

AUDITS

Boards and Commissions Training

October 25, 2017

Audits of Licensing and Regulatory Boards

- SEE HANDOUT
- NRS 218G.400
- NRS 622.100, 622.200

Other Audits and Audit Entities

Audits of State Agencies Awarded Federal Grants

Contract Auditor – Eide Bailly

- Audits internal controls over major federal award programs
- Audits compliance with major federal award program requirements
- Prepares audit findings relative to major federal award programs
- Audits basic financial statements for the State of Nevada
- Audit performed annually

Statutorily Required Agency Audits by Contract Auditors

Some state agencies are required to be audited annually by contract auditors. Agency board selects the contract auditor. Examples:

- Public Employees' Benefits Program
- Colorado River Commission
- Public Employees' Retirement System of Nevada

Executive Branch – Division of Internal Audits

- Conducts audits approved by the Executive Branch Audit Committee
- Provides training and assists agency staff in developing internal controls
- Reviews expenditures for adherence to state requirements

Legislative Branch – Legislative Counsel Bureau, Audit Division

- Audits state agencies based on a schedule approved by the Legislative Commission
- Conducts audits based on a specific request approved by the Legislative Commission
- Conducts audits as required by legislation

Sunset Subcommittee of the Legislative Commission – NRS 232B

- Conducts reviews of boards and similar entities
- Selects entities to review each interim
- Determines whether those entities should be continued, modified, consolidated, or terminated

Questions?

STATE CONTRACTING BASICS

Types of Contracts

Procedures

Boards and Commissions Training

2017

Sources of Nevada Procurement Law

- NRS Chapters 333, 333A, 334
 - 332 (local governments)
 - 338 (Public Works)
 - 353.500-.630; 277.080-.170, .180
- NAC (Nevada Administrative Code) Chapters 333, 333A, 334
- SAM (State Administrative Code) [Dept of Admin – Budget – Documents]
 - <http://budget.nv.gov/uploadedFiles/budgetnvgov/content/Governance/SAM.pdf>

Main Types of Contracts

- Services of Independent Contractor NRS 333.700
- Purchase of Goods NRS 333.300 et seq.
- Installment Purchase and Lease Purchase Agreements NRS 353.500 -.630
- Interlocal Contracts Between Government Entities NRS 277.180, 277.080 -.170

Other Contracts and Agreements

- Leases
 - State as Lessor (State Lands, NRS 321.001, 322.010)
 - State as Lessee (B & G, NRS 331.110; certain boards exempt from B&G jurisdiction in 331.070, 353.005 – generally occupational and professional licensing boards)
- Revenue Contracts

Miscellaneous Contracts

- Volunteer Agreements
- Licenses to Use State Facilities
- Grants
 - Grants are contracts if any enforceable promise or performance is expected
 - SAM Chapter 3000 deals with procedures for distributing Federal grants

WHY IS THIS IMPORTANT?

- State policy is to secure the best value for the taxpayer dollar in all goods, supplies, equipment and services. See NRS 333.140.
- Knowing the process and potential issues will expedite your procurements
- AND

There is personal responsibility

- NRS 333.810 contracts contrary to Chapter 333 are void; head of using agency or employee who made the purchase may be personally liable
- NRS 353.260(2) It is unlawful to bind or attempt to bind the State in any amount in excess of the specific amount provided by law, or in any other manner than provided by law. (This is malfeasance in office or a misdemeanor.)

Contract for Services of Independent Contractor

- State contracts on handouts and <http://purchasing.nv.gov/Contracts/ToolBox/#Forms/Templates>
 - Standard Form
 - “Short” Form (<\$50,000)
 - Instructions for Short Form Contract

Insurance Required

- Standard Form Contract Requires a separate Insurance Schedule
 - (from Risk Management Division; see <http://risk.nv.gov/Contracts/CR/>)
- Short Form Contract has insurance Requirements embedded
 - Worker's Comp
 - CGL
 - Auto
 - Professional Liability

Importance of Standard Contracts

- Nonappropriation Clause
- Limits on State's Liability (NRS Ch 41)
- Indemnification from Contractor
- State Cannot Contractually Indemnify Contractor
- Warranties
- Choice of Nevada Law and Jurisdiction



Beware of Contractor Forms

- Contractor May Submit Its Own Form
- Will Contain Provisions Detrimental to State
- May Violate Nevada Law
 - State Sovereign Immunity and Damages Limitations
 - Confidentiality/Public Records
 - Unconditional Obligations, Acceleration of Payments, Penalties, Etc.

Procurement of Goods or Services (Forms of Contract)

SERVICES

- Contract for Services of Independent Contractor
 - Short Form <\$50,000
 - Standard Form
- GENERALLY REQUIRES AG REVIEW AS TO FORM NRS 333.700(6), SAM 0342

GOODS

- Invitation to Bid
- Bid
- Notice of Award

Role of Purchasing Division

Contracts for Services

- Purchasing Contracts for Services \geq \$100,000; may authorize Agency $<$ \$100K
- Purchasing may (1) contract for Agency if best interest of State; or (2) assist Agency in contracting if requested.
- NRS 333.165

Purchase of Goods

- $>$ \$50,000: Purchasing Division to receive sealed bids on an ITB. NRS 333.300
- $<$ \$50,000 Purchasing Division may do informal solicitation
- Purchasing may authorize local purchases ($<$ \$5,000; $<$ \$15,000 heavy equipment) NRS 333.390

Criteria for Award

SERVICES

- **Best interest of the state** – as determined by the scores assigned to the proposals; NRS 333.335(5)
- Criteria are stated in NRS 333.335(3)
 - Includes any other factor disclosed in the RFP

GOODS

- **Lowest responsible bidder**
NRS 333.340, 333.300

Applicability of NRS 333.700

- Grants authority to contract with Independent Contractors (Does your agency have independent authority to contract? E.g., NDOT)
- Applies to “**using agencies**”
- “Using Agency” defined in 333.020(10)
- Officers, departments, institutions, boards, commissions, other agencies in the **Executive Department**
- ANY support from “**public money**”
 - From State, Federal or private or other sources
- Exceptions – e.g., NSHE, Housing Div, Local Gov’ts

Board of Examiners Approval

CONTRACTS FOR SERVICES (not goods)

- <\$2,000 (Agency approval)
- 2,000 – 49,999 (Clerk of BOE)

Changed by AB41 (2013) NRS 333.700; and action of the BOE August 2013; Was 2,000-9,999

- ≥50,000 (BOE)

EXCEPTIONS FROM BOE REVIEW

- NRS 333.700(8) full list
- Examples
 - Office equipment maintenance and repair NRS 333.700(8)(d), SAM 0326
 - Computer software maintenance consisting of license agreements, remote download of updates, off-site tech support. SAM 0326

EXCEPTIONS FROM COMPETITIVE SOLICITATION

- Not suitable for competitive solicitation NAC 333.150(2)
- Professional Services NAC 333.150(2)(b) (the list is not exclusive, but requires Chief of Purchasing approval if not listed)
- Sole Source NAC 333.150(2)(a) (as determined by the Chief of Purchasing)
- Emergency NAC 150(2)(c) (as determined by the Chief of Purchasing)

