing the "tone of the profession one small step at a time."

Recommendations for All Stakeholders:

- Acknowledge the problems and take responsibility.
- Use the Report as a launch pad for a profession-wide action plan.
- Leaders should demonstrate a personal commitment to well-being.
- Facilitate, destigmatize, and encourage help-seeking behaviors.
- Build relationships with lawyer well-being experts.
- Foster collegiality and respectful engagement throughout the profession.

Recommendations for All Stakeholders:

- Enhance lawyers' sense of control (ie. Autonomy).
- Provide high-quality educational programs about lawyer distress and well-being.
- Guide and support the transition of older lawyers.
- De-emphasize alcohol at social events.
- Utilize monitoring to support recovery from substance abuse disorders.
- Begin a dialog about suicide prevention.
- Promote a lawyer well-being index to measure the profession's progress.

Recommendations for Judges:

- Communicate that well-being is a priority.
- Develop policies for impaired judges.
- Reduce stigma of mental health and substance abuse disorders.
- Conduct "Judicial Well-Being" surveys.
- Provide well-being programming for Judges and Staff.
- Monitor for impaired lawyers and partner with Lawyer Assistance Programs.

Recommendations for Regulators:

- Take actions to meaningfully communicate that Lawyer Well-Being is a priority.
- Adjust the admissions process to support Law Student Well-Being.
- Adjust lawyer regulations to support Well-Being.
- Add Well-Being-Related questions to the MPRE.

"Happier, healthier lawyers equate to better risk, fewer claims, and greater profitability." (p. 43).

Recommendations for Legal Employers:

- Establish organizational infrastructure to support Well-Being.
 - Form a Lawyer Well-Being Committee.
 - Assess Lawyers' Well-Being.
- Establish policies and practices to support Lawyer Well-Being.
 - Monitor for signs of work addiction and poor self-care.
 - Actively combat social isolation and encourage interconnectivity.
- Provide training and education on Well-Being, including during new lawyer orientation

Recommendations for Law Schools:

- Create best practices for detecting and assisting students experiencing psychological distress.
- Assess law school practices and offer faculty education on promoting "Well-Being" in the classroom.
- Empower students to help fellow students in need.
- Include "Well-Being" topics in courses on professional responsibility.
- Commit resources for onsite professional counselors.
- Facilitate a Confidentiality Recovery Network.
- Provide education opportunities on Well-Being related topics
- Discourage alcohol-centered social events.
- Conduct anonymous surveys relating to "Student Well-Being".

Recommendations For Bar Associations:

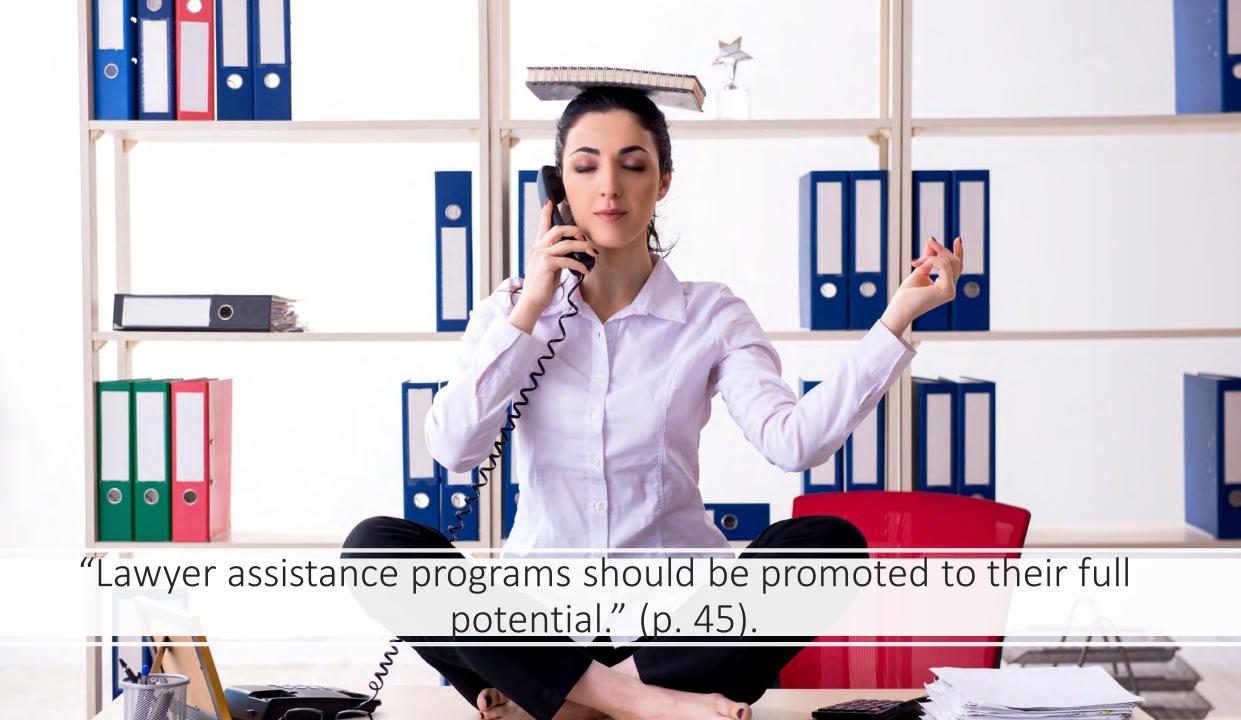
- Encourage education and Well-Being topics in association with Lawyer Assistance Programs.
- Sponsor empirical research on Lawyer Well-Being as part of annual member surveys.
- Launch a Lawyer Well-Being Committee.
- Serve as an example of best practices relating to Lawyer Well-Being at Bar Association events.

<u>Recommendations for Professional Liability</u> <u>Carriers:</u>

- Actively support Lawyer Assistance Programs.
- Emphasize Well-Being in Loss Prevention Programs.
- Incentivize desired behavior in underwriting law firm risk.
- Collect data when lawyer impairment is a contributing factor to claims activity.

<u>Recommendations for Lawyers Assistance</u> <u>Programs:</u>

- Lawyers Assistance Programs should be appropriately organized and funded.
- Pursue stable, adequate funding.
- Emphasize confidentiality.
- Develop high quality Well-Being programming.
- Lawyer Assistance Programs' Foundational Elements.
 - American Bar Association Model Lawyer Assistance Program.
 - American Bar Association Guiding Principles for Lawyer Assistance Programs.



Themes in the Recommendations:

- Destigmatize mental health and substance abuse issues.
- Encourage help-seeking.
- Commitment of resources by all stakeholders.
- Communication of Well-Being as a priority by all stakeholders.
- Looking out for each other.
- Education.

<u>Educational</u> <u>Topics for</u> <u>Lawyer</u> <u>Well-Being:</u>

- Work Engagement v. Burnout
- Stress
- Resilience and Optimism
- Mindfulness Meditation
- Rejuvenation and Recovery from Stress
- Physical Activity
- Leadership and Development Training
- Control and Autonomy

- Conflict Management
- Work-Life Conflict
- Meaning and Purpose
- Substance Use and Mental Health Disorders
- Stress Mindset
- Grit
- Nutrition
- Growth Mindset
- Organizational Fairness

Additional Resources

- "The Path To Lawyer Well-Being: Practical Recommendations for Positive Change."
 - https://www.americanbar.org/content/dam/aba/images/abanews/ThePathTo LawyerWellBeingReportRevFINAL.pdf
- The Institute for Well Being In Law- https://lawyerwellbeing.net/
- American Bar Association
 - ABA Commission on Lawyer Assistance Programs
 - ABA Working Group to Advance Well-Being in the Legal Profession
- State Bar of Nevada Lawyer Assistance Program

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J.D.

