

THE NEVADA OPEN MEETING LAW

Presented by
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1

Learning Objectives

- Introduce you to the Open Meeting Law
- Use the statutory provisions of the Open Meeting Law to recognize avoidable mistakes

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What is the Open Meeting Law

- NRS 241.010 sets forth a declaration from the legislature as follows:
 - The Legislature finds and declares that all public bodies exist to aid in the conduct of the people's business.
 - It is the intent of the law that their **actions** be taken openly and that their **deliberations** be conducted openly.

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Application of the Open Meeting Law

- The Open Meeting Law applies to "Public Bodies" as defined in NRS 241.015(3).

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Elements of the Definition of a "Public Body" in NRS 241.015(3)

- Any administrative, advisory, executive or legislative body (of 2 or more) of the state or local government
- which **expends** or **disburses** or is supported in whole or in part by **tax revenue**
- or which **advises** or **makes recommendations** to any entity which expends or disburses or is supported in whole or in part by tax revenue
- includes any board, commission, committee, subcommittee or other subsidiary thereof, IF ANY SUCH BODY IS CREATED BY: (continued)

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NRS 241.015(3)(a) – IF BODY CREATED BY:

- Nev. Const., NRS, City Charter, City Ordinance, NAC; or
- Any body thus created, further creates a body by "resolution or other formal designation" (NRS 241.015(3)(a)(5); or
- Any body created by Executive Order of Governor; or (see also NRS 241.015(3)(b)); or
- Any body created by "resolution or an action" by a political subdivision governing body (BOS in Carson City).
- Local government executive officer exception (AG – OML Opinion 2009-02)

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Who is NOT a “Public Body”?



- NRS 241.015(3) clearly provides that a “public body” does not include the Legislature of the State of Nevada
- Most private non-profit corporations
- City executive staff

7

What is a Meeting of a Public Body?

- NRS 241.015(2)(a)(1) Provides a Basic Definition for a Meeting
- (a) Except as otherwise provided in paragraph (b), means:
 - (1) The **gathering** of members of a public body at which a **quorum** is present to **deliberate toward a decision or to take action** on any matter over which the public body has supervision, control, jurisdiction or advisory power.

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Methods of Holding Meetings

- In addition to standard meetings and if properly noticed and open to the public:
 - Via telephone
 - Video conference



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Definition of Meeting Continued ... NRS 241.015(2)(a) Also Provides

- (2) Any **series** of gatherings of members of a public body at which:
 - (I) Less than a quorum is present at any individual gathering;
 - (II) The members of the public body attending one or more of the **gatherings collectively** constitute a quorum; and
 - (III) The **series** of gatherings was held with the **specific intent** to avoid the provisions of this chapter.

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Remember!

- Electronic communication must not be used to circumvent the spirit or letter of the Open Meeting Law



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CAUTION NEEDED

- The Nevada Supreme Court stated that in the absence of a quorum, members of a public body can **privately discuss** public issues or even **lobby** votes. However, if a quorum is present, or is gathered by a serial electronic communications, the body must deliberate and actually vote on the matter in public. *Del Papa v. Board of Regents*, 114 Nev. 388 (1998).
- If a member of a public body sends out an **email** to a **quorum** of the public body regarding an issue that the public body has supervision, control, jurisdiction or advisory power over, a potential violation may evolve.
- Use email BCC to other members (avoid quorum deliberation or decision).

12

What is a Quorum?

- A “Quorum” has been defined by NRS 241.015(4) as meaning:
 - a simple majority of the constituent membership of a public body or another proportion established by law
 - Or specific statute

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Social Function

- Not always a meeting
- At a social function if the members do **not deliberate** toward a decision or take action on any matter over which the public body has supervision, control, jurisdiction or advisory power. (NRS 241.015(2)(b)(1))

14

Conferring With Counsel

- Non-meeting
- If purpose is to receive information from the attorney employed or retained by the public body regarding potential or existing litigation involving a matter over which the public body has supervision, control, jurisdiction or advisory power and to deliberate toward a decision on the matter, or both.
 - NRS 241.015(2)(b)(2)
 - Okay to deliberate
 - NOT okay to act

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What is “Action”?

- In short, action is:
 - Any decision or consensus
 - Any commitment or promise
- Includes serial communications that may also constitute meetings
- NRS 241.015(1)(a) and (b)

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Action Also Includes

- If a public body has any member who is not an elected official, an affirmative vote taken by a **majority of the members present** during a meeting of the public body
 - NRS 241.015(1)(c)
- If all the members of a public body are elected officials, an affirmative vote taken by a **majority of all** the members of the public body
 - NRS 241.015(1)(d)

17

Issues Involving Abstention

- Review:
 - NRS 241.0355
 - NRS 281.501(5) – Ethical considerations
- Abstention can effect the quorum to act and the number of votes necessary to act on a matter
- This issue is dependent on:
 - Whether the public body is comprised of all elected members
 - Whether the public body legal counsel renders a written opinion on the abstention in advance
 - Discuss abstention issues with public body legal counsel: NRS 241.0355(2) need for written Opinion by Counsel prior to abstention to preserve quorum

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Quorum - Calculation

- **NRS 281A.420(5):** Except as otherwise provided in NRS 241.0355, if a public officer declares to the body or committee in which the vote is to be taken that the public officer will abstain from voting because of the requirements of this section, the **necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.**