OTHER SPECIAL CASES

- Installment-Purchase or Lease-Purchase under NRS 353.500 -.630
- Applies to State of Nevada or State Agency
 - Applies to both real property and personal property NRS 353.510
 - Agreements involving real property have special requirements. See NRS 353.550
 - Not subject to competitive bidding or other procedures for award of contracts 353.580

MORE SPECIAL CASES

- LEASES of equipment – by the Administrator of Purchasing NRS 333.150; SAM 1534 (except short-term rentals \leq \$5,000)
- Interlocal Cooperation Agreements NRS 277.080 -.170 (Requires BOE approval SAM 0310)
- Interlocal Contracts between public agencies NRS 277.180 (Requires BOE approval SAM 0316)

INSURANCE

- The State Risk Manager has responsibility for procuring insurance and using means to reduce risks to the State NRS 331.182, 331.184, 331.186, SAM 0516
- Risk Management Division publishes an insurance manual for contracts, that contains suggested types and limits of insurance policies according to the type of contract and risk involved. <http://risk.nv.gov/Contracts/CR/>

Common Types of Required Insurance

Based on Nature of Risk, not Amount of Contract

- Comprehensive General Liability
- Automobile Liability
- Worker's Compensation (Sole proprietors may execute an affidavit of rejection of WC coverage. NRS 616B.627, 617.210)
- Professional Liability
- Commercial Crime or Fidelity Bond
- Network Security (Cyber) and Privacy Liability

Contract Amendments

- There is a Form. See <http://purchasing.nv.gov/Contracts/ToolBox/#Forms/Templates>
- The Amendment Form is a hybrid
 - Reason for Amendment (Description)
 - Substitution (Cut-and-Paste)
- If you both describe the amendment and substitute a new section, make sure they match

Amendment By Description

- Description (1. A.): [Give a brief explanation of reason for contract amendment.]
 - Example: “Due to unexpected delays, the term of the contract is extended six months, to December 31, 2017”
 - Example: “The term of the contract is extended to December 31, 2017”

Amendment by Substitution

Current Contract Language:

3. CONTRACT TERM. This Contract shall be effective as noted below, unless sooner terminated by either party as specified in Section 10, Contract Termination. Contract is subject to Board of Examiners' approval (anticipated to be December 10, 2015).

Effective from: January 1, 2016 To: June 30, 2018

Amended Contract Language:

3. CONTRACT TERM. This Contract shall be effective as noted below, unless sooner terminated by either party as specified in Section 10, Contract Termination. Contract is subject to Board of Examiners' approval (anticipated to be December 10, 2015).

Effective from: January 1, 2016 To: **December 31, 2018**

Some Reasons for Amendment

CAUTION!

- Extending Term
- Increasing NTE Amount
- New or different service (careful not to make a material change in the solicitation or allow material changes to original proposals)
- Assignment/Change of Contractor's Form of Organization (There is a special amendment and assignment form)

Do you need a new contract? **Shortcut I**

- Purchasing Division Has a number of “Good of the State” or Master Agreements
- These can be used by multiple state agencies and sometimes local governments
- Go to Purchasing site and click “State Contracts” for the list
<http://purchasing.nv.gov/contracts/>
- Can be utilized by a purchase order

Shortcut II

- Does Vendor have a contract with GSA or another government agency for these same supplies, materials or equipment, and is willing to offer substantially similar prices?
NRS 333.480
- Can You join or use contracts of local governments located in or outside Nevada?
NRS 332.195
 - Applies to State as well as local governments!

Certified Contract Managers

Each agency must have a contract manager, who must take the Certified Contract Manager course offered by the Division of Purchasing. SAM 0322.

<http://purchasing.nv.gov/SA/TrainingOpps/>

The course covers procurement, contract management and use of the State's Contract Entry Tracking System (CETS)

Nevada Ethics in Government Law

Presented by:

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Executive Director



Nevada Commission on Ethics

What is the Nevada Commission on Ethics?

■ The Commission

- The Ethics Commission consists of 8 members appointed to serve 4-year terms
 - 4 members appointed by the Governor
 - 4 members appointed by the Legislative Commission.

■ Staff

- The state-wide staff to the Commission consists of an Executive Director, Commission Counsel, Associate Counsel, Investigator, Paralegal and an Executive Assistant.



Nevada Commission on Ethics

OUR MISSION

To enhance the public's faith and confidence in government and uphold the public trust by **ensuring that public officers and public employees commit themselves to avoiding conflicts** between their private interests and their public duties.

Conflict of Interest

A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.

~ Black's Law Dictionary, Eighth Edition



Commission Jurisdiction (2 years)

- ✓ Public Officers
- ✓ Public Employees
- ✓ State Legislators
 - ✓ Exceptions
- ✓ Former Public Officers and Employees

- ✓ Exceptions:
 - ✓ Judicial Officers
 - ✓ Advisory Board Members



Nevada Commission on Ethics

- Interprets and provides guidance on the statutory provisions of NRS 281A - the Ethics in Government Law (**First-Party Requests for Opinion**)
- Investigates and adjudicates complaints from public officers, public employees and the public (**Third-Party Requests for Opinion**)
- Accepts certain written disclosures

Personal Interests:

- “Pecuniary” (NRS 281A.139)
- “Commitments in a Private Capacity” (NRS 281A.065)
 - Family/Relatives
 - Employers
 - Business Interests
 - Household Members
 - Substantially Similar Relationships
 - Fiduciary Positions – Nonprofit Boards of Directors

PROHIBITED CONDUCT

- Gifts
- Improper Use of Public Position:
 - Unwarranted Benefits
 - Improper Contracts/Employment
 - Additional Compensation From Private Source
 - Using/Suppressing Nonpublic Government Info
 - Use of Governmental Property/Resources
 - Influencing Subordinate – Personal Benefit
 - Honoraria
 - Government Resources – Ballot Question/Candidate

PROHIBITED CONDUCT

GIFTS...



(Improper Influence)

NRS 281A.400(1)

PROHIBITED CONDUCT

- IMPROPER USE OF POSITION
 - Unwarranted Benefits



NRS 281A.400(2)

PROHIBITED CONDUCT

- IMPROPER USE OF POSITION

Improper Contracts/Employment
(Negotiating/Entering)



NRS 281A.400(3,10); 281A.430

PROHIBITED CONDUCT

- IMPROPER USE OF POSITION

Additional Compensation – Private Source



NRS 281A.400(4)

PROHIBITED CONDUCT

■ IMPROPER USE OF POSITION

Using/Suppressing Non-public Government Information



NRS 281A.400(5,6)

PROHIBITED CONDUCT

■ IMPROPER USE OF POSITION

Using Government Resources



NRS 281A.400(7)

PROHIBITED CONDUCT

Honoraria for performing your public duty.



Causing a governmental entity to make an expenditure to support or oppose a ballot question or candidate (during period between candidate filing and election).



