





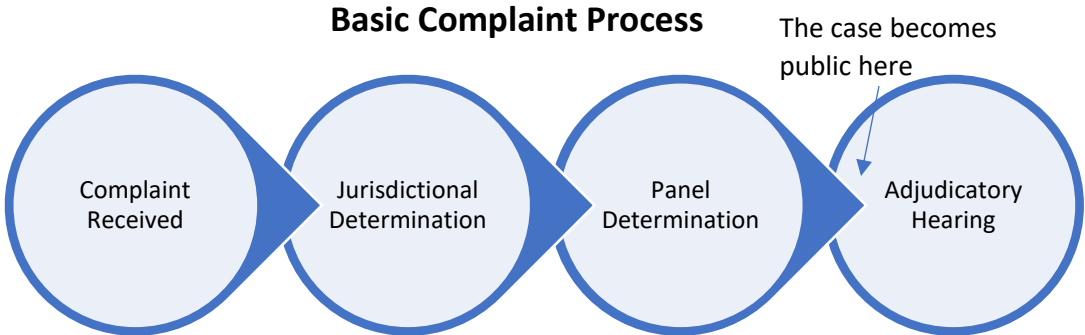


Nevada Commission on Ethics Quick Reference Guide

Topic	Answer	Legal Citation*
Basics		
 Individuals Covered	Public Officers (position in Nevada Constitution, Nevada Law, local government charter or ordinance, or listed in NRS 281A.182) Public Employees Some cases – former public officers/employees	NRS 281A.160 NRS 281A.150 NRS 281A.180
 Statute of Limitations	Jurisdiction is limited to acts that occurred within last two years. Some exceptions for unknown or concealed activity.	NRS 281A.280
 Specifically Outside Jurisdiction	Allegations of harassment or other activity covered by Equal Employment Opportunity Commission or Nevada Equal Rights Commission Other employment related grievances Activity not specifically covered by NRS 281A	NRS 281A.280
Important Definitions		
 “Commitment in a Private Capacity”	<ul style="list-style-type: none"> • Spouse/domestic partner • Member of household • Related by third degree of consanguinity • Employer of individual or their spouse/partner/household member • Substantial and continuing business interest • “Substantially similar” to any of the above 	NRS 281A.065
 “Pecuniary interest”	Any beneficial or detrimental interest in a matter that consists or is measured in money or otherwise related to money including <ul style="list-style-type: none"> • Anything of economic value • Payments or other money which a person is owed 	NRS 281A.139
 “Unwarranted”	Without justification of reason	NRS 281A.400

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

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



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



NEVADA'S OPEN MEETING LAW

Rosalie Bordelove

Chief Deputy Attorney General

Nevada Attorney General's Office

1

What is the
Open Meeting
Law?

2

When does the
OML apply?

3

How do I
comply with
the OML?

4

What happens
when the OML
is violated?

5

Updates from
the 2023
Legislative
Session

What is the Open Meeting Law (OML)?



- NRS Chapter 241
- “In enacting 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).

When does the OML apply?

PUBLIC BODY

- The OML generally applies to all meetings of public bodies in the State of Nevada.
 - Includes subcommittees
 - Exceptions are strictly construed

MEETING

- Under the OML, a “meeting” requires a **Quorum + Deliberation or Action**
- Quorum means a simply majority of the total body or other proportion established by law.
- Deliberate means collectively to examine, weigh and reflect upon the reasons for or against an action.
- Action means a majority vote of the members present (all members for elected bodies).

When does the OML apply?

- A gathering of a quorum at a social function or for training is *not* a meeting *as long as* there is no deliberation or action.
- Exception: Attorney client conference regarding potential or existing litigation, can include deliberation
- Electronic communication between a quorum of members can constitute a meeting.
 - Email pitfall: “reply all”
- Serial communications or “walking quorums” constitute a constructive meeting.
 - A constructive quorum can exist with less than a quorum speaking together at any given time if opinions are relayed between members.



How do I
comply
with the
OML?

Meeting Notice and Agenda

- Must include:
 - Time, place and location (or information on remote technology system)
 - Name, contact and business address for supporting material, plus location (physical or electronic)
 - Clear and complete statements of topics
 - Action items denoted as “for possible action”
 - Public comment periods and restrictions
- Requirements can be found in NRS 241.020
- Agenda posting requirements:
 - Office of the public body or location of meeting
 - Public body website
 - Nevada notice website
- Posted no later than 9 AM of the 3rd working day before the meeting.
- Notice must be sent to persons who have requested notice of meetings.

Additional Requirements

- Public bodies shall make reasonable efforts to assist and accommodate persons with physical disabilities desiring to attend.
- Additional notice required for consideration of a person's character, misconduct or competence or to take administrative action against a person.
- Meetings must be recorded or transcribed.
- Minutes must be kept in conformance with NRS 241.035.
- Supporting material is required to be available to the public at the time it is provided to members of the public body.
- 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.

Public Comment

- Minimum requirement:
 - Two options—general or limited to agenda items prior to any action item or on each action item after discussion, but prior to vote
 - General public comment period at some time prior to adjournment
- Restrictions must be reasonable time, place, and manner restrictions. NRS 241.020(3)(d)(3)
- 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.”
- New in 2023: If using a remote technology system, must offer at least telephonic public comment.



How do I comply with the OML?

CLOSED SESSIONS

- Closed sessions may be held by a public body to consider the character, alleged misconduct, professional competence or physical or mental health of a person. NRS 241.030
 - May also be held to grade examinations.
- Exceptions:
 - Appointment of a member to the public body
 - Consider the chief officer of the body/agency
- Action must still occur during a public meeting.

VIRTUAL ATTENDANCE

- Members of public bodies may attend virtually whether or not there is a physical location for public to attend.
 - If no physical location for public, virtual attendance options must be provided.
- Public must be able to hear and observe to the same level as members.
 - Pit-fall: chat function in remote technology system.

What happens when the OML is violated?



- Actions taken in violation of the OML are void.
- Attorney General's Office has authority to investigate and prosecute violations.
- Corrective action is recommended and while it may not eliminate the violation, it can mitigate severity and further ensure that the business of government is accomplished in the open.
 - Prospective only
 - Requires independent deliberative process

Updates from the 2023 Legislative Session



2023 Updates

- “Quorum” Definition
 - Only voting members count
 - For appointed bodies, vacancies do not count
- “Meeting” Definition – Language changed to clarify existing meaning
 - Attorney-client conference is only true exception
- “Administrative Action Against a Person” Definition – An action that is uniquely personal to the person and includes the potential for a negative change in circumstances
- Notice to Individuals for administrative action against or considerations of character (previously 241.033 and 241.034)
 - Personal service: 7 calendar days
 - Certified mail: 14 calendar days
 - Can serve attorney
 - Emergency exception
- All elected bodies may now take advantage of NRS 281A.420(5)’s quorum reduction

2023 Updates

- Public Comment During Multi-Day Meetings – If using the two-period public comment option, must have at least two periods *each day* of the multi-day meeting.
- Agenda Posting – Location of meeting is alternative posting location if there is a physical location
- Meetings to consider regulations or contested cases under NRS 233B must have a physical location for public
- Public Comment During Virtual Meetings:
 - Entirely virtual meetings must have clear and complete instructions on the agenda for how to call in for public comment
 - If offering virtual public comment, must read instructions for public comment prior to first public comment period
 - Must offer at least telephonic public comment if meeting is being *conducted* via remote technology system

LINKS

- https://ag.nv.gov/Hot_Topics/Training_Materials/
- https://ag.nv.gov/About/Governmental_Affairs/OML_Opinions/
- https://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Governmental_Affairs/2019-03-26_OML_12TH_AGOMANUAL.pdf





ETHICS LAW BASICS

BOARDS AND
COMMISSIONS

STAY ON THE PATH



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

NRS 281A.020

STATUTORY AND REGULATORY AUTHORITY



- Chapter 281A Nevada Revised Statutes – Nevada Ethics Law
- Chapter 281A Nevada Administrative Code – Ethics Regulations

THE NEVADA ETHICS COMMISSION



- 8-member Commission
- No more than 4 members of the same party
- No more than 4 members from the same county
- At least 4 former public officers or employees
- At least 2 licensed attorneys
- No current public officers / prohibition on being actively involved in political party or campaign



THREE MAJOR FUNCTIONS OF THE ETHICS COMMISSION

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

WHY AN ETHICS LAW?