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Quorum - NRS 241.0355 Calculation

- **Carson City Charter Section 2.010:** The Board of Supervisors consists of five (5) members elected by the voters.
- Statutory "action" quorum is **3**
 - Statutory "2/3 action" quorum is **4** (5x.6666=3.333).
- If **1 opinion abstention:** "action" quorum is still **3** (majority of 4=3)
 - Statutory "2/3 action" quorum is **3** (4x.6666=2.666)
- If **2 opinion abstentions:** "action" quorum is **2** (majority of 3=2)
 - Statutory "2/3 action" quorum is **2** (3x.6666=1.999)

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Agenda

- An agenda is:
 - A list of items to discuss and act on ("For Possible Action")
 - Clear and complete
 - NOT vague
 - Actually gives notice to the general public
 - Obtain competent prior review of the agenda
- NRS 241.020



21

Agenda Also Includes

- The time, place and location of the meeting
- A list of locations where the notice has been posted
- Must clearly indicate action items ("For Possible Action")
- Should include a statement for additional assistance for physically handicapped
- Must have a public comment period
- Should have an Agenda Management Notice
- Must include the name of the person being considered in a closed meeting or who the public body may consider taking administrative action against. NRS 241.020(2)(c)(4)-(5).

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Public Comment

- Public comment is *not required on every individual item* on the agenda. A public body can limit public comment to the statutory minimum, provided such limitation is *noticed* and *applied* equally to all members of the public. That NRS 241.020(2)(c)(3) minimum would be:
 - After Roll Call Agenda Item (before any action item): A general public comment period that is expressly limited to *any topic that is relevant to the public body's agenda items or authority...*(optional as noticed in the agenda): 3 minute limitation per person on such public comment); **and**
 - Last Agenda Item (before action to adjourn): A general public comment period on *any matter that is or is not specifically included on the agenda as an action item and allowable under the Open Meeting Law* (optional as noticed in the agenda): 3 minute limitation per person on such public comment).

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Posting the Agenda - NRS 241.020(3)

- At office
- Three other public places
- On internet (if maintain a website). NRS 241.020(4)
- Three full working days before meeting
 - Example: For a Tuesday meeting, must post by 9:00am on the previous Thursday
- Agenda must be timely given to persons who request it

24

Materials Available to the Public

- Agenda
- Agenda back-up material
 - Before the meeting, over the counter at the office
 - On the day of the meeting
 - Upon being available to the “public body” back-up material must be made available to the public. NRS 241.020(6)
 - Confidential support material must relate to proprietary information under NRS 332.025, and does not need to be disclosed to the public. NRS 241.020(5).
- Can/must be made available by e-mail if the requester approves/requests

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Emergency Meeting or Emergency Agenda Item

- Must be an unforeseen circumstance
- Immediate action must be required
- NRS 241.020(2) and (8)
- Examples
 - Fire
 - Flood
 - Earthquake

26

Closed Meetings – NRS 241.030

- A public body may hold a closed meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person. Conditioned upon prior timely notice to person considered. NRS 241.033.
- Must pass a motion to close the meeting stating the nature of the business and the statutory authority to close the meeting. NRS 242.030(3).
- The Open Meeting Law does not require a public body to conduct closed meetings. Can't close to consider government “role” of elected member or certain appointed public officers. NRS 241.031.
- REMEMBER!
 - Even closed meetings must be placed on the agenda

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Closed Meetings Cont'd.

- The person being considered may request the meeting be conducted in open and the public body must open the meeting unless a relevant person requests the meeting remain closed. NRS 241.030(2).
 - Relevant person is a different person being considered or a witness.
- It is within the Chair's discretion to determine who may attend a closed meeting or the public body may vote in open. NRS 241.033(5).

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Closed Meetings Cont'd.

- DELIBERATION AND ACTION MAY NOT OCCUR IN A CLOSED MEETING!!!!!!!!!!!!
- Cannot use closed meeting to circumvent Open Meeting Law and no action. NRS 241.030(5).

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Administer Examinations

- NRS 241.033(1):
- If the public body administers examinations, it may “prepare, revise, administer or grade examinations” in a closed meeting.
- An appeal of these examinations may also occur in a closed meeting.

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Restrictions on Closed Meetings

- A closed meeting cannot be held to consider the character, alleged misconduct, professional competence or physical or mental health of an **elect**ed member of a public body or
- “An **appointed public officer** or serves at the pleasure of a public body as a chief executive or administrative officer or in a comparable position.” (i.e. City Managers, County Managers president of university, and school superintendents). NRS 241.031.
- A closed meeting cannot be held for discussion of an appointment of any person to public office or as a member of a public body. NRS 241.030(4)(e).

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Notice for Closed Meetings – NRS 241.033

- Notice **must** include a statement that:
 - Lists the “general topics concerning the person who will be considered;”
 - The person may attend the closed meeting;
 - The person may have an attorney or representative present; and
 - The person may present evidence, either written or testimonial.

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Notice Continued

- A casual or tangential reference to a person does not require the public body to notice that person. NRS 241.033(7).
- If personal service of the notice on the person, then must be at least five (5) working days prior to the meeting.
- If sent by certified mail, must be sent at least twenty-one (21) working days prior to the meeting.