“Cooling-Off” Prohibitions

- One-year cooling off period to seek or accept employment or certain private representations after leaving public service (certain exceptions) (NRS 281A.550(3) and (5) and 281A.410)
- Relief **may** be granted from the strict application of certain prohibitions. (NRS 281A.550(6))

Disclosure and Abstention for Public Officers and Employees

Walking the Disclosure & Abstention tightrope



Disclosures

- **Disclosure** is mandatory for any interest created by:
 - ✓ A gift or loan
 - ✓ A **substantial*** pecuniary interest
 - ✓ A “commitment in a private capacity”
- **Disclosure** must be made at the time the matter is considered.
- **Sufficient** to Inform Public – Nature and Scope

Disclosure – Public Employees

- **To supervisory head of organization**
- **Sufficient to inform public**



Voting & Abstention

Abstention is ***required only*** in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected.

This determination should be made by the public officer and explained **on the record**.

Voting & Abstention

- Voting is presumed permissible **if the** resulting benefit/detriment to the public officer (or committed person) is no greater than the benefit/detriment to anyone else affected by the matter.

Penalties

- The Commission is authorized to impose civil penalties for **willful** violations of the Ethics in Government Law..
- Mitigating factors

Penalties:

Monetary sanctions & referral for removal from office

- Not to exceed **\$5,000** for a first willful violation;
- Not to exceed **\$10,000** for a separate act or event that constitutes a second willful violation; and
- Not to exceed **\$25,000** for a separate act or event that constitutes a third willful violation.
- **Referral for removal** from position of trust.

The Commission must consider comparable situations in a comparable manner and ensure the disposition of a matter bears a reasonable relationship to the severity of the violation.

SAFE HARBOR PROVISIONS

No willful violation **IF:**

(a) The public officer or employee relied in **good faith** upon the **advice of the legal counsel** retained by his or her the public body, agency or employer:

and

(b) The legal advice was:

- Provided before conduct; and
- Not contrary to prior published opinion on Commission website.



Pending Legislation

- 79th (2017) Legislative Session
 - SB 30 (Attorney General)
 - SB 36 (Governor)
 - SB 84 (NCOE, Sponsored by Governor)

Commission Opinions & Other Resources

- Resources and Opinions of the Nevada Commission on Ethics are indexed on the NCOE website:

www.ethics.nv.gov

(New website!)

Nevada Commission on Ethics

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Nevada Public Records Act (NPRA) Overview

Asheesh S. Bhalla, Deputy Attorney General

2017 Training

AGENDA

- ▶ What is a public record?
- ▶ The Nevada Public Records Act (NPRA) - NRS 239
- ▶ Response Requirements
- ▶ Costs and Fees
- ▶ Judicial Review
- ▶ Q & A

What is a Public Record?

- All state agency records are public unless declared confidential by law. NRS 239.010.
- Under the NPRA, information is by default public record unless specific confidentiality restrictions apply.
- ▶ The NPRA allows both written and verbal requests for public records. *See NRS 239.0107(1)*.
 - ▶ E.g. - A request for an agenda or supporting material at an open meeting of a public body.

Nevada Public Records Act (NPRA)

- ▶ Codified in NRS Chapter 239.
- ▶ General framework to use when handling public record requests.
 - ▶ Confidentiality requirements per statute; and
 - ▶ Public interest regarding the information where specific confidentiality statutes are non-existent.

General Premise of NPRA

- The NPRA favors:
 - Transparency in government;
 - Open access to agency records; and
 - Liberal construction of statutory text in order to maximize the public's right of access to agency records.

General Premise of NPRA

- ▶ “The Legislature has declared that the purpose of the NPRA is to further the democratic ideal of an accountable government by ensuring that public records are broadly accessible.” *Reno Newspapers, Inc. v. Jim Gibbons, Governor of the State of Nevada*, 127 Nev. Adv. Op. 79, at 5 (2011) (citing NRS 239.001(1)).
- ▶ Records requested must be identifiable and requests must not be overbroad. *See State ex re. Zidonix v. Columbus State Community College*, 976 N.E.2d 861, 866-67 (Ohio 2012).
- ▶ Records should be presumed to be public unless a specific statute provides for confidentiality.

Bradshaw Balancing Means

- “Weighing” the agency’s interests in non-disclosure against the general policy in favor of open government and the requestor’s “*fundamental right*” to access public records.
- The burden is upon the agency to explain why the records requested should not be furnished, with specific evidence justifying the withholding of the records.
- Government interest in withholding must “clearly” outweigh the public interest in disclosure.

Denying Request or Withholding Records

- Regulatory and Statutory Confidentiality Provisions
 - State Statute
 - NRS 239.010
 - State Regulation
 - Federal statute
 - Case law
- If none of the above, then *Bradshaw* balancing test.

A Written Response is Required

- An agency must respond in writing to records requests by not later than the end of the *fifth business day* after the request is received. NRS 239.0107(1).
- If a public book or record is readily available, in lieu of a written response the agency shall allow the requestor to inspect or copy or receive a copy of the record.
- Do you have a public records policy and procedure to ensure that you are meeting this timeframe?

Extraordinary Requests **MUST** be in writing.

- All extraordinary requests must be in writing. See NRS 239.055.
- What is “extraordinary” will vary based on the request, the size of your agency, and other factors. See NSLA Manual.
 - Non-extraordinary requests may be oral and may not be ignored or required to be submitted in writing.
- Does your public records policy and procedure define “extraordinary”?
 - It should! See NSLA Manual.

5th Business Day Written Response

- Three Options
 - Provide the records requested either by giving a copy to the requester or allowing the requester to inspect the records;
 - Provide the date when the records will be available; or
 - Inform the requester that the agency does not have the requested records, and provide the name and contact information for the government entity that does have the records, if known.

When Denying the Request and/or Withholding the Record

- The agency must provide a written response and a citation to statute or other legal authority making the record confidential. NRS 239.0107(d).
- The agency generally must provide a log to the requestor describing each individual withheld record. Gibbons, 127 Nev. Adv. Op. at 12.
 - The agency may be exempt from providing a log to the requestor if the agency can demonstrate that the requestor has sufficient information to meaningfully contest the claim of confidentiality without a log.

Withheld Records Log

- This log should contain “a general factual description of each record withheld and a specific explanation for nondisclosure.”
 - Gibbons, 127 Nev. Adv. Op. at 13.
- The explanation should include specific authority supporting the nondisclosure of the record and a reason why this authority supports the agency’s claim of confidentiality. “[A] string of citations to a boilerplate declaration of confidentiality” does not satisfy the agency’s requirements under the NPRA. Gibbons, 172 Nev. Adv. Op. at 16 (citing NRS 239.0107(1)(d)(2)).

Recover Actual Costs

- An agency may recover its actual costs in providing a copy of a public record to the requestor. NRS 239.052.
- Providing copies of public records to the public is deemed part of the agency's regular duties. Thus, these costs generally may include only actual costs incurred in responding to the records request, such as those for toner, paper, and postage, and not employee time in responding to the request, unless the request is extraordinary.

Extraordinary Use

- ▶ These charges are in addition to actual costs.
- ▶ The fee for extraordinary use may not exceed 50 cents a page.
- ▶ You must define “extraordinary use” in your public records policy to recover extraordinary use costs when responding to a public records request.
- ▶ Does your policy address this?