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



WHO IS COVERED IN THE JURISDICTION OF THE ETHICS COMMISSION?



Nevada Ethics Law

- Public Officers (position in Nevada Constitution, Nevada Law, local government charter or ordinance, or listed in NRS 281A.182)
- Public Employees
- Some cases – former public officers/employees

Not Nevada Ethics Law

- Private individuals
- Private business, companies, or organizations
- Public agencies as in “the agency violated the ethics law”
- Judges
- Federal Government Employees
- Volunteers
- Advisory Committees

WHAT TYPES OF CONDUCT FALLS UNDER THE JURISDICTION OF THE ETHICS COMMISSION?

Nevada Ethics Law

- Conduct within the last two years
- Conduct that is expressly prohibited by a statute found in NRS Chapter 281A

Not Nevada Ethics Law

- Conduct older than two years
- Allegations of harassment or other activity covered by Equal Employment Opportunity Commission or Nevada Equal Rights Commission
- Other employment related grievances
- Local or other agency ethics rules that are not found in NRS Chapter 281A

COMMITMENT IN A PRIVATE CAPACITY - NRS 281A.065



Spouse / Domestic Partner



Member of Household



3rd Degree of
Consanguinity / Affinity



Employer



Substantial and Continuing
Business Relationship



Substantially Similar

ETHICS CATEGORIES

- Improper Benefits
- Disclosure/Abstention
- Cooling Off

ANDREA

SIXTEEN

CASPER

THE CASE OF JO-JO BEAR



IMPROPER BENEFIT – GOVERNMENT RESOURCES



1. Use of government position

2. Benefit

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

IMPROPER BENEFIT - GIFTS





IMPROPER BENEFIT - GIFTS

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

Different than financial disclosure requirements administered by the Secretary of State





IMPROPER BENEFIT – GOVERNMENT RESOURCES

- Economic opportunity using public position (NRS 281A.400(1))
- Unwarranted privileges, preferences, exemptions or advantages using position (NRS 281A.400(2))
- Negotiating a contract with self or for others with current agency (NRS 281A.400(3))
- Benefit to self or other using influence over a subordinate (NRS 281A.400(9))
- Honorarium for speaking (NRS 281A.510)
- Contract with government agencies prohibition (NRS 281A.430)



IMPROPER BENEFIT – GOVERNMENT RESOURCES



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



IMPROPER BENEFIT – USE OF INFORMATION



- Use of non-public information to benefit self or others (NRS 281A.400(5))
- Suppression of government report to benefit self or others (NRS 281A.400(6))

DISCLOSURE & ABSTENTION



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

President Woodrow Wilson

DISCLOSURE & ABSTENTION

Before approving, voting, or acting on a matter when

- Gift or loan accepted
- Significant pecuniary interest
- Reasonably affected by commitment in private capacity
- Former lobbying

NRS 281A.420

QUALITY DISCLOSURE



- “Sufficient to inform the public of the potential effect of the action or abstention upon the person or interest”

AND

- “Made at the time the matter is considered”

DISCLOSURE & ABSTENTION

- A Public Officer shall not vote upon or advocate for the passage or failure of a matter
 - Independence of judgment of a reasonable person affected by
 - own pecuniary interest,
 - commitment in a private capacity,
 - gift or loan



DISCLOSURE & ABSTENTION



Presumption in NRS 281A.420

- Favors participation
- Abstention required in clear cases where the public officer's situation is materially affected
- Presumed permissible if no greater benefit/detriment to officer than to anyone else affected by the matter

Case by Case Basis

Item by Item Basis

DISCLOSURE & ABSTENTION



Test Cases

- Licensing Board member
 - Friend from high school is before the board for disciplinary action
- Commission that sets fees
 - Uncle is someone who pays the fee, commission considering raising the fee
- Board Member employed by Company A
 - Company A is applying to the board for a decision on expanded service



COOLING OFF

COOLING OFF

- One-year cooling off period to seek or accept employment
 - Regulated business/industry (State Only)
 - Vendors of the agency
- Counseling or lobbying the agency

NRS 281.410 and .550



Relief can be granted



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

Nevada Ethics Law

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

Not Nevada Ethics Law

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



4 TIPS FOR COMPLIANCE

1. Maintain a list of individuals or entities to which you have a “commitment in a private capacity”
2. Review any agendas where you have action items beforehand to identify potential conflicts of interest
3. Consult with legal counsel who can search prior opinions
4. Request an advisory opinion



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



HYAS GROUP

FIDUCIARY FUNDAMENTALS

State of Nevada

January 2025

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Introduction

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History

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Fiduciary Ecosystem – Who’s Who?

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Staying Competitive

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Appendix

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01

Introduction

THE PARTICIPANT OUTLOOK

Financial stressors abound



60% - Not Saving Enough for Retirement



85% - Rising Costs of Goods & Services



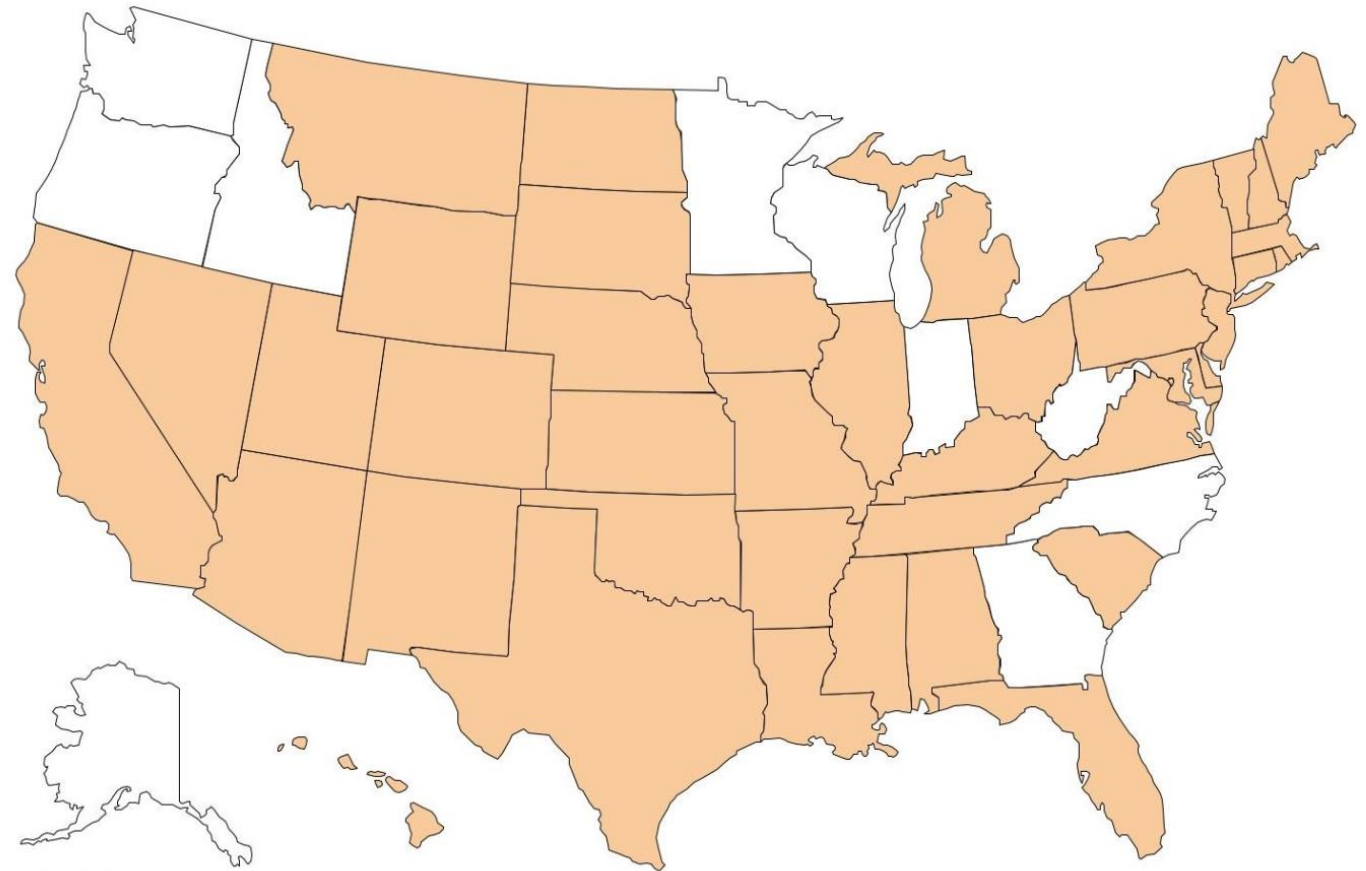
82% - Increasing Inflation and Interest Rates