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Notice for Administrative Action or Condemnation – NRS 241.034

- Same as notice for closed meetings
- If a closed meeting will occur to consider a person’s character, alleged misconduct, professional competence, or physical or mental health, **AND** at the same meeting, the public body may take administrative action against that person, the person **must receive BOTH types of notices** under NRS 241.033 and NRS 241.034.
- **A notice pursuant to NRS 241.033 may state that administrative action may also occur at the same meeting, such a notice fulfills both notice requirements. NRS 241.034(3).**

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Minutes of Public Meetings

- Minutes:
 - **A meeting must be audio recorded or transcribed by a certified court reporter** – May be taken by hand.
 - Must be available within 30 working days after the meeting. NRS 241.035(2).
 - Must be retained for five (5) years (audio for one (1) year). NRS.035(2) and (4).
- Minutes of closed meetings may be released only with the consent of the person - NRS 241.035.

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Comments Made During a Meeting

- A statement “made by a member of the public body during the course of a public meeting is absolutely privileged and does not impose liability for defamation or constitute a ground for recovery in a civil action.”
- “A witness who is testifying before a public body is absolutely privileged to publish defamatory matter as part of a public meeting, except that it is unlawful to misrepresent any fact knowingly when testifying before a public body.”
- NRS 241.0353

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Violations

- Action taken in violation of the Open Meeting Law is void - NRS 241.036.
- Attorney General's Office has primary jurisdiction to enforce NRS chapter 241.
- Attorney General's Office investigates complaints for allegations of violations of the Open Meeting Law.

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Enforcement

- Attorney General's Office may bring a legal proceeding to void an action allegedly taken in violation of the Open Meeting Law.
- Attorney General's Office may also bring a legal action to obtain an injunction to prevent violations of the Open Meeting Law.
- A private citizen may also bring a legal proceeding. NRS 241.037(2).

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Criminal Penalties

- Attorney General's Office has primary criminal jurisdiction over violations of the Open Meeting Law.
- Violations of the Open Meeting Law can result in misdemeanor charges.
- If criminally convicted of an Open Meeting Law violation, a member of a public body vacates their seat – NRS 283.040(1)(d).

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Golden Rule of Open Meeting Law

- If the public body is not sure whether a certain act should be done in the open, it should ALWAYS perform that act at a properly noticed open meeting and there will not be an Open Meeting Law issue.

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Sources of Information

- Review the provisions of NRS Chapter 241 often.
- Don't assume that other public body members will be able to spot every issue.
- Rely on your knowledge and discuss issues with the public body legal counsel.

41

Additional Sources of Information

- Case law in the annotations to NRS Chapter 241.
 - Available in your local law library
- Opinions relating to the Open Meeting Law published by the Attorney General's Office.
 - Available in your local law library or on line at <http://ag.state.nv.us>

42

But Wait! There's More...

- Letters issued by the Attorney General's Office to public bodies after investigation of Open Meeting Law complaints.
 - Available on line at <http://ag.state.nv.us>
- Open Meeting Law Manual published by the Attorney General's Office.
 - Available on line at <http://ag.state.nv.us>
- Consultation with public body counsel.

43

Any Questions

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NEVADA PUBLIC RECORDS

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Nevada Public Records Law - Highlights

- All “public” books & records – Contents not otherwise declared by law to be confidential. NRS 239.010(1).
- Duty to redact, delete, conceal or separate confidential information. NRS 239.010(3).
- Readily Available Medium. NRS 239.010(4).

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NPRL – Highlights (cont.)

- Personal Information Confidentiality - Local Government Recreational or Instructional Activity. NRS 239.0105.
- Response Due - 5th Business Day after date of written request. NRS 239.0107(1).
- Response in Writing: When it will be available; or Why confidential: “A citation to the specific statute or other legal authority.” NRS 239.0107(1)(c)-(d).

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NPRL – Highlights (cont.)

- Requester may “apply” for a court order to inspect or copy a public record. NRS 239.011.
- Priority over other civil matters. NRS 239.011.
- Requester prevails: costs & reasonable attorney’s fees. NRS 239.011.
- Government’s burden of proof (Preponderance). NRS 239.0113

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NPRL – Highlights (cont.)

- Confidential at least 30 years – “apply” for court order (rebuttable presumption of right to inspect or copy). NRS 239.0115.
- Good faith denial of any public records request: Immunity from liability for damages. NRS 239.012.

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PUBLIC RECORDS’ RULES TO REMEMBER

- The Government has a duty to redact and release where possible.
- Federal FOIA is not applicable to a state (or its local government) entity.
- The two common law exceptions to the public records law that have evolved in Nevada, are narrowly construed and applied by the courts.
- You should expect a District Court will exercise considerable independent judgment in deciding a public records dispute.

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FIRST COMMON LAW EXCEPTION

Balancing of Interests:

- In 1990 the Nevada Supreme Court construed the public records statute to include a government's duty regarding the "**balancing of interests.**" See *Donrey of Nevada v. Bradshaw*, 106 Nev. 630, 798 P.2d 199 (1990).

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Donrey

- The Court did not find in favor of government non-disclosure.
- The Court's analysis suggests a government "duty" to engage in balancing of interests to ensure sound public policy is exercised in any decision to not disclose a public record regardless of a claim of record confidentiality.

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Donrey Balancing – Important Facts

- Reno City Attorney negotiates a plea bargain with Joe Conforte, dismissing charges for delinquency of a minor.
- Reno Police Department investigates whether dismissal was based upon any bribery.
- Reno P.D. final investigation report sent to City Attorney, the D.A. and a municipal judge.