No Charge for Minutes and Recordings of Meetings

- Minutes of public meetings are public records. Minutes or audiotape recordings of the meetings must be made available for inspection by the public within 30 working days after the adjournment of the meeting and a copy of the minutes or audio recordings must be made available to a member of the public upon request at no charge. NRS 241.035(2).
- All agencies must have five years of minutes; the remainder may be sent to State Archives. See NRS 241.035(2).

List of Fees

- The agency must prepare and maintain a list of its fees for providing public records, which should be posted in a conspicuous place in each of its offices. NRS 239.052(3).

District Court Review

- Pursuant to NRS 239.011, if a public records request is denied by the agency, the requestor may apply to the district court in the county where the book or record is located for an order:
 - Permitting the requestor to inspect or copy the book or record; or
 - Requiring the agency who has legal custody or control of the public book or record to provide a copy to the requestor.

Record Retention and Archiving

- ▶ At the appropriate time according to your Records Retention Schedule:
 - ▶ Destroy securely or
 - ▶ Send to State Library and Archives
- ▶ For more information:
 - ▶ <http://nsla.nv.gov/>, click on “Records Management” at the top, then “State Agencies,” and then look for the retention schedule you need.

Q & A





Open Government Training

Asheesh S. Bhalla, Deputy Attorney General

2017 Training

ROADMAP

- ▶ What is Open Government?
- ▶ How does Open Government work in Nevada?
- ▶ What is a “meeting”?
 - ▶ Notice
 - ▶ Agenda
 - ▶ Public Comment
- ▶ Nevada Public Records Act

What is Open Government?

▶ Open Government is:

▶ Constitutional Right (1st Amendment)

- ▶ The U.S. Supreme Court consistently has recognized that the public and press have a presumptive First Amendment right of access to judicial proceedings in criminal cases, finding that “a presumption of openness inheres in the very nature of a criminal trial under our system of justice.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).
- ▶ In addition to the constitutional right - and even where it does not apply - “the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978)

▶ Federal Laws and Regulations

- ▶ Freedom of Information Act 5 USC 552a
- ▶ Privacy Act 1974
- ▶ Classified Information - Executive Order 13526
- ▶ Controlled Unclassified Information (CUI) 32 CFR Part 2002

▶ State Laws

- ▶ Nevada Open Meeting Law (OML) -1960, 2011
- ▶ Nevada Public Records Act (NPRA)

Overcoming the Presumption of Openness

- ▶ Where a constitutional presumption of access applies, the court may close proceedings only after making specific, on-the-record findings:
 - ▶ (1) that closure is necessary to further a **compelling governmental interest**;
 - ▶ (2) the closure order is **narrowly tailored** to serve that interest; and
 - ▶ (3) that **no less restrictive means** are available to adequately protect that interest.

Applicability of the Open Meeting Law (OML) in Nevada

- ▶ The governing body of a city is a public body. NRS 241.015(4)(a).
- ▶ Public bodies working on behalf of Nevada citizens must conduct open meetings in conformity with the statutory requirements of the OML including the requirement to publish an agenda that provides full notice and disclosure of discussion topics and any possible action.

NRS 241.015(4)(a)

Any administrative, advisory, executive or legislative body of the State or a local government consisting of at least two persons 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, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof . . . if the administrative, advisory, executive or legislative body is created by:

- ▶ (1) The Constitution of this State;
- ▶ (2) Any statute of this State;
- ▶ (3) A city charter and any city ordinance which has been filed or recorded as required by the applicable law;
- ▶ (4) The Nevada Administrative Code;
- ▶ (5) A resolution or other formal designation by such a body created by a statute of this State or an ordinance of a local government;
- ▶ (6) An executive order issued by the Governor; or
- ▶ (7) A resolution or an action by the governing body of a political subdivision of this State; . . .

Open Meeting Law (NRS Chapter 241)

- ▶ “In exacting this chapter, 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.” NRS 241.010(1).
- ▶ “The exceptions provided in this chapter, and electronic communication, must not be used to circumvent the spirit or letter of this chapter to deliberate or act, outside of an open and public meeting, upon a matter over which the public body has supervision, control, jurisdiction or advisory powers.” NRS 241.016(4).
- ▶ The spirit and policy behind the OML favors open meetings and any exceptions thereto should be strictly construed. *McKay v. Board of Supervisors*, 102 Nev. 644, 730 P.2d 438 (1986).

Open Meeting Law (NRS Chapter 241)

- ▶ **AGENDA:** Must provide full notice and disclosure of discussion topics and any possible action.
- ▶ **DECISIONS:** Deliberation and action must be properly noticed and taken openly.
- ▶ **DECISIONS:** Action is only taken by the body as a whole.
- ▶ **SUBCOMMITTEES:** To the extent a multimember group is appointed by a public body and given the task of making recommendations to that public body, that group is also a “public body” subject to the OML.

What is a Meeting?

- ▶ The governing body of a charter school is required to hold public meetings at least quarterly. NRS 388A.320.
- ▶ NRS 241.015 says:
 - ▶ **Quorum** of members of a public body *gathering* together with:
 - ▶ **Deliberation** toward a decision; and/or
 - ▶ **Action:** which means making a decision, commitment or promise over a matter within the public body's supervision, jurisdiction, control or advisory power.

Meeting Notice and Agenda - NRS 241.020

- ▶ Time, place and location of meeting
- ▶ List of locations posted
- ▶ Agenda consisting of a **clear and complete** statement of the topics scheduled to be considered
- ▶ Action items clearly denoted as “for possible action”
- ▶ Public comment at beginning/end or before any action item
- ▶ Posted at office of the public body *or* location of meeting **and** 3 other separate, prominent places within Nevada
- ▶ Posted at public body website **and** at www.notice.nv.gov
- ▶ Posted no later than 9 AM of the third working day before the meeting

What is “Clear and Complete?”

- ▶ Agenda items must be **clear and complete**. NRS 241.020(2)(d)(1).
- ▶ A **higher degree of specificity** is necessary for topics of **substantial public interest**. *Sandoval*, 119 Nev. at 154-55, 67 P.3d at 906. Factors to consider include:
 - ▶ Does the topic generate public comment?
 - ▶ Does the topic generate debate among the members of the body?
 - ▶ Does the topic generate media interest/coverage?

Meeting Notice and Agenda Contents

- ▶ **RECORDS:** Name and contact information for person the public may request supporting materials from and locations where the supporting material is available
- ▶ **CLOSED SESSION:** If any portion of the meeting will be closed to consider the character, alleged misconduct or professional competence of a person, the name of the person
- ▶ **ADMIN ACTIONS:** If the public body will consider whether to take administrative action regarding a person, the name of the person
- ▶ **STACKED AGENDA:** Notification that items on the agenda may be taken out of order, may be combined for consideration, and may be removed from the agenda or delayed for discussion at any time

Additional Requirements (Accommodations and Notice)

- ▶ ACCOMODATIONS: Public bodies shall make reasonable efforts to assist and accommodate persons with physical disabilities desiring to attend. NRS 241.020(1).
- ▶ Notice to persons who have requested notice of meetings pursuant to NRS 241.020(3)(c).
- ▶ Additional notice requirements for consideration of character, misconduct, competence, or physical or mental health: 5 days personal service or 21 days certified mail. NRS 241.033. This would not apply to passing remarks.
- ▶ An emergency meeting may only be called where the need to act upon a matter is truly unforeseen and circumstances dictate that immediate action is required. NRS 241.020(9).