THE PENSION OUTLOOK

Declining Benefits

- ▶ 7.5% is the average pension reduction
- ▶ New employees are disproportionately impacted by benefit decreases

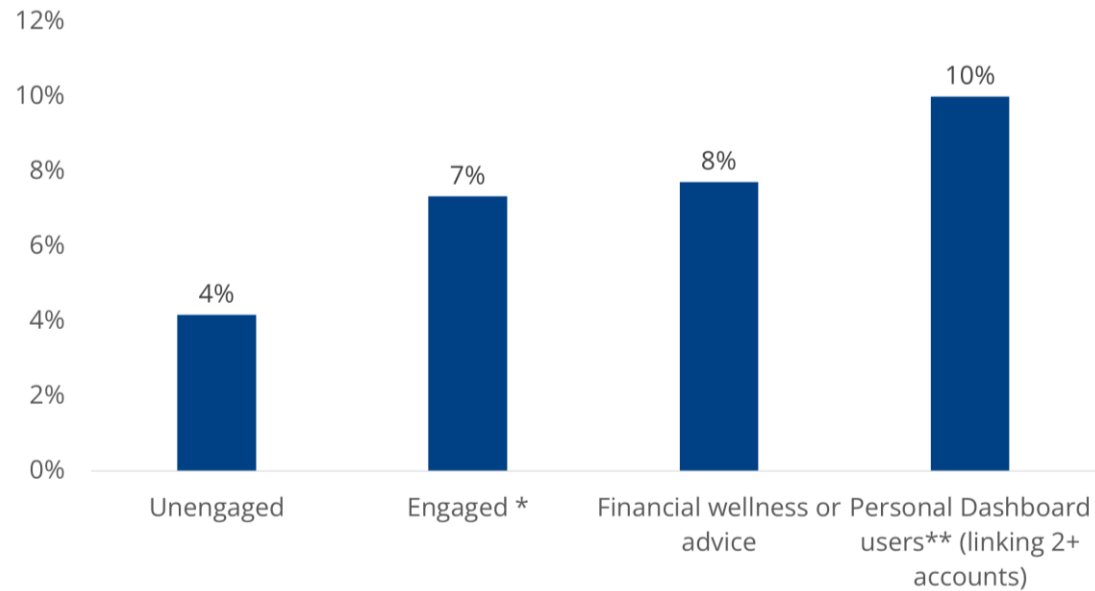
States that Reduced Pension Benefits Since 2009



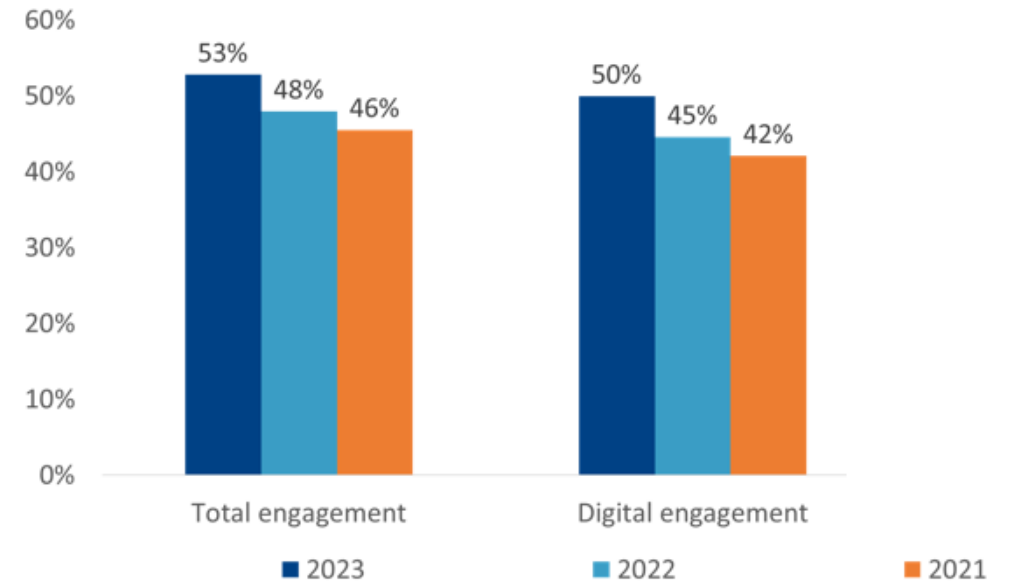
NASRA

THE GROWING FOCUS ON DC PLANS

Average savings rates by type of interaction



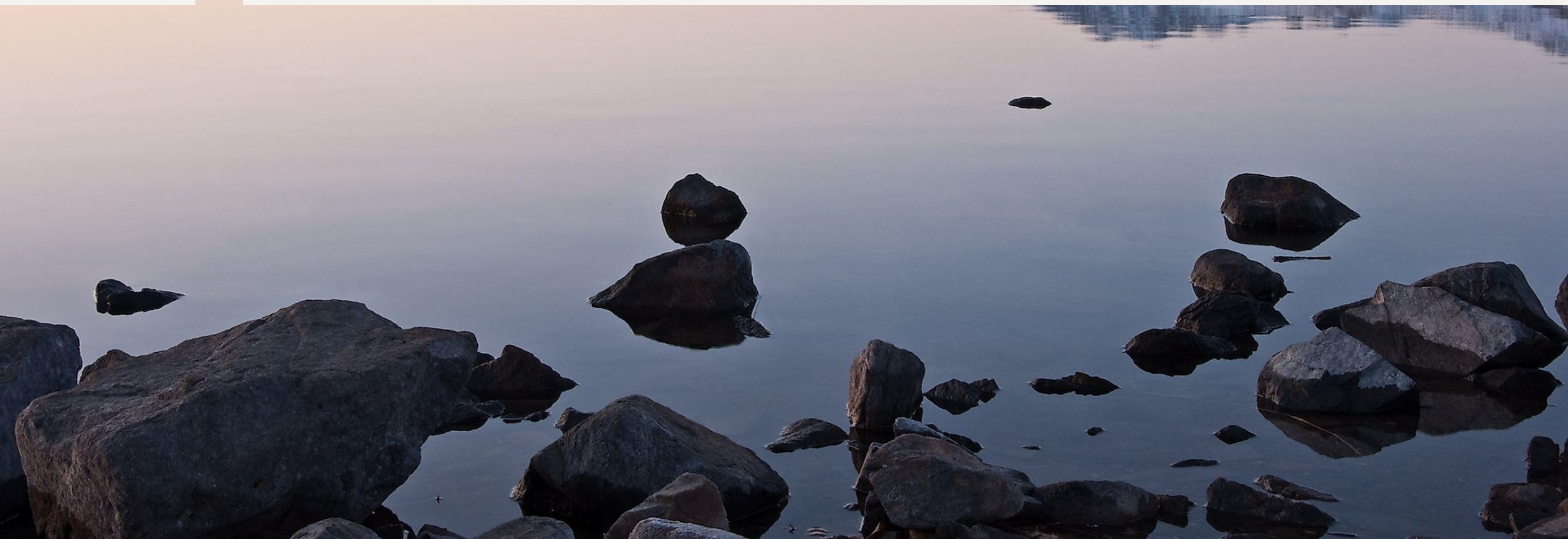
Engagement is up





02

History



PUBLIC SECTOR RETIREMENT PLAN FIDUCIARY OVERSIGHT MILESTONES

1974

Employee Retirement
Income Security Act
(ERISA) *

1978

Revenue Act created
457, 401(k) plans

1986

Tax Reform Act of 1986
closed 401(k) plans
to State and Local
Governmental entities

1992

Unemployment
Compensation
Amendments
introduced mandatory
20% withholding

1996

Small Business Job
Protection Act placed
457 plan assets into
“trust” status

PUBLIC SECTOR RETIREMENT PLAN FIDUCIARY OVERSIGHT MILESTONES

2002

EGTTRA legislation eliminated most differences between 457 plans and private sector 401(k) plans

2006

Pension Protection Act; introduces QDIAs, auto features for plans where applicable

2008 - PRESENT

Litigation over failure to oversee retirement plans increases, with most actions involving investments and fees

PUBLIC SECTOR RETIREMENT PLAN FIDUCIARY OVERSIGHT MILESTONES





03

Fiduciary Ecosystem – Who's Who?