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Donrey Balancing – Weighted In Favor of Releasing

- Court: No legitimate public policy concerns in the final report of a completed investigation.
- The legitimate public policy interests in maintaining confidentiality of criminal investigation records and crime reports include the protection of the elements of the investigation of a crime from premature disclosure, the avoidance of prejudice to the later trial of the defendant from harmful pretrial publicity, the protection of the privacy of persons not arrested from the stigma of being singled out as a criminal suspect, and the protection of the identity of informants. *Id.* at 635.

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SECOND COMMON LAW EXCEPTION

Deliberative Process Privilege (and Balancing):

- Ten years after *Donrey* the Court ruled in *DR Partners v. Board of County Commissioners*, 116 Nev 616, 6 P.3d 465-471 (Nev. 2000).
- The Court reinforces the need for "balancing of interests" in a second, more specific common law exception, the "deliberative process privilege."

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DR Partners – Facts/Rationale

- The Press requested records regarding cell phones calls over a two year period for publicly owned cell phones.
- County partially complied with redacted records.
- County's primary defenses: 1) deliberative process privilege; 2) individual privacy rights of the persons whose phone numbers were listed on the billing statements.
- District Court denied petition for Writ of Mandamus based upon finding the existence of a deliberative process privilege, and thus did not reach the privacy issue.

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DR Partners – Deliberative Process Privilege (Plus: Balancing)

- “Neither party to this appeal disputes that the records at issue are public records under the Act.”
- “The public official or **agency bears the burden of establishing** the existence of **privilege based upon confidentiality.**”
- “In **balancing the interests.** . . ., the scales must reflect the **fundamental right of a citizen** to have access to the public records as contrasted with the **incidental right of the agency** to be free from unreasonable interference.”

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DR Partners – Deliberative Process Privilege (Plus: Balancing)

- “The **citizen’s predominant interest** may be expressed in terms of the burden of proof which is applicable in this class of cases; the burden is cast upon the agency to explain why the records should not be furnished.”
- “The **agency bears the burden** of establishing the character of the decision, the deliberative process involved, and the role played by the documents in the course of that process.”

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DR Partners – Deliberative Process Privilege (Plus: Balancing)

- “Once the court determines that a document is privileged, it must still determine whether the document should be withheld. Unlike some other branches of the executive privilege, the **deliberative process privilege is a qualified privilege.**”

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DR Partners – Deliberative Process Privilege (Plus: Balancing)

- “Once the agency demonstrates that document fits within [the deliberative process privilege], the **burden shifts to the party seeking disclosure.** It must demonstrate that its **need for the information outweighs the regulatory interests** in preventing disclosure.”

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DR Partners – Facts/Rationale

- The Nevada Supreme Court stated: “Unless a statute provides an absolute privilege against disclosure, the burden of establishing the application of a privilege based upon confidentiality can only be satisfied pursuant to a balancing of interests.” *Id.* at 621.
- The Court: “To qualify for non-disclosure under this privilege, the requested documents must be both pre-decisional and deliberative.” *Id.* at 623.

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DR Partners – Facts/Rationale

- The Court: “To qualify as part of the “deliberative process, the materials requested must consist of opinions, recommendations, or advice about agency policies.” *Id.* at 623. “It is well established that purely factual material, which is severable from the opinion or policy advice in a document is generally not protected and must be disclosed in FOIA suit.” *Id.* at 624.

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DR Partners – Facts/Rationale

- The Court holds: “Identifying persons who participate in policy formation and are somehow identified in the public records, does not implicate the disclosure of factual information inextricably intertwined with the decision or policy-making processes of government...and that there is a public interest in knowing who is being consulted by government and contributing to its decisions.” *Id.* at 624-625.

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DR Partners – Facts/Rationale

With regard to the privacy issue raised, but not reached by the district court, the Court found that there is no “expectation of privacy” in cell phone billings. And to the extent that exigent circumstances are shown to justify non-disclosure, a district court reviewing such a claim is required to apply the *Donrey* balancing test. *Id.* at 627. The Court noted those exigent circumstances should be “serious privacy concerns,” and not mere “hypothetical concerns.” *Id.* at 628.

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Case History-Justice Delayed

- **Gray v. Clark Co. School Dist.- Clark County District Court (Case No. A543861; Dept. XXII)**
- November 6, 2006-Karen Gray requested copies of cell phone records and emails of CCSD Trustees-Wanted information for 2007 Legislature.
- November 17, 2006-CCSD Responded only one trustee had a publicly issued cell phone; one trustee received a \$50 stipend for private

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Case History-Justice Delayed

- April 12, 2007-Gray requested at trustee’s meeting all policies, procedures and protocol regard repository and retrieval of trustees’ electronic public records.
- May 7 & 31, 2007-Gray complained about non-response.
- June 28, 2007-ACLU filed Civil Complaint for Declaratory Judgment, Injunctive Relief and Damages (public records release).
- October 14, 2008-Court Hearing

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Case History-Justice Delayed

- **Decision (Judge Susan Johnson):**
- While NRS 239.055 allows charging for extraordinary use of personnel or technological resources for retrieval, “there is nothing contained within the statute to suggest a citizen, such as MS. GRAY, should bear the costs of the entity’s review for and redaction of what it may claim to be confidential or privileged...it is the governmental entity’s burden to produce the record or explain why it

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Case History-Justice Delayed

- **Decision (Judge Susan Johnson):**
- Karen Gray is entitled to publicly provided or funded cellular telephone records created, received or kept by CCSD.
- Not entitled to private or personal cell phone records...definition of public records “requires that it be created, received or kept and paid for by the governmental entity.” Stipend alone does not change character of a private cell phone record.
- Entitled to policies, procedures and protocol

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Class Discussion: Rebuttal

- **NAC 239.091**
- “Public record” means a record of a local governmental entity that is created, received or kept in the performance of a duty and paid for with public money.