PNL1 Nutrition, PNL1 Sleep, Stress Management & Recovery



NEVADA LAWYER ASSISTANCE PROGRAM AND **LAWYERS CONCERNED** FOR LAWYERS

ASSESSMENT AND CLINICAL SERVICES

A free confidential evaluation is available for attorneys and judges with addiction or abuse problems. Visit **www.nvbar.org/NLAP** for the name and contact information of a provider near you.



Attorneys and judges may receive up to three free counseling sessions for issues related to stress, anxiety or other issues affecting your ability to perform well at work. Call **866-828-0022** for a confidential referral.

HELP FROM A FELLOW LAWYER Lawyers may seek confidential peer support to get - or stay - in recovery. Closed door meetings are held statewide. Peer support is also available for attorneys to discuss stressors in their personal life of practice. **866-828-0022.**

WWW.NVBAR.ORG/WELLNESS



SIGNS THAT YOU OR A FELLOW ATTORNEY MAY NEED ASSISTANCE



ROUTINE TARDINESS

for office/client meetings, court appearances or other work functions - with or without excuses.



CLAIMS OF ILLNESS

that prevent keeping commitments.



UNEXPLAINED NEED FOR MONEY and/or other non-specific financial problems.



LACK OF MOTIVATION OR FOCUS including declining performance throughout the day.



DECLINE IN PRODUCTIVITY and/or billable hours



CHANGES IN PHYSICAL APPEARANCE hygiene or dress; sudden weight loss or gain.



APPEARANCE OF BLOODSHOT EYES or enlarged/small pupils.



OVERREACTION TO CRITICISM and/or shifting blame to others



CO-MINGLING OF FUNDS or borrowing from client trust accounts



ENGAGING IN SECRETIVE BEHAVIORS or behaviors that seem suspicious.

HOTLINE: 866.828.0022

NEVADA COMMISSION ON ETHICS

PRESENTED BY ROSS ARMSTRONG, ESQ., EXECUTIVE DIRECTOR

Slido.com #2580041







When you think of the term ethics, what words come to mind?

(i) Start presenting to display the poll results on this slide.

NEVADA ETHICS LAW

"A public office is a public trust and shall be held for the sole benefit of the people"

NRS 281A.020

WHY AN ETHICS LAW?

- Watergate Scandal Triggered Enactment of Government Ethics Laws
 - Federal Ethics in Government Act (1978)
 - Nevada Ethics Law (1975)



LAWYER ETHICS VS. NEVADA'S ETHICS LAW

Nevada Rules of Professional Conduct	Nevada's Ethics Law – NRS 281A
Adopted by Supreme Court	Nevada's Legislative Process
General Topics	
Competence, Scope, Communication, Confidentiality	Disclosure and Abstention
Conflict of Interest	Conflict of Interest & Improper Benefits
Fees, Advertising, Handling Property/Money	Cooling Off
Duties to others	
Meritorious claims, candor, fairness	
Jurisdiction Over	
Lawyers and non-lawyers (unauthorized practice)	Public Officers & Employees

THREE MAJOR FUNCTIONS OF THE ETHICS COMMISSION

- I. Education and Outreach about Nevada's Ethics Law
- 2. Provide Advisory Opinions to public officers and employees about Nevada's Ethics Law
- 3. Receive and process Complaints alleging violations of Nevada's Ethics Law

KEY ETHICS LAW TERMS

- Public Officer Position in Nevada Constitution, Nevada Law, local government charter or ordinance or listed in NRS 281A.182
- "Commitment in a Private Capacity" special relationship
 - Spouse/domestic partner
 - Member of household
 - Related by third degree of consanguinity
 - Employer of individual or their spouse/partner/household member
 - Substantial and continuing business interest
 - "Substantially similar" to any of the above
- "Pecuniary interest" any beneficial or detrimental interest in a matter that consists of or is measured in money or otherwise related to money