Meeting Materials and Recording

- ▶ One copy of the agenda, any supporting materials, and the recording of a public meeting must be provided at no cost to a member of the public requesting them and *at least* one copy made available at the meeting. NRS 241.020(6); NRS 241.035(2).
- ▶ Supporting materials must be available to the public when provided to public body members. NRS 241.020(7).
- ▶ Meeting must be recorded or transcribed. NRS 241.035(4).

Exceptions - NRS 241.030

- ▶ Closed sessions may be held by any public body to consider:
 - ▶ Character;
 - ▶ Alleged misconduct;
 - ▶ Professional competence;
 - ▶ Physical or mental health of a person,
 - ▶ With some exceptions, or to prepare, revise, administer, or grade examinations administered on behalf of the public body;
 - ▶ Consider an appeal by a person of the results of an examination administered on behalf of the public body.

Public Comment Pitfalls

- ▶ Restrictions must be reasonable “time, place, and manner” restrictions. NRS 241.020(d)(7). This means NO:
 - ▶ Halting comment based on viewpoint of speaker;
 - ▶ Halting comment upon belief defamation is occurring; or
 - ▶ Halting comment critical of a public official.
- ▶ But, presiding officer may halt comments that become unduly repetitive or that stray from the scope of a specified agenda topic for which comment is offered, or halt conduct that is willfully disruptive. *See Kindt v. Santa Monica Rent Control Bd.*, 67 F.3d 266 (9th Cir. 1995); *White v. City of Norwalk*, 900 F.2d 1421, 1425-26 (9th Cir. 1990).
- ▶ The OML does not “[p]revent the removal of any person who willfully disrupts a meeting to the extent that its orderly conduct is made impractical.” NRS 241.030(4)(a).

Violations

- ▶ Actions taken in violation of the law are void. NRS 241.036.
- ▶ The OAG has statutory enforcement powers under the OML and the authority to investigate and prosecute violations of the OML. NRS 241.037; NRS 241.039; NRS 241.040.
- ▶ When a violation of the OML occurs or is alleged, the OAG recommends that the public body made every effort to promptly correct the apparent violation. NRS 241.0365.
- ▶ Although it may not completely eliminate the violation, corrective action can mitigate the severity of the violation and further ensure that the business of government is accomplished in the open.
- ▶ Corrective action is prospective only. NRS 241.0365(4).

Using Technology for a Meeting

- ▶ Quorum of a public body using serial electronic communication to deliberate toward or make a decision violates law. NRS 241.016(4); *Del Papa v. Board of Regents*, 114 Nev. 388, 956 P.2d 770 (1998).
- ▶ If technology is used to convene a quorum for a public meeting:
 - ▶ There must always be a physical location for members of the public to attend the meeting. NRS 241.020(1).
 - ▶ All the members of the public body and the members of the public who are present at the meeting must be able to hear or observe and participate in the meeting. NRS 241.010(2).
 - ▶ That technology must not be used to circumvent the spirit or letter of the OML. NRS 241.016(4).

Procedure and Ethics Guidelines

- ▶ Parliamentary procedure is not addressed in the OML - Duties of the presiding officer, recognizing speakers, motions and voting, making a clear record. *See Robert's Rules of Order* (11th ed. 2011).
- ▶ Disclosure and abstention **prior to consideration of a topic** in conformance with Ethics in Government Law (NRS Chapter 281A). Abstain only in a clear case where the independence of judgement of a reasonable person in your situation would be materially affected by the conflict of interest disclosed. *See* NRS 281A.420; *see also Carrigan v. Commission on Ethics*, __ Nev. __, 313 P.3d 880 (2013).

Administrative Procedure (NRS Chapter 233B)

- ▶ Due process of law is required whenever the state deprives a person of “life, liberty, or property.” U.S. Const. amend. XIV § 1; Nev. Const. art. 1, § 8.
- ▶ Due process requires:
 - ▶ Reasonable notice that an action is pending and of the factual and legal issues that will be adjudicated; and
 - ▶ An opportunity for a hearing, including the opportunity to present evidence, call witnesses and cross-examine opposing witnesses (NRS 233B.121),
 - ▶ Before an impartial adjudicator. *Stivers v. Peirce*, 71 F.3d 732, 741-42 (9th Cir. 1995).

Administrative Procedure (NRS Chapter 233B)

- ▶ Initial notice provided to respondent pursuant to NRS 233B.127(3) prior to the matter being scheduled for hearing. When a matter is scheduled for hearing, respondent then receives a complaint and notice of hearing pursuant to NRS 233B.121, which summarizes the factual allegations and alleged violations of law.
- ▶ Due process also requires that Board members not conduct their own investigations or engage in *ex parte* discussions regarding disciplinary cases before the Board. NRS 233B.122; NRS 233B.126.
- ▶ The Board's duty as an adjudicator is to develop a full record supporting a **reasoned decision** based upon clearly and separately-stated findings of fact and conclusions of law. NRS 233B.125.

Q & A



Administrative Rulemaking

State of Nevada, Office of the
Attorney General, Boards and
Commissions Training 2017

Caroline Bateman, Chief Deputy Attorney General



Administrative Rulemaking

- Administrative Rulemaking refers to the creation (drafting and approval) of regulations as outlined in NRS Chapter 233B.

What is a Regulation? (NRS 233B.038(1))

- Definition
 - “An agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency.”
- Designated by Statute
 - Applies to the public in general or to all licensees.
 - Affects private rights or procedures available to the public.

What is NOT a Regulation? (NRS 233B.038(2))

- Guidelines governing the internal management of the agency, such as internal policies and procedures regarding day-to-day business.
 - Example: Desk manual which provides procedures for opening and sorting mail, preparing bank deposits, etc.
- Guidelines do not affect the private rights or procedures available to the public.



Regulations are also NOT

- Declaratory rulings or orders,
- Agency decisions or findings in a contested case, and
- Contracts or agreements entered into by agencies.
- Why?
 - Because these are NOT of general applicability—these items deal with specific situations and specific sets of facts. They are not mandatory for everyone to follow.



When In Doubt, Consider a Regulation

- With few exceptions, anything you want the public and/or licensees to know about and/or follow should become a regulation.
- If it was not on the previous “not” lists, it probably should be a regulation.

Why Adopt Regulations?

- *Dunning v. Nevada State Board of Physical Therapy Examiners*, Nevada Supreme Court Case No. 67322 (*Unpublished* 2016)
 - In 2013, the Board adopted a policy prohibiting licensees from using the terms “osteopractic” or “osteopractor” in any manner, including advertising.
 - The Board published this policy on its website and by sending it to all licensees in a newsletter.
 - The Board did not engage in rulemaking with regard to this policy, i.e., turn it into a regulation.

Market Participants

- The Nevada Supreme Court held that this policy was a regulation because it was of general applicability.
- “[W]here an interpretive ruling affects other market participants, appears to be part of a general policy, and ‘is of such major policy concern and of such significance’ that it may be characterized as being of general applicability, the ruling is a regulation.” *Dunning*, at 4 quoting *State Farm Mut. Auto Ins. Co. v. Commissioner of Ins.*, 114 Nev. 535, 543, 958 P.2d 733, 738 (1998).