(Added to NAC by St. Librarian, eff. 10-26-83; A by Library & Archives Admin'r by R090-06, 6-1-2006)

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Class Discussion: Rebuttal

- **NAC 239.101**
- “Record of a local government” means information that is created or received pursuant to a law or ordinance, or in connection with the transaction of the official business of any office or department of a local governmental entity, including, without limitation, all documents, papers, letters, unpublished books, maps, charts, blueprints, drawings, photographs, films, computer

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Class Discussion: Rebuttal

- **NAC 239.051**
- “Nonrecord” means published books and pamphlets, books and pamphlets printed by a governmental printer, worksheets used to collect or compile data after it has been included in a record, answer pads for a telephone or other informal notes, unused forms except ballots, brochures, newsletters, magazines, newspapers . . . Etc.

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Class Discussion:

- *November 6, 2007 - Reno Gazette-Journal*
“RGJ sues to get budget documents”
- *December 19, 2007 – Reno Gazette-Journal*
“Judge rejects RGJ lawsuit seeking documents about state budget cuts”

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Class Discussion:

- *January 28, 2009 – Las Vegas Sun:*
“Judge rules on confidentiality of governor’s e-mails” (releases some; withholds others based on State’s email policy)
- *February 26, 2009 – Reno Gazette-Journal :*
“RGJ appeals court ruling on Gibbons e-mails”
– Issue: State’s email policy and Scope of “Vaughn Index”

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Class Discussion:

- ▶ **Vaughn Index:**
 - ▶ *Union Leader Corp. v. New Hampshire Housing Financial Auth.*, 705 A.2d 725 (N.H. 1997).
- “Due to the limited number of emails, and the brevity of most of the transmissions, the compilation of a ‘Vaughn index’ was not necessary for the review...Such an index in this case would disclose otherwise confidential information.” *Special Master (Carson City District Court).*

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The Governor's Email

- Nev. Supreme Court held a State email policy cannot create an exception to the Public Records Law. *Reno Newspapers, Inc., v. Gibbons*, 266 P.3d 623 (Nev. 2011).
- A formal Vaughn Index is required before in-camera review, but only after litigation has begun, if such is required for a litigant's ability to obtain a meaningful explanation so as to allow for fair litigation of the matter.
- However, a confidentiality claim can only be tested in a fair and adversarial manner, thus a **log** typically must be provided.

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Class Discussion:

- *December 13, 2008 - Reno Gazette-Journal*
"Municipal salaries ruled public records"

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Reno Newspaper, Inc., v. Mike Haley, 126 Nev.Adv.Opn. 23 (7-01-2010), 234 P.3d 922

Justice Hardesty's En Banc Opinion

- RGJ heard that Sheriff Haley had suspended or revoked Governor Gibbons concealed firearms permit due to inaccuracies in the application.
- RGJ sought information from the post-application process, acknowledging that the application's information is confidential pursuant to NRS 202.3662.
- RGJ's request was denied. The District Court agreed with the Sheriff, but the Nevada Supreme Court disagreed and reversed the District Court.

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Justice Hardesty - En Banc

- The Supreme Court observed the statute is notably silent as to whether the name of a permittee, or records generated as part of an investigation, suspension, or revocation of the permit, are confidential...and the statute repeatedly recognized a difference between an applicant and a permittee.
- The status of an applicant changes to that of permittee when the permit issues.

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Justice Hardesty – En Banc

- "...in light of the Legislature's declaration of the rules of construction of the Act-requiring the purpose of the Act to be construed liberally and any restriction to government documents to be construed narrowly- the **balancing test under [Donrey] now requires a narrower interpretation of private or government interests promoting confidentiality or nondisclosure** to be weighed against the liberal policy for an open and accessible government. See NRS 239.001. We emphasize that the balancing test must be employed in accordance with the underlying policies and rules of construction required by the Nevada Public Records Act." [Emphasis added.]

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Justice Hardesty – En Banc

- "Therefore, the district court must review the post-permit investigation, suspension, or revocation record to determine whether it contains information within either the application or the post-application investigation that is explicitly made confidential under NRS 202.3662. In such event, the district court must order the **redaction of confidential information from the post-permit record** under NRS 202.3662(1)(b)." [Emphasis added.]

36

City of Ontario v. Quon, 130 S. Ct. 2619 (2010)

- Sexually explicit text messages by police officer to private parties on City's equipment.
- Officer disciplined for violating department rules on use of equipment.
- Officer argues expectation to privacy and violation of 4th Amendment search without a warrant.
- The Court couldn't get majority support to decide the privacy issue and found sufficient employer rights were reserved in policy regarding private use of City equipment.