CONFLICTING CONFLICTS

Nevada Rules of Professional Conduct

- Conflicts
 - Current clients (Rule 1.7)
 - Former Clients (Rule 1.9)
 - Government Officers/Employee (Rule 1.11)
- Focus of NRPC:
 - Protection of clients from attorneys behaving poorly

Nevada's Ethics Law

- Conflicts
 - Financial or personal gain using government position
 - Time, money, equipment, information

- Focus of Nevada Ethics Law
 - Preventing personal gain from public service

ETHICS CATEGORIES

- Improper Benefits
- Disclosure/Abstention
- Cooling Off



THE CASE OF JO-JO BEAR



IMPROPER BENEFIT – GOVERNMENT RESOURCES

I. Use of government position

2. Benefit

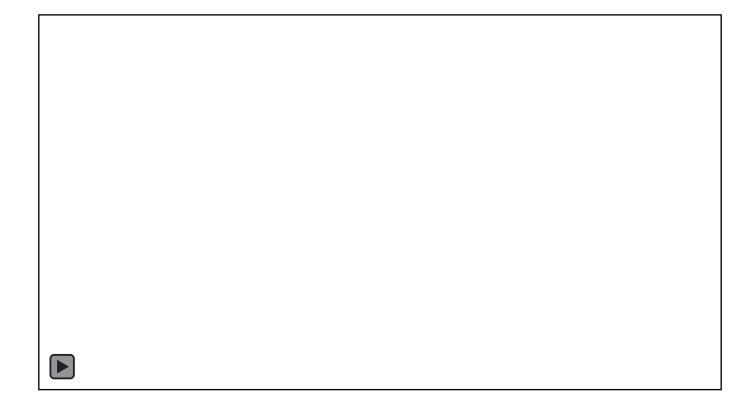
3. Benefit is for Self or to a Commitment in a Private Capacity or Result of Gift/Loan

IMPROPER BENEFIT – GOVERNMENT RESOURCES

- Unwarranted privileges, preferences, exemptions or advantages using position (NRS 281A.400(2))
- Negotiating a contract with self or for others with current agency (NRS 281A.400(3))
- Salary, retainer, expense allowances, etc. from private source for performance of public duties (NRS 281A.400(4))
- Benefit to self or other using influence over a subordinate (NRS 281A.400(9))
- Honorarium for speaking (NRS 281A.510)
- Use of non-public information or suppression or government report to benefit another (NRS 281A.400(5) & (6)



IMPROPER BENEFIT – GOVERNMENT RESOURCES



IMPROPER BENEFIT – GOVERNMENT RESOURCES



 Use of government time, property, equipment, or other facility to benefit a significant personal or pecuniary interest. NRS 281A.400(7)



Is paying the rent an ethics violation?

(i) Start presenting to display the poll results on this slide.

IMPROPER BENEFIT – GOVERNMENT RESOURCES

Limited Use Exception (Property, Equipment, Facility) NRS 281A.400(7)(a)

Properly authorized by policy allowing the use or if use is result of an emergency

Use does not interfere with performance of public officer/employee's public duties

Cost of value related to the use is nominal

Does not create the appearance of impropriety

All 4 conditions must be met together

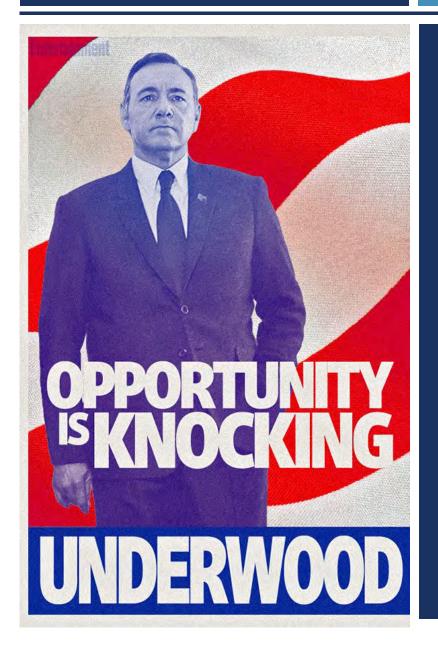
IMPROPER BENEFIT - GIFTS

- No gifts, services, favors, or engagements that "tend improperly to influence a reasonable person to depart from the faithful and impartial discharge of duties" NRS 281A.400(1)
- No salary or compensation from private source for performance of public duties NRS 281.400(4)