When to Adopt Regulations?

- If the Board wants to require all licensees to do something
 - MAKE A REGULATION.
 - Example: Internship hours, providing specialty area of practice in renewal, completing training, submitting information to the board.
- If the Board wants to prohibit all licensees from doing something
 - MAKE A REGULATION.
 - Example: Misleading advertising, outside the scope of practice.

Force and Effect of Law

- “A properly adopted substantive rule establishes a standard of conduct which has the force of law.” *State ex rel. Tax Comm’n v. Safeway*, 99 Nev. 626, 630, 668 P.2d 291, 294 (1983).
- This means that, after adoption by the agency, a regulation has the same power and effect as a law passed by the Legislature.
- For example, a licensee of a state agency, must conform his/her actions to those specified by both statutes and regulations for that agency.

Who Can Make Regulations?

- Must have authority in the NRS from the Legislature
 - “Enabling Statute”
 - Broad based, ex. NRS 385.080: State Board of Education is authorized to “. . .adopt regulations for its own government and as necessary for the execution of the powers and duties conferred upon it by law.”
 - Specific, ex. NRS 388.133: Department of Education required to “. . .prescribe by regulation a policy for all school districts and public schools to provide a safe and respectful learning environment that is free from bullying and cyberbullying.”

Special Subject Areas

- For monetary sanctions , penalties, or fees, the agency must have specific NRS authority authorizing the regulation.
 - Authority to make regulations regarding licensing does not provide authority to institute an application fee for licensure by regulation, there must be a statute authorizing a Board or Agency to charge a fee for the application.
- To obtain fingerprint records for applicants, the agency must have specific NRS authority authorizing the agency to require fingerprint cards be submitted by licensure applicants.



When in Doubt

- Check your enabling statutes for the parameters.
- Ask your assigned Deputy Attorney General for guidance.
- Don't enact a policy instead of adopting a regulation.
- Don't enforce a requirement or restriction, if you have not adopted a regulation.



Types of Regulations

- Permanent (Preferred)
- Temporary
- Emergency



Permanent Regulations - Requirements

- Workshop(s)
- LCB Review and Edits
- Adoption Hearing
- Resubmitted to LCB
- Legislative Commission
- Upon Approval, file with the Secretary of State
- Proposed Regulations must be submitted to the LCB Between July 1, odd years and June 30, even years to be Permanent

Temporary Regulations

- Workshop(s)
- No LCB Review
- Adoption Hearing
- No Legislative Commission, unless requested by a Legislator
- File with SOS, no sooner than 35 days after the date the temporary regulation was adopted
- Between July 1, even years and July 1, odd years
- Expires on November 1 of the odd year, permanent regulation must be adopted



Emergency Regulations (NRS 233B.0613)

- No Workshop
- No LCB Review
- No Adoption Hearing
- Submission to Governor with statement describing emergency which requires the regulation
- Governor Signs
- File with SOS
- Good for 120 Days



Drafting Regulations

- Step One: Draft the regulation language or draft a summary of the regulation change needed.

Drafting Regulations (Cont.)

- Step Two: Consider the impact of the proposed regulation on small businesses and prepare (if applicable) a small business impact statement.
 - If there is an impact, the Agency must conduct an analysis of the likely impact of the regulation on small business. The analysis may be conducted by someone employed by the Agency who is most knowledgeable in the subject area or an outside consultant.

Drafting Regulations (Cont.)

- Step Three: Conduct at least one workshop to discuss the general topic or topics covered by the proposed regulation.
 - Workshops require 15 days notice to the public
- Step Four: Submit the proposed regulation text to the LCB or submit the summary of the regulation change needed and ask LCB to draft regulation.

Drafting Regulations (Cont.)

- Step Five: After receiving the proposed regulation back from LCB, review regulation to ensure intent of the regulation is incorporated, prepare and post the Notice of Intent to Act Upon Regulations.
 - Adoption Hearings require 30 days' notice of the public hearing, and must be posted with the LCB draft of the regulation
- Step Six: Receive public comments about the proposed regulation at a public hearing.

Drafting Regulations (Cont.)

- Step Seven: Consider the comments received from the public and business affected by the proposed regulation.
- Step Eight: Final Adoption.
- Step Nine: Prepare Informational Statement.
 - NRS 233B.066 – Includes requirements for the informational statement
- Step Ten: Return Adopted regulation to LCB for inclusion in the next Legislative Commission meeting



Drafting the Text

- Include a citation to the NRS authority authorizing the agency to make the regulation.
- Goals in writing are accessibility, clarity, and conciseness. NRS 233B.062.
- Gender neutral language.



Drafting the Text

- Look for related or relevant NAC provisions from other agencies, some may provide helpful guidance. Try to be consistent with the language found in other sections of NAC within your chapter
- Include the whole section of NAC being amended.
- It is not necessary to include the entire chapter of NAC if you are not amending it all.

Drafting the Text

- For the new language—make the font colored and italicized, i.e. *not black*
- Include brackets and strikethrough in the language you are proposing to be deleted:
[~~grass~~]

Small Business Impact

- Before conducting a workshop on a proposed regulation, the agency must make a concerted effort to determine whether the regulation is likely to “[i]mpose a direct and significant economic burden upon a small business” or “[d]irectly restrict the formation, operation or expansion of a small business.” NRS 233B.0608(1).

Small Business Impact

- If the agency believes there will be such an impact it must pursuant to NRS 233B.0608(2):
 - If practical, consult with owners and officers of small businesses likely to be affected,
 - Conduct an analysis of the likely impact of the proposed regulation on small businesses. The analysis must be conducted by the employee of the agency who is most knowledgeable about the subject of the regulation and the likely impact or a consultant or independent contractor
 - Consider methods to reduce the impact of the regulation on small businesses, and
 - Prepare a small business impact statement and make copies of the statement available to the public at the workshop and public hearing on the regulation.

Hold a Workshop

- Schedule a workshop to discuss the proposed language of the regulation
- Notice must be posted 15 days before the workshop and an electronic copy of the notice must be submitted to the Director of LCB for posting on LCB's website: <http://www.leg.state.nv.us/App/Notice/A/>
- Agency is required by law to have a mailing list of persons interested in regulatory changes
- Adoption Hearing on the regulation cannot occur on the same day as the workshop
- Incorporate any input from the workshop into the regulation

Workshops

- Proposed language is not required at workshop.
- All workshops MUST be conducted in accordance with Nevada's Open Meeting Law, NRS Chapter 241. NRS 233B.061(5).
 - **Minimum Open Meeting Law Requirements:**
 - Agenda,
(Posted as required by the Open Meeting Law and on the LCB site)
 - Recording, and
 - Minutes.

Submission to LCB (Pre-Adoption)

- The agency must deliver a copy of the proposed rule to the Legislative Counsel Bureau at the start of the rulemaking process. NRS 233B.060; NRS 233B.063.
 - Regulation will be assigned an “R#.”
- NRS 233B.063 requires that the LCB review the regulation to determine whether the language is clear, concise, and suitable for incorporation in the NAC.