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City of Ontario v. Quon, 130 S. Ct. 2619 (2010)

- "The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risk error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. [citations omitted]. In [*Katz v. United States*, 389 U.S. 347 (1967)], the Court relied on its own knowledge and experience to conclude that there is a reasonable expectation of privacy in a telephone booth...It is not so clear that courts at present are on so sure a ground. Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices." *Id.* at 10.

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PUBLIC RECORDS' REALITIES TO REMEMBER:

- The conventional wisdom that the government always has the right to balance interest on public records is a trap for the unwary.
- Avoid taking an unreasonable public records stand that you will not be able to defend.
- If your facts do not tell a very compelling story for non-disclosure, the law is weighted against you.

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PUBLIC RECORDS' REALITIES TO REMEMBER:

- You must have a good witness that can make the factual case to the court.
- Courts are reluctant to have to decide public records disputes because balancing of interests is too subjective and the controlling precedents are confusing.
- Normally, a public records dispute that makes it to court involves the Press as petitioner, which adds additional subjective pressures on a judge.

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PUBLIC RECORDS' REALITIES TO REMEMBER:

- Justice Hardesty was legal counsel for the media in *Donrey*, and it was his balancing test argument that prevailed in the case. As a District Court judge he followed *Donrey* in his public records rulings. As a sitting justice, he will persuade the Nevada Supreme Court to follow, if not strengthen *Donrey*.

41 41

Ethics Law & Civility

Public Officers, Public Appointees and Employees
of Carson City

Presented by:
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1

Nevada Ethics Commission

- ❑ Interprets and provides guidance on the provisions of NRS 281A.020 through 281A.660 (Nevada Ethics in Government Law)
- ❑ Investigates and adjudicates ethics complaints
- ❑ Accepts financial disclosure statements of certain public officers

2

Ethics Commission Jurisdiction

NRS 281A.160

Public Officer:

- ✓ Elected or appointed pursuant to constitution, statute or ordinance; and
- ✓ Exercises public power, trust, or duty
 - Exercises administrative discretion in formulating public policy;
 - Expends public money; and
 - Administers laws and rules of state, county or city.

3

Exceptions:

Public Officer does not include:

- Judges or officers of the court system
- Those serving in an advisory capacity
- Certain general improvement district members or county health officers

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Commission Jurisdiction (continued)

NRS 281A.150

Public Employee:

- ✓ Performs public duties for compensation at state, county, or city level; and
- ✓ Actions directed or controlled by a public officer.

5

Ethics – Prohibitions

NRS 281A.400 -.410

- ❑ Accepting gifts, services, favors, employment, economic opportunities, etc. which would improperly influence a reasonable person.
- ❑ Using a public office to secure unwarranted privileges, preferences, exemptions, or advantages for himself or his pecuniary interest, or a person to whom there is a commitment in private capacity to the interest of that person.

6

Ethics – Prohibitions (continued)

- ❑ Participating as an agent of government in the negotiation or execution of contracts with a business in which the person has a pecuniary interest.
- ❑ Accepting a salary or other compensation from a private source for performing public duties.

7

Ethics – Prohibitions (continued)

- ❑ Using confidential information to further a pecuniary interest or that of others.
- ❑ Suppressing governmental reports or documents which might tend to unfavorably affect a pecuniary interest.

8

Ethics – Prohibitions (continued)

- ❑ Attempting to benefit a personal or financial interest by influencing subordinates.
- ❑ Seeking other employment or contracts through the use of the public office.

9

Ethics – Prohibitions (continued)

- ❑ Using governmental time, property, equipment, or other facility to benefit a personal or financial interest.
- ❑ Limited personal use of Government Property is allowed if four specific criteria are met:
 - NRS 281A.400(7)(a):

10

Acceptable Limited Personal Use of Governmental Property

1. Use is authorized by the responsible public officer or the use is necessary in an emergency;
2. Use does not interfere with the performance of public duties;
3. Cost or value of use is nominal; and
4. Use does not create the appearance of impropriety.

11

Ethics – Prohibitions (continued)

- ❑ One-year cooling off period after leaving public service. NRS 281A.410
- ❑ No contracts between governmental agencies and private businesses in which a Public Officer has a pecuniary interest. NRS 281A.430

12

Ethics – Prohibitions (continued)

- ❑ Public Officers and Employees shall not accept honorariums. NRS 281A.510
- ❑ Public Officer or Employee causing a governmental entity to make expenditures to support or oppose a ballot question or candidate during the period of candidacy and election. NRS 281A.520

13

Criminal Statutes – Ethics Violations

- ❑ Anti-nepotism provisions (within 3 degrees)
(NRS 281.210 – gross misdemeanor)
- ❑ No personal profits from public office
(NRS 281.230 - \$250 or more Class D Felony)

Jurisdiction: District Attorney; Attorney General

14

Ethics Commission - Opinions & Complaints

- ❑ Advisory opinions about past, present, or future conduct of public officers (first-party request)
- ❑ Ethics complaints about conduct of public officers (third-party request)
- ❑ The District Attorney does not tender defense to City officers and employees. NRS 281A.450 (only state officers and state employees are entitled, under certain conditions, to a government attorney defense of an Ethics complaint).

15

Conflict of Interest – Guidepost

When any person, such as a public officer or public employee, has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties.

16

Appearance of Impropriety - Guidepost

Conduct which would create in reasonable minds a perception that the a person's ability to carry out their responsibilities with integrity, impartiality, and competence is impaired.