MULTIPLE LAYERS OF PROTECTION and FIDUCIARY OVERSIGHT

Recordkeeper

Plan Sponsor

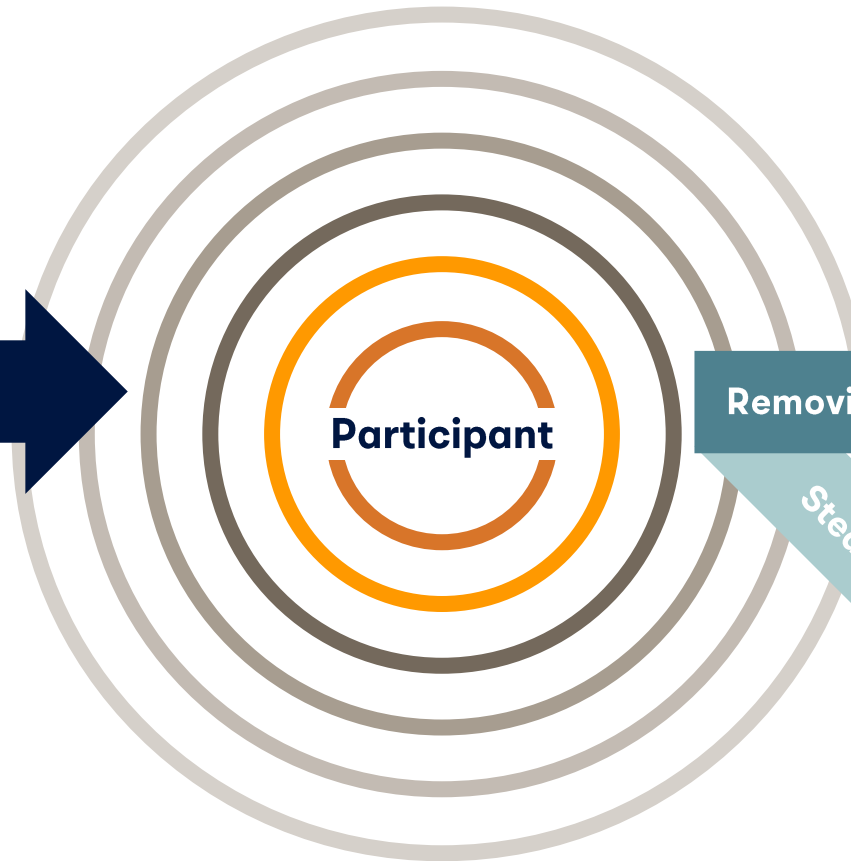
- NDC Committee
- NV-DOA Admin Staff
- NV-DAG

Plan Consultant

Outside Legal Counsel

Asset Management Companies/
Funds/Trust/Board of Directors

Trust Company and Custodian



Advisors

Brokers

Annuity Sales

Recordkeeper's IRA

Hackers

Fraudsters

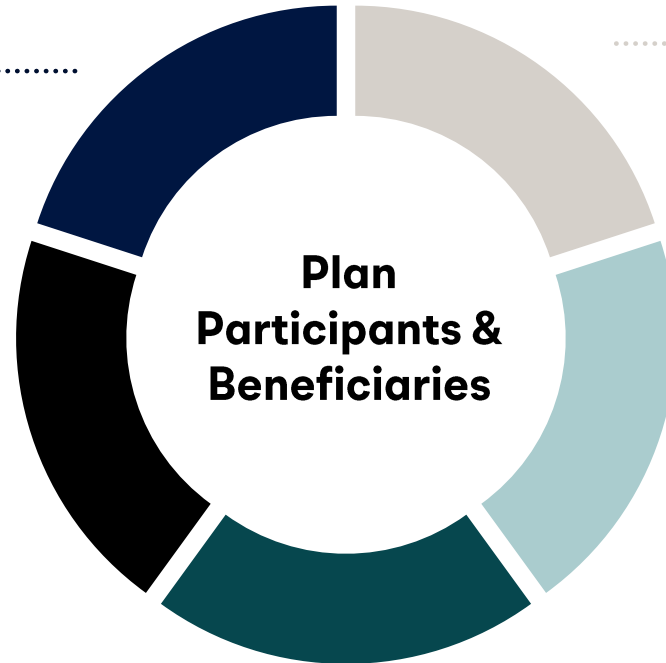
THE MAJOR PLAYERS OF YOUR DC PLAN

*Plan Sponsor (Agency/County)

- ▶ Sponsoring organization
- ▶ Maintains authority
- ▶ Determines plan features/offering
- ▶ Establishes decision making apparatus (Retirement Committee)
- ▶ City Staff operations – likely a non-fiduciary/settlor function

*Retirement Plan Consultant

- ▶ Provides investment advice and education
- ▶ Helps facilitate proper governance/oversight
- ▶ Provides performance reporting
- ▶ May provide participant education



Recordkeeper (Plan Provider)

- ▶ Facilitates plan access for participants
- ▶ Abides by plan documents
- ▶ May establish plan documents
- ▶ May provide participant education

Investment Managers (Mutual Funds)

- ▶ Provide investment solutions
- ▶ Discretionary investment management
- ▶ Covers a variety of investment categories
- ▶ Selected by Plan Sponsor or Consultant

*Legal Counsel

- ▶ Provides legal advice and direction
- ▶ May provide plan documents
- ▶ May ensure Committee conduct is proper

GOVERNANCE STRUCTURES

Plan Administrator

- ▶ Individual is vested with full authority over plan
- ▶ Individual reviews plan materials and conducts business on behalf of the plan
- ▶ Individual carries full fiduciary responsibility of plan decisions

Evaluation Committee

- ▶ Evaluation Committee does not have authority but may provide insight to Board or Plan Administrator
- ▶ May consist of 3-9 members who review material and provide feedback to plan authority
- ▶ Committee members are not fiduciaries in name or function

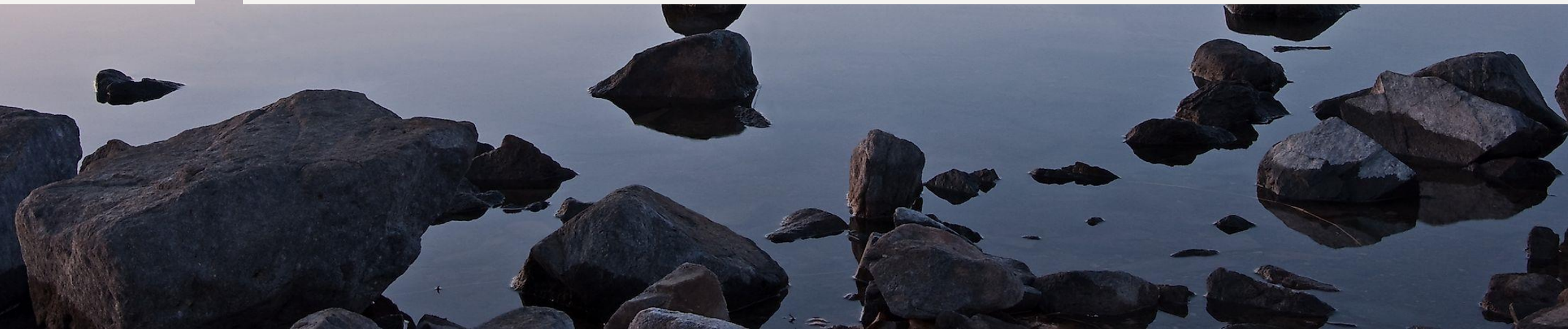
Plan Committee

- ▶ Committee is vested with full authority over plan
- ▶ Committee charter determines rules and processes
- ▶ May contain 3-9 members, each with fiduciary responsibilities
- ▶ Establish regular meetings to review plan
- ▶ Potentially include a retired stakeholder



04

Fiduciary Duties



FIDUCIARY DUTIES PER ERISA

Duty of Loyalty

- ▶ Avoid self-dealing
- ▶ Avoid conflicts of interest
- ▶ Operate the plan for the exclusive purpose of providing benefits and offsetting reasonable expenses
- ▶ Reasonable plan expenses may be charged