Different than financial disclosure requirements administered by the Secretary of State

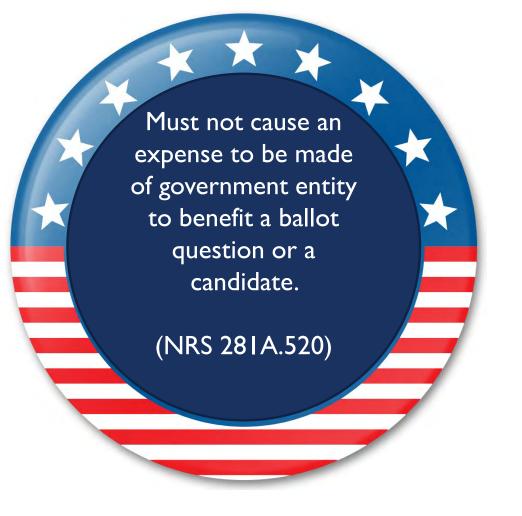
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IMPROPER BENEFIT – CAMPAIGN SEASON

IMPROPER BENEFIT – CAMPAIGN SEASON



- Access to non-public spaces
- Use of computers, phones, office equipment, etc
- Email messages or formal government communications
- Use of government staff

Also implicated NRS 281A.400(2), (4), (5), (7), (9)

DISCLOSURE & ABSTENTION

"Government ought to be outside and not inside...Everybody knows that corruption thrives in secret places, and avoids public places, and we believe it a fair presumption that secrecy means impropriety"

President Woodrow Wilson

DISCLOSURE & ABSTENTION

Before approving, voting, or acting on a matter when

- Gift or loan accepted
- Significant pecuniary interest
- Reasonably affected by commitment in private capacity
- If lobbyist in previous year

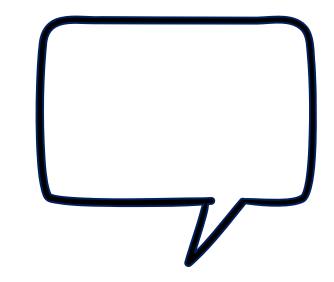
NRS 281A.420

QUALITY DISCLOSURE

 "Sufficient to inform the public of the potential effect of the action or abstention upon the person or interest"

AND

"Made at the time the matter is considered"



DISCLOSURE & ABSTENTION



Presumption in NRS 281A.420

- Favors participation
- Abstention required in clear cases in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected
- Presumed permissible if no greater benefit/detriment to officer than to any else affected by the matter

COOLING OFF



COOLING OFF

- One-year cooling off period to seek or accept employment
 - Regulated business/industry
 - Vendors of the agency
- Relief may be granted
- One-year prohibition on counseling or representing before former agency

NRS 281.410 and .550



WHAT ACTION CAN THE ETHICS COMMISSION TAKE IN RESPONSE TO A VIOLATION

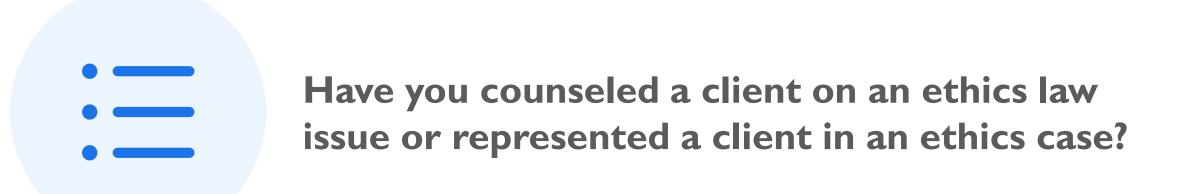
Nevada Ethics Law

- Monetary penalties
- Stipulated agreements to require education, practice changes, or mandate public apologies
- Issue Letter of Instruction or Caution
- Petition for removal of the public officer or employee
- Admonish or reprimands
- Refer to other appropriate authorities