17

Public Meetings - Avoiding Conflict Situations

- ❑ Full, Timely Disclosure (at the time the matter is considered). NRS 281A.420(4)
- ❑ Knowing when you must abstain from voting and avoid advocacy for passage or failure. NRS 281A.420(2)
- ❑ Knowing when you shouldn't even participate

18

Voting, Disclosing & Abstaining

NRS 281A.420(1)

- ❑ Voting is permissible if the value which the person would accrue as a result of the vote is no greater than the value which accrues to anyone else.
- ❑ When in doubt, disclose the interest and vote.

19

Voting, Disclosing & Abstaining

NRS 281A.420(4)

- ❑ Disclosure is mandatory for any interest created by:
 - ✓ A gift or loan
 - ✓ A pecuniary interest
 - ✓ A commitment in a private capacity to the interests of others
- ❑ Disclosure must be public and at the time the measure is considered.

20

Voting, Disclosing & Abstaining

NRS 281A.420(2)

- ❑ Prohibits advocating or voting for the passage or failure of, but otherwise allows active participation in, a matter if independent judgment would be affected by:
 - ✓ A gift or loan
 - ✓ A pecuniary interest
 - ✓ A commitment in a private capacity to the interests of others

21

Pecuniary Interest

- ❑ A monetary interest or an interest that can be valued in money.
- ❑ Campaign contributions are not pecuniary interests, and do not require disclosure if they are reported timely and as required under statute. NRS 281A.420(4)(c).

22

Commitment in a Private Capacity to the Interests of Others

NRS 218A.420(8)

A Commitment to a Person in a Private Capacity:

- ❑ Member of the household;
- ❑ Related by blood, adoption, or marriage within 3rd degree of consanguinity or affinity;
- ❑ Employs the voter or a household member; or
- ❑ With whom the voter has substantial or continuing business relationship.
- ❑ Or, **NRS 281A.420(8)(e) other similar relationships.** (Ruled Unconstitutionally Overbroad. Carrigan v. Nevada Ethics Commission, 126 Nev. Adv. Opn. 28 (July 29, 2010)), *reversed* by U.S. Supreme Court, *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011).

23

Carrigan v. Nevada Ethics Commission, 126 Nev. Adv. Opn. 28 (July 29, 2010)

- ❑ Ethics Commission censured for failing to abstain from voting on the proposed Lazy 8 casino.
- ❑ Carrigan's Disclosure prior to vote: "I have to disclose for the record...that Carlos Vasquez, a consultant for Redhawk,...is a personal friend, he's also my campaign manager. I'd also like to disclose that as a public official, I do not stand to reap either financial or personal gain or loss as a result of any official action I take tonight. Therefore, according to [NRS 281A.420] I believe that this disclosure of information is sufficient and that I will be participating in the discussion and voting on this issue."

24

Saving a Quorum – Foreseeable Conflict

- **NRS 241.0355(1)**: A public body that is required to be composed of elected officials only may not take action by vote unless at least a majority of all the members of the public body vote in favor of the action. For purposes of this subsection, a public body may not count an abstention as a vote in favor of an action.

25

Saving a Quorum – Foreseeable Conflict

- **NRS 241.0355(2)**: The provisions of subsection 5 of NRS 281A.420 **do not apply** to a public body that is required to be composed of elected officials only, **unless before abstaining from the vote, the member of the public body receives and discloses the opinion of the legal counsel authorized by law to provide legal advice to the public body that the abstention is required pursuant to NRS 281A.420.** The opinion of counsel **must be in writing** and set forth with specificity the factual circumstances and analysis leading to that conclusion.

26

Saving a Quorum – Foreseeable Conflict

- **NRS 281A.420(5)**: Except as otherwise provided in NRS 241.0355, if a public officer declares to the body or committee in which the vote is to be taken that the public officer will abstain from voting because of the requirements of this section, the **necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule, is reduced as though the member abstaining were not a member of the body or committee.**

27

Saving a Quorum – Foreseeable Conflict

- **Carson City Charter Section 2.010**: The Board of Supervisors consists of five (5) members elected by the voters.
- Statutory “action” quorum is **3**.
 - Statutory “2/3 action” quorum is **4** (5x.6666=3.333).
- If **1 opinion abstention**: “action” quorum is still **3** (majority of 4=3)
 - Statutory “2/3 action” quorum is **3** (4x.6666=2.666)
- If **2 opinion abstentions**: “action” quorum is **2**
 - Statutory “2/3 action” quorum is **2** (3x.6666=1.999)

28

Carson City – Code of Ethics CCMC §2.34.010 through § 2.34.100

- Substantially similar to Nevada’s Code of Ethical Standards but has a broader application to advisory appointees.
- CCMC 2.34.010(4): “The provisions of the NRS which conflict with this chapter or which impose greater standards shall supersede the provisions of this chapter.”
- District Attorney Enforcement Authority
 - Misdemeanor Crimes and Removal from Office

29

Carson City – Code of Ethics

- An elected official must abstain from voting on or participating in the discussion of an item before the Carson City board of supervisors whenever such official has a direct financial interest. When the item is called on the agenda, the elected official must disclose the existence and nature of the direct financial interest prior to any testimony being introduced on the item. **CCMC § 2.34.070(1).**