Duty of Prudence

- ▶ A fiduciary must execute his/her duties with the care, skill, prudence, and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use:
 - ▶ Allows for the hiring of “experts” to assist
 - ▶ Experts must be prudently selected and monitored



Duty to Diversify

- ▶ A fiduciary must diversify investments in order to minimize risk of loss unless it would be considered prudent not to diversify investments
- ▶ For Defined Contribution Plans with Self-Direction of Investments by Participants:
 - ▶ ERISA § 404(c) is an accepted guide to minimums, but only requires three options

Duty to Follow Plan Document

- ▶ Must oversee and make sure the plan operates in compliance with the plan document, trust agreements, and/or other documents
- ▶ Fiduciaries should be familiar with:
 - ▶ Plan documents
 - ▶ Federal and state law in relations to the documents

Duty of Loyalty

- ▶ Avoid self-dealing
- ▶ Avoid conflicts of interest
- ▶ Operate the plan for the exclusive purpose of providing benefits and offsetting reasonable expenses
- ▶ Reasonable plan expenses may be charged

Duty of Prudence

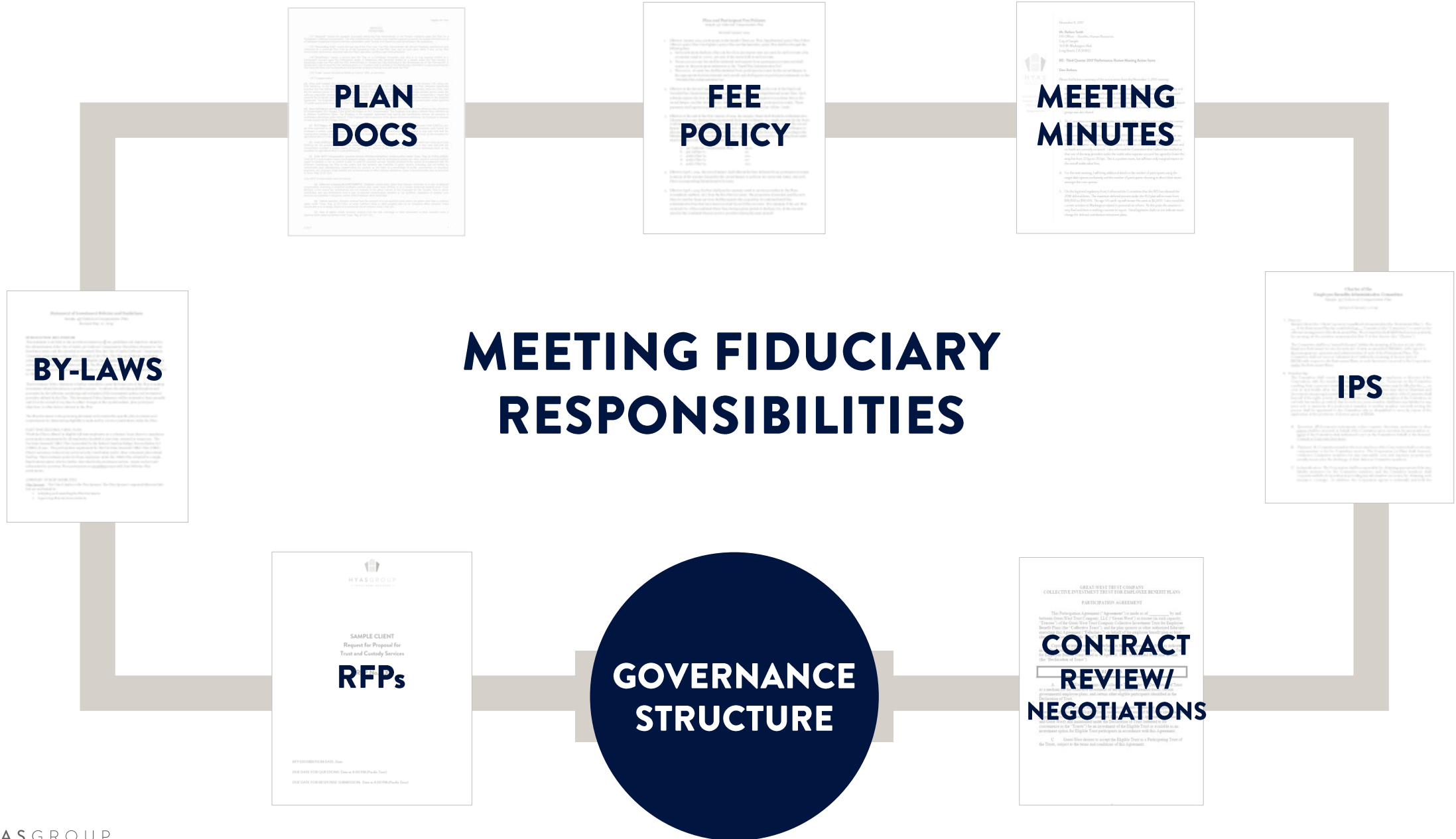
- ▶ A fiduciary must execute their duties with the care, skill, prudence, and diligence under the prevailing circumstances that a prudent person acting in a like capacity and familiar with such matters would use:
 - ▶ Allows for the hiring of “experts” to assist
 - ▶ Experts must be prudently selected and monitored

Duty to Follow Plan Document

- ▶ Must oversee and make sure the plan operates in compliance with the plan document, trust agreements, and/or other documents
- ▶ Fiduciaries should be familiar with:
 - ▶ Plan documents
 - ▶ Federal and state law in relations to the documents

Duty to Diversify

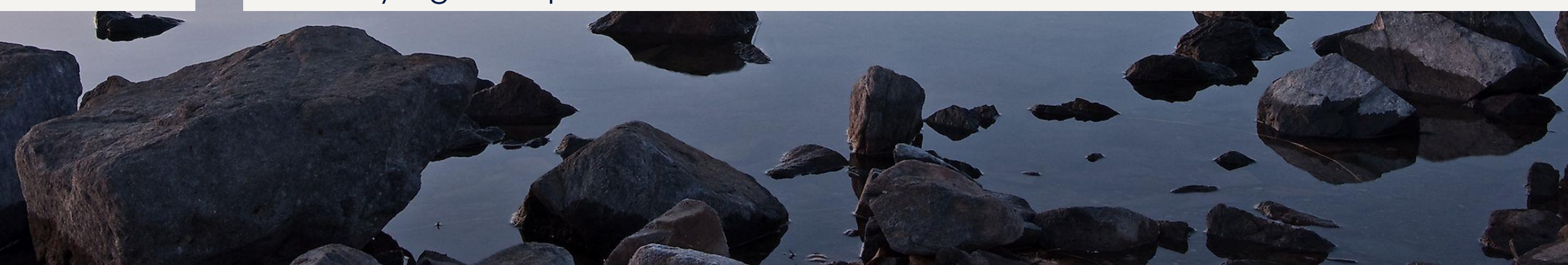
- ▶ The “Diversification Rule”:
 - ▶ A fiduciary must diversify investments in order to minimize risk of loss unless it would be considered prudent not to diversify investments
- ▶ For Defined Contribution Plans with Self-Direction of Investments by Participants:
 - ▶ ERISA § 404(c) is an accepted guide to minimums, but only requires three options