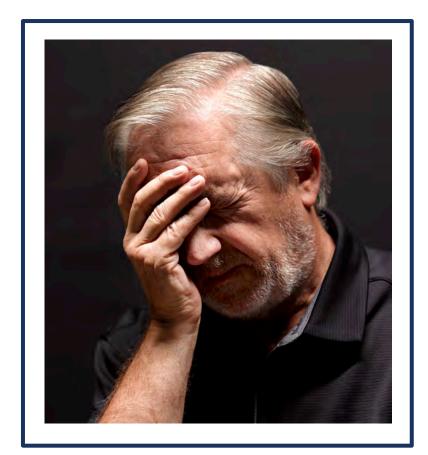
Not Nevada Ethics Law

- File an injunction to prevent a public officer from taking an action
- Any criminal sanctions or remedies including sentencing a person to jail or prison





"I'VE RECEIVED AN ETHICS COMPLAINT; WILL YOU REPRESENT ME?" REPRESENTING ETHICS SUBJECTS CONSISTENT WITH NRPC I.I



- Complaint \rightarrow Jurisdictional Determination
- Yes Jurisdiction \rightarrow Notice to Subject \rightarrow Review Panel
- First steps
 - Consider waiving statutory timeframes?

TIPS FOR LAWYERS REPRESENTING CLIENTS IN ETHICS CASES

Written Response NRS 281A.720

After Jurisdictional Determination before Panel

Investigatory Phase

Two audiences I) Executive Director 2) Review Panel

Suggested content

- Is client a public officer or employee?
- Is conduct within statute of limitations?
- Nature of the benefit
- Nature of relationship to beneficiary
- Disclosure or abstention?
- Limited use exception?
- Mitigating factors?
- Safe harbor provisions triggered?

Thinking about the audience

Other investigatory paths the Commission should take?

Documentation that should be reviewed?

What do you want the review panel to do?

- Dismiss
- Dismiss with letter of caution/instruction
- Stipulated agreement
- Referral to Commission

Subject does not appear at the Review Panel

TIPS FOR LAWYERS REPRESENTING CLIENTS IN ETHICS CASES

Referral to Adjudicatory Hearing

Discovery phase

Again, consider timeframes

 If no time waiver, do you have enough time to deliver a competent (NRPC Rule 1.1) defense?

Considerations

- Commission will not hear about motives of person who filed the complaint
- If a hearing occurs, three step process
 - I. Is there a violation? NRS 281A.765
 - 2. Was the violation willful or not? NRS 281A.775
 - 3. What should be the penalty? NRS 281A.785

Benefits to a Stipulated Agreement

Secure a non-willful finding or if willful prevent impeachment/petition for removal

Focus on mitigating factors

Commission places an emphasis on

- Training
- Policy change
- Subjects becoming part of a larger ethics solution

Limit monetary penalties

Expedites litigation – NRPC 3.2

Attorney's Role as Advisor – NRPC 2.1

5 TIPS FOR COMPLIANCE

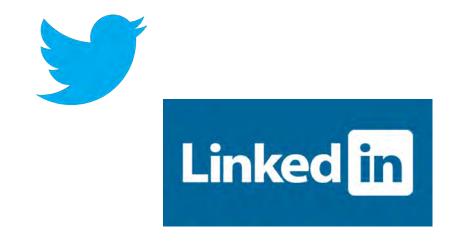
- I. Read through the ethics statutes each time you sign an acknowledgement of ethical standards
- 2. Maintain a list of individuals or entities to which you have a "commitment in a private capacity"
- 3. Review any agendas where you have action items beforehand to identify potential conflicts of interest
- 4. Consult with legal counsel who can search prior opinions
- 5. Request an advisory opinion