Submission to LCB (Pre-Adoption)

- LCB will draft the regulation to carry out what it can determine is the intent of the regulation.
- The Agency should review the language of the proposed regulation after LCB has drafted it to ensure that the regulation carries out the intent of the Agency. If it does not, contact LCB to discuss the intent and possible revisions to the regulation to ensure it carries out the intent.

Submission to LCB (Pre-Adoption)

- LCB is required to draft the regulation within 30 days pursuant to NRS 233B.063(2). However, if LCB has questions concerning the regulation, the Agency must ensure someone is available to answer those questions to ensure this timeline is met. Occasionally with more substantive regulations, drafting may take longer than the 30 days.
- LCB will review authority for a regulation and ensure that the agency may adopt a regulation in that subject area.



Notice of Intent to Act Upon Regulations

- Prepare and post the Notice of Intent to Act Upon Regulations.
 - This Notice is the notice for the date, time, place of public hearing. Must be submitted to the Director of LCB for posting on LCB's website
 - 30 days' notice is required.
 - Notice may not be given UNTIL after the agency receives the approved or revised text of the proposed regulation from the LCB.
 - Requirements of Notice are codified in NRS 233B.0603.
 - The Office of the Attorney General adopted a regulation, NAC 233B.010, that specifies the form of the Notice.



Notice of Intent to Act Upon Regulations

- See Appendix B of Administrative Rulemaking Manual for copy of the form required for the Notice and should be used in all cases to provide the required notice of rulemaking.
- Because this form does not satisfy the Open Meeting Law requirements for an agenda, a separate agenda for the public hearing must also be prepared.
 - Don't forget to post this agenda on the LCB site.

Who Gets the Notice?

- When Notice is given, provide a copy of the Notice and the proposed text of the regulation to the State Library and Archives Administrator.
- One copy to the Director of LCB for posting on LCB's website: <http://www.leg.state.nv.us/App/Notice/A/>
- Also, send a copy in word format to the LCB for posting to the Register
- One copy of the Notice and text of proposed regulation must also be kept in each of the agency's offices.
- Send one copy of Notice and text of proposed regulation to the main public library in any county where the agency does not maintain an office.

Who Gets the Notice?

- Send copies to all persons on the agency's mailing list for regulations.
- Affirmative duty to solicit comment on proposed regulations and provide notice to the public.
 - In general, the more notice provided, the better.
 - May provide notice to other public and private places, such as courthouses and offices of businesses or professional associations.

The Public Hearing (Adoption)

- At the time and place set for hearing on the proposed regulation, the agency must afford “[a]ll interested parties . . . a reasonable opportunity to submit data, views or arguments upon a proposed regulation.” NRS 233B.061(1).
- The agency must accept both oral comments at the public hearing and written comments.
 - The agency must set a deadline for receipt of written comments, keeping in mind the need for those acting on the proposed regulation to have time to consider all comments received prior to adoption.

The Public Hearing

- All public hearings MUST be conducted in accordance with Nevada's Open Meeting Law, NRS Chapter 241. NRS 233B.061(5).
 - Minimum Open Meeting Law Requirements:
 - Agenda,
 - Recording, and
 - Minutes.
 - The minutes of the hearing are a public record and must be available for public inspection and should be included in the agency's file for the regulation and retained for at least 5 years.
 - For more information regarding the Open Meeting Law:
 - NRS Chapter 241
 - Open Meeting Manual, published by the Nevada Attorney General's Office online at <http://ag.nv.gov/> (click publications, manuals and guides, Open Meeting Law Manual.)

Consideration of Public Comment

- The person or body with the authority to adopt the regulation must “consider fully” all oral and written comments received on the proposed regulation. NRS 233B.061(3).
- In some cases the hearing may be held at the same time as a public meeting of the board or commission called to consider and take action on the regulation.
 - In that case, since the members will have been present for the taking of public comments and may review any written comments previously submitted, this would appear to be an efficient means of complying with this requirement, provided that the members take the time to discuss the comments received in the public meeting prior to adoption.



Consideration of Public Comment

- Boards or commissions considering the public comments on proposed regulations should retain in the minutes a record of their discussion regarding the public comment and their reasons for either amending the proposed rule in response to the comments or adopting the rule without change.



Adopting the Regulation with Changes

- Generally speaking, if the text of the proposed regulation changes substantively as a result of public comment that it must be again submitted to LCB for review prior to adoption.
- LCB will draft a “revised proposed” regulation and the Agency will have to post a notice and consider comments before adoption
- If the changes are not substantive, an agency may adopt the regulation with those changes.



Adopting the Regulation with Changes

- Do not avoid making needed changes because the process may be extended.
 - The proposed regulations will eventually become law, and it is important that it meets the Agency's intent and the needs of the Agency and the public.
- To avoid problems, the Agency's attorney should be consulted regarding changes.



Two-Year Time Period (NRS 233B.040)

- An Agency has two (2) years from the date the proposed regulation was submitted to LCB for drafting to adopt it.
- If the agency does not adopt it within the two (2) years, the executive head of the agency must appear before the Legislative Commission before it moves forward with adopting the regulation

Two-Year Time Period

- Review the Agency's pending regulations and withdraw any regulations that the Agency is not going to pursue by sending an e-mail to Deb Corp requesting that the regulation be withdrawn.
- Recommendation: Any regulations that are outside this two-year time period should be withdrawn and the process restarted for any that the Agency still wishes to pursue.
- An agency may withdraw a regulation by submitting an email indicating as much to Deb Corp at dcorp@lcb.state.nv.us

Final Adoption

- Adopt the regulation and file the original with the LCB. Upon its filing with the Secretary of State by the LCB, file a conformed copy with the State Library and Archives Administrator.
 - **Items to file with the LCB:**
 - Original, final copy of the regulation,
 - Informational statement required by NRS 233B.066, which must include an explanation concerning the need for the regulation
 - Form for Filing Administrative Regulations, and
 - The form Notice of Adoption of Regulation (see Appendix F to Administrative Rulemaking Manual).



Legislative Commission Approval

- Regulation will now be reviewed and approved by Legislative Commission or Subcommittee to Review Regulations.
- *See* NRS 233B.066 for information required in Informational Statement. *See also* Appendix G of Administrative Rulemaking Manual.



Informational Statement

- If the Agency does not provide the informational statement or the small business impact statement, LCB will return the regulation to the agency indicating the missing documents.
- Unless the documents are supplied, LCB will not submit the regulation to the Legislative Commission.

Legislative Commission

- Legislative Commission will review regulation for conformity with legislative authority and intent after it has been adopted and approve the regulation before it becomes effective.
 - Regulation will be reviewed at the Legislative Commission's next scheduled meeting or be referred to Subcommittee to Review Regulations.
- For permanent regulations, affirmative action by the Legislative Commission or Subcommittee to Review Regulations is required to approve or object to a regulation.
 - If no action is taken by the Commission or Subcommittee, the regulation does not become effective.