30

Carson City – Code of Ethics

- Members of the Carson City board of supervisors and the mayor must disclose the existence of a direct financial interest of a relative regarding an item before the Carson City board of supervisors. Disclosure must be made prior to any testimony being received on the item. After disclosure, the official may discuss and vote on the item. **CCMC § 2.34.070(2). CAUTION REQUIRED.**

31

Carson City – Code of Ethics CAUTION – “Relatives” Trap

- NRS 281A.420(2)(c) requires that “a public officer **shall not vote upon or advocate** the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by [his] commitment in a private capacity to the interests of others.”
- NRS 281A.420(8) defines the “commitment in a private capacity to the interests of others” as a commitment to a person: (a) Who is a member of his household; (b) Who is a relative to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (c) Who employs him or a member of his household; (d) With whom he has a substantial and continuing business relationship; or (e) other similar relationships.

32

Carson City – Code of Ethics

- An elected official must abstain from voting on or participating in the discussion of an item before the Carson City board of supervisors whenever such official or member of his immediate family has accepted a gift from an applicant within the preceding eighteen (18) months, or whenever such official or member of his immediate family has sold or entered into a contract for the sale of goods or services to an applicant during the preceding eighteen (18) months which involves payment by the applicant of five hundred dollars **(\$500.00) or more**. When the item is called on the agenda, the elected official must disclose the existence and nature of the conflict prior to any testimony being introduced on the item. **CCMC § 2.34.070(3).**

33

Carson City – Code of Ethics

- A member of the Carson City board of supervisors and the mayor may discuss and vote upon an item, after disclosure, if the benefit or detriment accruing to the official as a result of the decision, either individually or in a representative capacity as a member of a business, profession, occupation or group, is not greater than that accruing to any other member of the business, profession, occupation or group. **CCMC § 2.34.070(4).**

34

Carson City – Code of Ethics

- All provisions of this section apply to all committees, commissions, boards and subcommittees appointed by the board of supervisors. **CCMC § 2.34.070(5).**

35

Managing Public Meeting Civility

- “Civility is much more than just behaving politely, but it is a good place to start. This behavior shows that the individual has a deep abiding respect for others and their opinions. Civility also requires maintenance of self control, especially in dialogues with others with whom we disagree.”
 - In Search of Civility*, Jacqueline J. Byers, NACO Research Director, June 2010.

36

Civility – Problem

- ❑ Washoe County has experienced circumstances involving a lack of civility that required removal of citizens from public meetings.
- ❑ RGJ, November 28, 2010: “Washoe District Judge Jerome Polaha has ruled Robert Larkin, chairman of the Washoe County Board of Commissioners in 2007, had the right to throw out citizen activist...for ignoring Larkin’s repeated warnings to stick to the agenda...[citizen’s] actions in ‘arguing with Larking, disrespecting his position as chair of the board, ignoring him, and talking over him were willful.”
- ❑ Part of Washoe’s strategy to manage civility included a Board adoption of a Decorum Statement:

37

Civility – Board’s Decorum Statement

“The Chairman and Board of County Commissioners intend that their proceedings should demonstrate the highest levels of decorum, civic responsibility, efficiency and mutual respect between citizens and their government. The Board respects the right of citizens to present differing opinions and views, even criticism, but our democracy cannot function effectively in an environment of personal attacks, slander, threats of violence and willful disruption.”

38

Open Meeting Law – Decorum Authority – Checks & Balances

- ❑ **NRS 241.030(4)(b)**: This chapter does not: (b) Prevent the removal of any person who willfully disrupts a meeting to the extent that its orderly conduct is made impractical.
- ❑ **NRS 241.040(2)**: Wrongful exclusion of any person or persons from a meeting is a misdemeanor.
- ❑ **NRS 241.0353**: Statements of Members during the course of a public meeting, and testimony not knowingly false by a witness before a public body, is absolutely privileged and not subject to civil action.

39

Decorum Authority Statement - Used as Needed

- ❑ The Nevada Open Meeting law provides the authority for the chair of a public body to maintain the decorum and to declare a recess if needed to remove any person who is disrupting a meeting, and notice is hereby provided of the intent of this body to preserve the decorum and remove anyone who disrupts the proceedings of the board.

40

Balancing Decorum & Disagreement

- ❑ OML requires public comment, but nothing in law requires a public body to tolerate profanity and verbal abuse, or to allow disruption of its meeting by citizens.
- ❑ Sometimes limiting time per person becomes necessary. So long as:
 - Agenda provides authority to do so.
 - It is applied fairly

41

Balancing Decorum & Disagreement

- ❑ Slippery slope of “public comment” dialogue with board members or staff:
 - Board cannot consider an item not on the Agenda. (dialogue vs. deliberation).
 - Devolution into argumentative banter (vertical vs. horizontal argument).
 - Institutional respect and authority (staying on the right side of the line).

42

Managing a Decorum Event

- ❑ Gavel Order.
- ❑ Chair reads the Board's Decorum Authority Statement.
- ❑ Chair specifies behavior that is out of order.
- ❑ Chair warns citizen of disruptive behavior that may result in a recess and removal if it continues.
- ❑ If citizen continues, the disruptive behavior is noted for the record and recess is called.
- ❑ Chair and District Attorney shall confront citizen in person and insist they leave and not return during the balance of the public meeting.
- ❑ If citizen refuses, call security or 911 to enforce removal.

43