CONTACT INFO

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Twitter: @ethics_nevada LinkedIn: Nevada Commission on Ethics

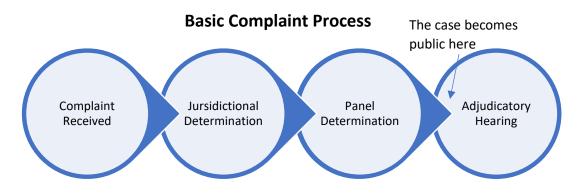


Special thanks to Susan Willeke of the Ohio Ethics Commission for media clips

Nevada Commission on Ethics Quick Reference Guide		
Торіс	Answer	Legal Citation*
Basics		
۩ ۩ ۩	Public Officers (position in Nevada Constitution, Nevada Law, local government charter or ordinance, or listed in NRS 281A.182)	NRS 281A.160
шшшш Individuals Covered	Public Employees	NRS 281A.150
	Some cases – former public officers/employees	NRS 281A.180
Statute of Limitations	Jurisdiction is limited to acts that occurred within last two years. Some exceptions for unknown or concealed activity.	NRS 281A.280
Specifically Outside Jurisdiction	Allegations of harassment or other activity covered by Equal Employment Opportunity Commission or Nevada Equal Rights Commission Other employment related grievances	NRS 281A.280
	Activity not specifically covered by NRS 281A	
Important Definitions		
"Commitment in a Private Capacity"	 Spouse/domestic partner Member of household Related by third degree of consanguinity Employer of individual or their spouse/partner/household member Substantial and continuing business interest "Substantially similar" to any of the above 	NRS 281A.065
"Pecuniary interest"	 Any beneficial or detrimental interest in a matter that consists or is measured in money or otherwise related to money including Anything of economic value Payments or other money which a person is owed 	NRS 281A.139
ت × ا × ا × ا × ا × ا × ا	Without justification of reason	NRS 281A.400

*Descriptions of statutes are summaries and do not necessarily include all legal elements nor should this document be viewed as legal advice.

Nevada Commission on Ethics Quick Reference Guide		
Statutory Prohibitions the Commission Can Enforce*		
Improper Benefit - General		
Gifts, services, favor, engagements that "tend improperly to influence a reasonable person to depart from the faithful and impartial discharge of duties	NRS 281A.400(1)	
No unwarranted privileges, preferences, exemptions, or advantages using public officer's position	NRS 281A.400(2)	
Negotiating a contract for self or others with current agency	NRS 281A.400(3)	
Salary, retainer, augmentation, expense allowance, or compensation from private source for performance of public duties	NRS 281A.400(4)	
Use of non-public information for benefit of self or others	NRS 281A.400(5)	
Suppression of government report to benefit self or others	NRS 281A.400(6)	
Use of government time, property, equipment, or other facility to benefit a significant personal or pecuniary interest (Limited use exceptions)	NRS 281A.400(7)	
Legislator-only version of use of government time	NRS 281A.400(8)	
Benefit to self or other using influence over a subordinate	NRS 281A.400(9)	
Seeking/obtaining other employment or contracts using official position	NRS 281A.400(10)	
Voting to benefit someone/entity without proper disclosure or abstention	NRS 281A.420	
Failure to file a timely acknowledgment of statutory ethical standards form	NRS 281A.500	
Receiving an honorarium (money for speaking, appearing) - limited exceptions	NRS 281A.510	
Improper Benefit – Political Cause		
Benefit to a ballot question or candidate using a governmental entity	NRS 281A.520	
Employment Restrictions / Cooling Off		
Compensation for lobbying, consulting, or representation on issue before former public agency	NRS 281A.410	
New employment or soliciting new employment using current position	NRS 281A.550	



*Descriptions of statutes are summaries and do not necessarily include all legal elements nor should this document be viewed as legal advice.