Legislative Objection to Regulation

- The majority of the time, issues are resolved prior to adoption through discussions with the LCB attorney reviewing the regulations.
- However, pursuant to NRS 233B.067(5) the Legislative Commission or Subcommittee to Review Regulations may object to a regulation on one of the following three grounds:



Legislative Objection to Regulation

- If there is an objection by the Legislative Commission or Subcommittee to Review Regulations on one of those four grounds, the agency must revise the regulation and return it to the LCB within 60 days.
- Regulation does not become effective until the Commission or Subcommittee approves the regulation and the LCB files the regulation with the Secretary of State. NRS 233B.0675.



Effective Date

- A regulation usually becomes effective upon filing with the Secretary of State, unless a statute prescribes a specific time when the regulation becomes effective or a later date is specified in the regulation.

Maintenance of Regulations

- Provide a copy of regulations to any person who requests a copy.
- Periodic Review
 - Rules of Practice: At least every three years, file form with Secretary of State.
 - OAG has a sample form that will be added to our Administrative Rulemaking Manual when it is next updated but it can provide upon request.
 - All Regulations: At least every ten years, to determine whether to amend or repeal any regulations.



Questions?

Social Media for Public Officers, Public Employees, Board and Commission Members

Deputy Attorney General, Asheesh S. Bhalla

BOARDS AND COMMISSIONS TRAINING 2017

What is Social Media?

- SOCIAL MEDIA - forms of electronic communication (such as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).

Examples of Popular Sites

- Facebook
- LinkedIn
- Twitter
- Personal Blog sites
- Pinterest
- Instagram
- Snapchat

Rule #1

- ***Assume everything you say and do on a social network will become public.***
 - Best Plan: NEVER post about Board business or your work with the public agency.
 - Ask yourself: Would I want to see this on the front page of tomorrow's newspaper?
 - Do not blog, post or tweet when you are angry, frustrated or intoxicated.
 - Humor fails, often. When in doubt, don't post.
 - Retaliation is a bad idea.
 - "Telling the truth" might cause problems for you.
 - Assume that once it is on the Internet, it is there forever.

Example

- Anya Cintron Stern is a Public defender in Miami-Dade. During a trial break, the family of her client brings him fresh clothing including a pair of leopard print briefs.
- Stern takes a picture of the briefs and posts them on her Facebook page with the caption “Proper attire for Trial?” Stern posts pictures for Friends only, but a Friend notifies the Judge who declares a mistrial.

Caught in a Lie...

- Judge Susan Criss of Galveston, Texas friends all attorneys.
- Attorney who appeared before her and was her “Friend” asked for a continuance due to the death of her father and the need to attend services.
- During the week of the alleged services, Attorney posted a string of status updates on Facebook, detailing her week of drinking, going out and partying.
- On her return to Criss’ court, the attorney asked for another continuance – Criss denied it, presented Attorney with print outs from Facebook and reported her to the State Bar.

Glenn Taylor - Utah

- Boy Scout Leader topples 2,000 pound ancient Goblin Sandstone formation in Utah state park.
- Films the incident and posts it on Facebook.
- One month prior had filed a lawsuit for personal injuries alleging that he had suffered “debilitating” physical injuries that arose out of a car crash with a teen driver.
- http://www.youtube.com/watch?v=qicKWK5ZPJs&feature=em-share_video_user

Rule #2

- ***If the communication would violate a rule of ethics or Nevada law if it was done in person, don't do it on social media either.***
- As a Board or Commission member, don't engage in "ex-parte" communications with individuals or attorneys appearing before you.
 - Don't accept new Facebook friend requests or LinkedIn connection requests during the pendency of a matter.
 - You may accept requests from individuals who regularly appear before you. However consider disclosure and recusal implications of such contacts.
 - Don't "help" attorneys through social media.
- Don't comment on pending matters.
 - Not before, not during, not after. Just don't do it.
 - Due process issues if bias or pre-judgment is suspected.
 - Open Meeting Law issues if quorum comments on a post.

Rule # 3

- ***Remember the Open Meeting Law and the Nevada Public Records Act when using social media.***
- Don't access social media sites during meetings.
 - Do not tweet, comment, or post on any site during meetings.
 - Don't play social media games during meetings.
- Don't message other Board or Commission matters about pending matters or issues that may become pending matters.
 - This may result in an Open Meeting Law violation.
- Do not use social media as a subterfuge – or as a way around the open meeting law.
 - Could be used against you as evidence of a “willful” criminal violation of the OML. (NRS 241.040.)
- If you are discussing public business on your personal devices or personal pages, a compelling argument can be made that such data is a public record.

Rule #4: Rule Varies, Depending on Your Role

- ***As a Board or Commission Member, don't conduct independent investigations or view social media pages of those appearing in front of you.***
 - All Board or Commission decisions should be made on the evidence presented to the Board or Commission at the meeting. It is Staff's job to investigate and obtain this information so that it may be presented to you.
 - Example: Board member cannot go to physical location to view sign if allegation is improper advertising/signage. Board member also cannot go to licensee's Facebook page prior to a hearing to see if there is any information that may be relevant to the hearing.
- ***As a Staff Member, "google" and/or review the public portions of social media of licensees, applicants, and/or other respondents as a part of your investigation process.***
 - Example: Pending criminal action may not show in criminal history, but may be found via a google search which brings up news articles.

Staff Investigations

- Social media may be used by staff to research the backgrounds of witnesses, licensees and others who appear before the agency.
- However – only the public portions should be reviewed.
 - “Friending” to gain more access to a person’s social media page is prohibited.
 - Asking a third party to “friend” someone to gain more access to a person’s social media page is prohibited.

Rule #5

- ***Know and manage contents of your page.***
 - Friends can link material to your page.
 - Friends can tag you in compromising photographs.
 - Be aware of groups you “like” and any implications.
 - Be wary of sharing political messages and joining political groups on social media.
 - Check the “public” view of your page.
 - Example: Log out of Facebook and then search for your page.
 - Educate yourself about the policies and privacy controls of the sites you use and update your settings every time there is a change.
 - You can limit the ability of others to post on your page.
 - Example: LinkedIn endorsements may be turned off.
 - But remember: Do not delete posts or pictures if litigation arises; such data is retrievable from the site.

Putting It All Together

- ***Develop and use a Social Media Policy for your agency.***
- Three areas to consider:
 1. Policy for use of official social media pages for the agency, e.g., Board Facebook page.
 - May be helpful to disseminate information to the public and licensees.
 - Examples to Aid the Public: Sanitation guidelines, how to verify that a professional is licensed, how to check for disciplinary history for a licensee, how to file a complaint, etc.
 - Examples to Aid the Licensees: Annual renewal reminders, Board office hours update, i.e., closed for upcoming holiday or other change or closure (with 30-day notice), link to lists of approved continuing education courses.
 - Include rules about vulgar, abusive, and/or inappropriate comments.
 - Consider “hiding” these comments.
 - Consider not allowing public postings.
 - Remember that the public records law and records retention schedules apply.

Putting it All Together

2. Policy for use of social media by employees.
 - Include confidentiality concerns and address use on state devices.
 - Consider including penalties for improper use.
 - Include rules about social media use in investigations and new license applications.
3. Policy for use of social media by Board or Commission members.
 - Don't post about Board business: not before, not after, not during.
 - Confidentiality concerns.
 - No independent investigation, no "friending."
 - Remember to follow NRS 281A and the Open Meeting Law in social media use and be cognizant of the Nevada Public Records Act also.