05

Staying Competitive



FOCUS ON FEES SEPARATELY

Recordkeeper Fee

+

Advisor/Consultant Fee

+

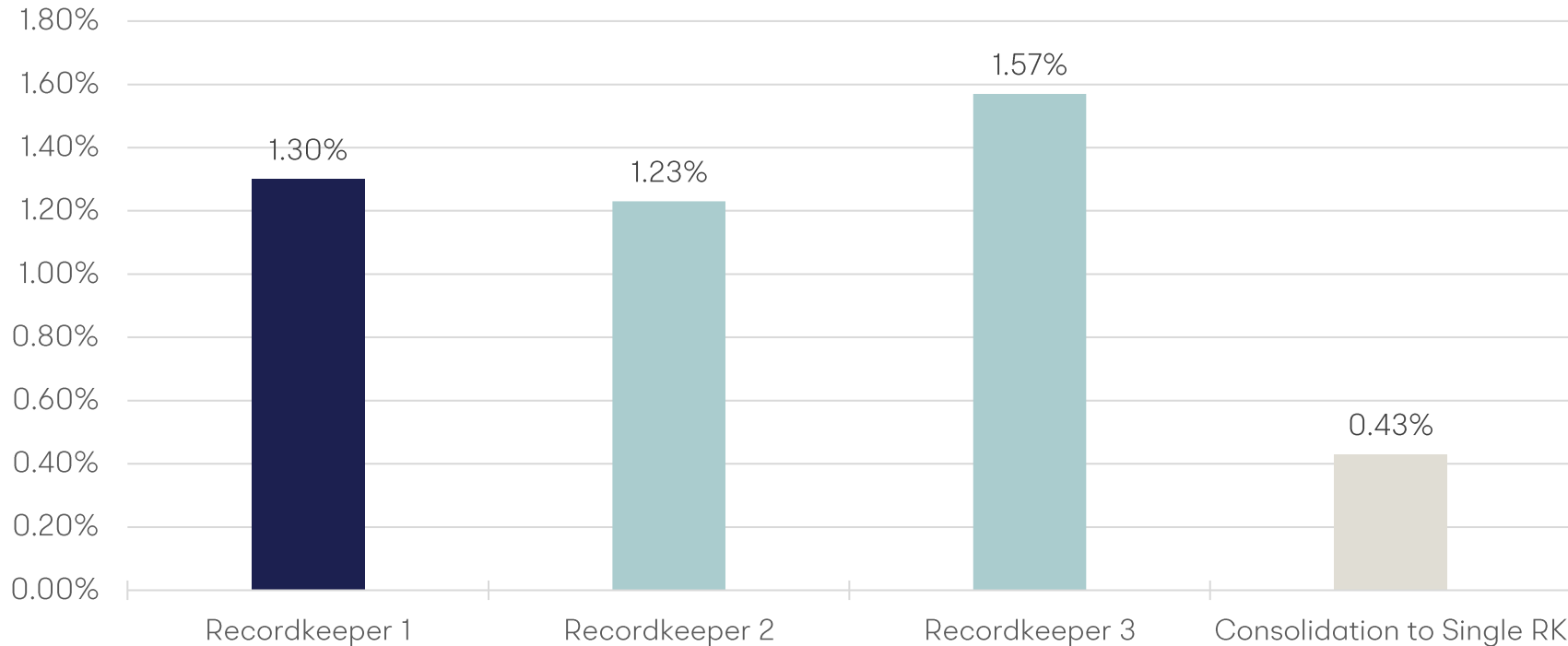
Investment Fees

=

Total Participant Fees

CASE STUDY – PLAN CONSOLIDATION

Multiple Vendor versus Single Vendor
Public Agency 457 Deferred Compensation Plan, 2023



Previous Recordkeeper + Investment Fees Per Recordkeeping Vendor

Recordkeeper + Investment Fees after Consolidation to a Single Vendor

Additional Benefits Included:

- ▶ Streamlined administration and operations
- ▶ Simplified oversight and reporting
- ▶ Improved “Purchasing Power”
- ▶ Greater investment flexibility and plan design capabilities
- ▶ Enhanced participant support and education resources

TYPICAL RETIREMENT PLAN INVESTMENT MENU

Stocks	Large Cap Equity	Mid Cap Equity	Small Cap Equity	International Equity
Value	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Blend/Core	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Growth	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Index	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Bonds	Fixed Income			
Stable Value	<input checked="" type="checkbox"/>			
Intermediate, Investment Grade Bond	<input checked="" type="checkbox"/>			
Inflation Protection	<input checked="" type="checkbox"/>			
High Yield Bond	<input checked="" type="checkbox"/>			
Others	Other			
Real Estate	<input checked="" type="checkbox"/>			
Target Date Fund Family	<input checked="" type="checkbox"/>			
Self Directed Brokerage	<input checked="" type="checkbox"/>			

STREAMLINED RETIREMENT PLAN INVESTMENT MENU

Stocks	Large Cap Equity	Mid Cap Equity	Small Cap Equity	International Equity
Value	<input checked="" type="checkbox"/>			
Blend/Core	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Growth	<input checked="" type="checkbox"/>			
Index	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Bonds	Fixed Income			
Stable Value	<input checked="" type="checkbox"/>			
Intermediate, Investment Grade Bond	<input checked="" type="checkbox"/>			
Others	Other			
Real Estate	<input checked="" type="checkbox"/>			
Target Date Fund Family	<input checked="" type="checkbox"/>			
Self Directed Brokerage	<input checked="" type="checkbox"/>			

Additional Considerations

- ▶ Collective Investment Trusts (CITs)
- ▶ Separately Managed Accounts (SMAs)
- ▶ Managed Accounts
- ▶ Socially Responsible (ESG) Investment Options

EVALUATE CAPITAL PRESERVATION OPTIONS

Ranked in the order of Plan Sponsor liquidity.

TYPE	SUBJECT TO CREDITORS	UNIT VALUE GUARANTEE	PLAN LIQUIDITY	PARTICIPANT LIQUIDITY	PORTFOLIO TRANSPARENCY	EXPLICIT MANAGEMENT FEE
Money Market	No	Implied US Government	One Day/ Market Value	Daily	Yes	Yes
Stable Value CIT	No	Typically Multiple Insurers	12-Month/ Book Value	Daily	Yes	Yes
Stable Value Separate Account	No	Single or Multiple Insurers	Market Value or Book Value typically over duration (~3-5 years)	Daily	Yes	Yes
Insurance Separate Account	No	Single Insurer	Market Value or 5-Year at Book Value/20% per year	Daily	Typically No	Typically No
Insurance Fixed Account	Yes	Single Insurer	5-Year at Book Value/20% per year	Daily	Typically No	No

UNDERSTAND THE NEEDS OF YOUR PARTICIPANTS

- ▶ Conduct plan surveys and study plan statistics
- ▶ Establish consistent participant support and education
- ▶ Conduct a “Gap Analysis” to determine retirement shortfalls
- ▶ Evaluate plan provisions to ensure they meet participant needs



06

Quiz

CASE STUDY #1

The Committee has received a request from a plan participant to add a particular real asset fund to the 457 plan that has recently been performing very well. You actually know of the specific fund because you have invested in it through your IRA and it has performed very well for you. You have recently been considering adding more money to the fund.

As a Committee Member, do you vote to add the fund?

- a) Yes – Because you know the fund and it has done very well for you
- b) No – You abstain from voting because you don't feel you can be objective about the decision, given your personal experience with the fund
- c) Maybe – Discuss whether real asset funds are appropriate for your plan's participants based on their investment knowledge

CASE STUDY #2

As a fiduciary Committee member, you are approached by the plan's recordkeeper. He offers you two different share classes of the same mutual fund. One has an expense ratio of .70% annually, but rebates back .25% to the plan to help offset recordkeeping expenses. The other has an expense ratio of .55%, but rebates nothing to help offset expenses.

Which one do you choose?

- a) The less expensive one because it is cheaper for participants
- b) The more expensive one because revenue sharing pays all the plan's administrative expenses
- c) Neither until you have assessed fee reasonableness and method for allocating plan expenses

CASE STUDY #3

Your Committee has identified an investment manager that is not performing in line with expectations contained in the Investment Policy Statement.

What should you do?

- a) Replace the manager immediately
- b) Identify the reasons for failure to meet expectations
- c) Consult the Investment Policy Statement for a watch list procedure and follow it
- d) Both b) & c)
- e) None of the above

CASE STUDY #4

As a fiduciary Committee member, you have noticed that one of the other Committee members rarely attends any of the meetings. This member also does not appear to make any effort to become informed about what they may have missed when not in attendance.

What should you do?

- a) Nothing since you have a quorum without this member
- b) Contact the SEC
- c) Discuss the issue with the Committee since members may be responsible for the conduct of others on the Committee
- d) Quit the Committee immediately

CASE STUDY #5

In spite of efforts to provide clear, concise communications to participants about the plan fees and structure, a participant continues to complain about the costs associated with the investments in the plan and claims everything is too expensive.

As a Committee member, what would you do?

- a) Tell the participant to call the consultant
- b) Tell the participant to call his/her broker
- c) Discuss the situation with the full Committee and determine a course of action
- d) None of the above





SECURE 2.0 ACT OF 2022

(“SECURE 2.0”)

- ▶ Passed as part of Consolidated Appropriations Act of 2023
- ▶ Passed December 27, 2022
- ▶ Signed into law December 29, 2022

SECURE 2.0 ACT PROVISIONS¹

Mandatory Provisions	Notes	Effective
107 – Increase in Age for RMDs	In 2023 age goes from 72 to 73 and then to 75 in 2033.	Immediately but in phases
302 – Decrease in Excise Tax	Reduces the penalty for failure to take RMDs from 50% to 25% of the shortfall (drops to 10% if corrected in two years).	Immediately
303 – Retirement Savings Lost & Found	Requires the establishment of an online searchable database that would enable retirement savers who may have lost track of their accounts to search for the contact information of their plan administrator.	01/01/2025
306 – Eliminates the First Day of the Month Rule	Eliminates the unique rule for 457 plan enrollment and contribution changes.	Immediately
309 – Exclusion of Certain Disability-related First Responder Retirement Payments	First responders are permitted to exclude service-connected disability payments from their gross taxable income after reaching retirement age.	01/01/2027
325 – Eliminates Roth RMDs	Removes the required distribution rules for Roth contributions within retirement plans (but the after-death RMDs still apply).	01/01/2024
338 – Annual Paper Benefit Statement	Annual paper benefit statement unless participant has specifically requested electronic delivery.	01/01/2026
603 – After-tax Catch-up Contributions	Requires that all catch-up contributions be made as Roth contributions (participants whose prior year's wages were less than \$145,000 are exempt).	01/01/2026

¹ SECURE 2.0 Act of 2022

United States Senate Committee on Finance

<https://www.finance.senate.gov/imo/media/doc/Secure%202.0%20Section%20by%20Section%20Summary%2012-19-22%20FINAL.pdf>

SECURE 2.0 ACT PROVISIONS (CONT.)¹

Optional Provisions	Notes	Effective
109 – Higher Catch-up Limits	Increases to \$10,000 or 150% of the catch-up amount in 2024 for participants age 60 to 63.	01/01/2025
110 – Matching of Student Loan Payments	Allows qualified student loan payments to be treated as retirement plan deferrals for matching purposes.	01/01/2024
115 – Penalty-free Emergency Expenses	Plans can offer distributions with no early withdrawal penalty for “unforeseeable or immediate financial needs relating to necessary or personal family emergency expenses.” Distributions cannot exceed \$1,000, a participant may take only one such distribution per calendar year, plan administrators can rely on participant’s self-certification of eligibility, and participants can repay a distribution within three years.	01/01/2024
127 – Emergency Savings Linked to DC Plans	Allows employers to offer their non-highly compensated employees and pension-linked emergency savings account as part of their deferred compensation program. Employers may automatically enroll employees at 3% or less (capped at \$2,500) on an after-tax basis.	01/01/2024
304 – Increase in De Minimis Amount	Raises the small account cash-out limit from \$5,000 to \$7,000.	01/01/2024
312 – Self-certifying Hardships	Plans sponsors can rely on participants to state that they incurred an unforeseeable emergency, that the amount of the request is not in excess of the amount required to satisfy the financial need, and that the participant has no alternative means reasonably available to satisfy such financial needs.	Immediately

¹ SECURE 2.0 Act of 2022

United States Senate Committee on Finance

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SECURE 2.0 ACT PROVISIONS (CONT.)¹

Optional Provisions	Notes	Effective
314 – Penalty-free Withdrawals in the Event of Domestic Abuse	Plans that aren't subject to IRC's qualified joint and survivor and preretirement-survivor annuity requirements can offer distributions with no early withdrawal penalty to victims of domestic abuse. Distributions cannot exceed the lesser of \$10,000 (indexed after 2024) or 50% of the participant's vested benefit, distributions must be made within one year of the date on which the participant is a victim of domestic abuse by a spouse or domestic partner, plan administrators can rely on participant's self-certification of eligibility, and participants can repay a distribution within three years.	01/01/2024
326 – Penalty-free Withdrawals for Terminal Illness	Plans can offer distributions with no early withdrawal penalty to participants certified by a physician as having a condition reasonably expected to result in death within 84 months after the date of certification. Statute does not limit amount or number of distributions that can be made available, and distributions can be repaid within three years.	Immediately
328 – Distributions to Retired Public Safety Officers for Health & Long-Term Care Premiums	These distributions no longer have to be paid directly to the insurer.	Immediately
329 – Change to Early Withdrawal Penalty	Extends the exception of the 10% early withdrawal penalty to public safety who have separated from service and have 25 years of service.	Immediately
330 – Change to Early Withdrawal Penalty	Similar to the above, this expands the public safety definition to include certain corrections officers.	Immediately
331 – Disaster Relief	Distributions up to \$22,000 per federally-declared disaster with no early penalty and option to repay over three years. Temporary max loan cap at \$100,000.	Immediately
604 – After-tax Match	Participants may be able to designate some or all employer matching contributions as Roth contributions.	Immediately

¹ SECURE 2.0 Act of 2022

United States Senate Committee on Finance

https://www.finance.senate.gov/imo/media/doc/Secure%202.0_Section%20by%20Section%20Summary%2012-19-22%20FINAL.pdf



THANK YOU.

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Secure Act 2.0 Appendix¹

Section 107 – Increase in Age for Required Beginning Date for Mandatory Distributions: Increases the age at which required minimum distributions (“RMDs”) from retirement plans must commence from age 72 to age 73 in 2023 and to age 75 in 2033 (“RMD Age”). Specifically, the RMD Age is (a) age 70 ½ for individuals born before July 1, 1949, (b) age 72 for individuals born after June 30, 1949, but before 1951, (c) age 73 for individuals born after 1950, but before 1960, or (d) age 75 for all others – note, apparent drafting error in the statutory language, makes it unclear when age 75 starts to apply in lieu of age 73, but it appears age 75 is intended to apply if born after 1959. Effective for distributions made after December 31, 2022, for individuals who attain age 72 after that date.

Section 109 – Higher Catch-up Limit to Apply at Age 60, 61, 62 and 63: Increases the catch-up contribution limit for non-SIMPLE plans for individuals aged 60 to 63 to the greater of (i) \$10,000 per year, or (ii) 150% of the regular catch-up contribution amount in 2024 (as indexed for inflation). The catch-up contribution limit for SIMPLE plans is similarly increased for individuals ages 60 – 63 to the greater of (i) \$5,000 per year, or (ii) 150% of the regular catch-up amount in 2025 (as indexed for inflation), beginning for taxable years beginning after December 31, 2024.

Section 110 – Treatment of Student Loan Payments as Elective Deferrals for Purposes of Matching Contributions: Allows for employer contributions made on behalf of employees for “qualified student loan repayments” to be treated as matching contributions to 401(k) plans, 403(b) plans, SIMPLE IRAs, and governmental 457(b) plans. With respect to nondiscrimination testing, such plans are permitted to separately test the employees who receive matching contributions on student loan repayments. Effective for plan years beginning after December 31, 2023.

Section 115 – Withdrawals for Certain Emergency Expenses: Allows one penalty tax-free withdrawal within a 3-year period up to \$1,000 per year for “unforeseeable or immediate financial needs relating to personal or family emergency expenses.” Such withdrawal may be repaid within the 3-year period and if so repaid, more than one withdrawal may be permitted within the 3-year period. Effective for distributions made after December 31, 2023.

Section 127 – Emergency Savings Accounts Linked to Individual Account Plans: Allows employers to offer their employees (excluding highly compensated employees) a pension-linked emergency savings account as part of a defined contributions plan. Employers may automatically opt employees into these accounts at no more than 3% of their salary, and the portion of an account attributable to the employee’s contribution is capped at \$2,500 (or a lower as set by the employer). Contributions are made on a Roth-like basis and are treated as elective deferrals for purposes of matching contributions with an annual matching cap set at the maximum account balance (\$2,500 or lower as set by the employer). Requires employer matching contributions be made to the individual’s defined contribution plan account rather than to the emergency savings account. At separation from service, employees are permitted to roll the emergency savings account into a Roth defined contribution plan or an IRA. Effective for plan years beginning after December 31, 2023.

Section 302 – Reduction in Excise Tax on Certain Accumulations in Qualified Retirement Plans: Reduces the excise tax penalty for failure to take RMDs from 50% to 25% of the shortfall. Such excise tax is further reduced to 10% if the individual corrects the shortfall during a 2-year window. Effective for taxable years beginning after the date of enactment.

Section 303 – Retirement Savings Lost and Found: Directs the DOL to create a national online searchable lost and found database to collect information on benefits owed to missing, lost or non-responsive participants and beneficiaries in tax-qualified defined benefit and defined contribution retirement plans to assist such plan participants and beneficiaries in locating their benefits and the contact information of their plan administrator. Requires plan to report certain information to the DOL regarding former employees whose benefits have not been paid out. Directs the DOL to create such database no later than 2 years after the date of enactment.

Section 304 – Updating Dollar Limit for Mandatory Distributions: Increases the amount that employers may, without participant consent, distribute and rollover from a participant’s workplace retirement account into an IRA from \$5,000 to \$7,000. Effective for distributions made after December 31, 2023.

Section 306 - Eliminate the “first day of the month” requirement for governmental section 457(b) plans. Under current law, participants in a governmental 457(b) plan must request changes in their deferral rate prior to the beginning of the month in which the deferral will be made. This rule does not exist for other defined contribution plans. Section 306 allows such elections to be made at any time prior to the date that the compensation being deferred is available. Section 306 is effective for taxable years beginning after the date of enactment of this Act.

Section 309 - Exclusion of certain disability-related first responder treatment payments. Section 309 permits first responders to exclude service-connected disability pension payments from gross income after reaching retirement age. Section 309 is effective for amounts received in taxable years beginning after December 31, 2026.

Section 312 – Employer May Rely on Employee Certifying that Deemed Hardship Distribution Conditions are Met: Allows for plan sponsors to rely on “participant self-certification” that the participant had an event that constitutes hardship for purposes of taking emergency hardship withdrawals from a 401(k) plan or a 403(b) plan. Plan administrators are also permitted to rely on such participant’s self-certification that the amount of such hardship distribution is not in excess of the amount required to satisfy the financial need and that the participant has no alternative means reasonably available to the to satisfy such financial needs. Similar rules apply for purposes of unforeseeable emergency distributions from governmental 457(b) plans. Effective for plan years beginning after the date of enactment.

Section 314 – Penalty Free Withdrawal from Retirement Plans for Individual Case of Domestic Abuse: Where a participant is a domestic abuse survivor, that participant may take a penalty tax-free withdrawal up to the lesser of (i) \$10,000 (indexed for inflation), or (ii) 50% of their account value with the option to repay such amounts within a 3-year timeframe. Effective for distributions made after December 31, 2023.

Section 325 – Roth Plan Distribution Rules: Eliminates the lifetime minimum distribution requirement for designated Roth accounts under qualified retirement plans (but the after-death required minimum distribution rules continue to apply). Under the current law, such exemption was previously limited to Roth IRAs (but not designated Roth accounts held in 401(k) and other plans). Generally effective for tax years beginning after December 31, 2023, although not with respect to distributions required before January 1, 2024.

Section 326 – Exception to Penalty on Early Distributions from Qualified Plans for Individuals with a Terminal Illness: Creates an exception to the 10% early withdrawal penalty for those participants with a terminal illness. Requires a physician certify that such participant has an illness or condition that is reasonably expected to result in death within 84 months. Effective on the date of enactment.

Section 328 – Repeal of Direct Payment Requirement on Exclusion from Gross Income of Distributions from Governmental Plans for Health and Long-Term Care Insurance: Eliminates the requirement that, in order to be excluded from gross income (up to \$3,000), distributions made from a governmental retirement plan that are used to pay for certain eligible public safety officers health insurance premiums be paid directly from such plan. Permits governmental retirement plans to pay for qualified health insurance premiums by making distributions directly to either the insurer or to the participant. If the plan makes such distributions to the participant, such participant must include a self-certification that such funds did not exceed the amount paid for premiums when filing their tax return for that year. Effective for distributions made after the date of enactment.

Section 329 - Modification of eligible age for exemption from early withdrawal penalty. The 10 percent additional tax on early distributions from tax preferred retirement savings plans does not apply to a distribution from a governmental plan to a public safety officer who is at least age 50. Section 329 extends the exception to public safety officers with at least 25 years of service with the employer sponsoring the plan and is effective for distributions made after the date of enactment of this Act.

Section 330 – Exemption from early withdrawal penalty for certain State and local government corrections employees. Section 330 extends the public safety officer exception to the 10 percent early distribution tax to corrections officers who are employees of state and local governments, effective for distributions made after the date of enactment of this Act.

Section 331 – Special Rules for use of Retirement Funds in connection with Qualified Federally Declared Disasters: Establishes permanent special rules governing plan distributions and loans in cases of qualified federally declared disasters. Permits up to \$22,000 to be distributed from employer retirement plans or IRAs for affected individuals. Creates an exemption to the 10% early distribution penalty tax for such distributions. Effective for disasters occurring on or after January 26, 2021.

Section 338 – Requirement to Provide Paper Statements in Certain Cases: Amends the relevant provisions of ERISA related to pension benefit statements to require plan sponsors of defined contribution plans to provide at least one paper statement to plan participants each calendar year and, with respect to defined benefit plans, to provide at least one paper statement every 3 years. Permits exceptions to these pension benefit statement rules for plans that allow employees to opt into e-delivery statements if the plan follows the conditions of the 2002 safe harbor. Directs the DOL to update the relevant sections of their regulations and corresponding guidance by December 1, 2024. Effective for plan years beginning after December 31, 2025.

Section 603 – Elective Deferrals Generally Limited to Regular Contribution Limit: Requires that all catch-up contributions to 401(a) qualified plans, 403(b) plans, and governmental 457(b) plans be made on a Roth basis, with an exception made for those employees whose prior year wages do not exceed \$145,000 (indexed for inflation). SIMPLE and SEP IRAs are excluded from this requirement. Effective for taxable years beginning after December 31, 2025.

Section 604 – Optional Treatment of Employer Matching or Nonelective Contributions as Roth Contributions: Allows a 401(a) qualified plan, 403(b) plan, or governmental 457(b) plan to provide participants with the option of treating employer matching and non-elective contributions as Roth contributions. Matching and nonelective Roth contributions must be 100% vested at the time of such contribution. Effective for contributions made after the date of enactment.

¹ SECURE 2.0 Act of 2022

United States Senate Committee on Finance

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Addendum A: Fiduciary Compliance Checklist

Fiduciary Compliance Checklist

I. General Fiduciary Responsibilities – Does the Committee:

- Act solely in the interest of plan participants and beneficiaries and with the exclusive purpose of providing a benefit to them
- Defray the reasonable costs of administration
- Act with the skill and diligence of a prudent person knowledgeable in the action being taken and in the best interest of the Program as a whole.
- Diversify plan investments
- Act in accordance with the established plan documents and look towards ERISA established standards as widely used practices within the industry; adopting policies if the Committee deems feasible.
- Avoid conflicts of interest and prohibited transactions

II. Committee Structure

- Are the Committee members aware of their fiduciary status
- Do Committee members participate in fiduciary training when appointed, and is annual ongoing fiduciary training provided by the contracted Investment consultant or designated investment management or compliance professional?
- Do Committee members participate in the Nevada Open Meeting Law (OML) and Nevada Boards and Commissions Training provided by the State of Nevada Attorney General's Office at time of appointment and reviewed or refreshed at least annually during tenure, and other annual training opportunities and support?
- Do Committee members meet and maintain the Committee requirements outlined in NRS 287.325 to carry out their fiduciary duties?
- Does the State of Nevada contract with or employ knowledgeable experts in Investment Management, Recordkeeping, and Plan Administration to ensure fiduciary compliance?
- Have all fiduciaries to the Plan been identified? Do all fiduciaries have control over the management or disposition of assets and/or Plan Design?
- Do the fiduciaries have discretionary authority over administration of the Plan?
- Does the Plan provide a platform for participants to receive investment advice for a fee (with intent that it be acted upon by choice and direction of the participants)
- Does the committee have a charter, if applicable?

III. Plan and Committee Procedures

- Has the Mission Statement of the Plan been established and reviewed at least annually, and are ongoing goals and objectives of the plan formally reviewed, discussed, amended (if needed), and documented on at least an annual basis?
- Are there formal policies and procedures established for the following:
 - Frequency of meetings (quarterly, etc.)
 - Monitoring of service providers and other professionals (E.g., frequency of vendor searches, contract management, contract evaluation, etc.).
 - Determining the prudence of investments
 - Determining the reasonableness of fees
 - Determining reasonableness of service contract terms and conditions
 - Appointing and/or replacing committee members
- Is there an Investment Policy Statement (IPS) established and adopted?
 - Is the IPS regularly consulted when making investment decisions?
 - Is the IPS regularly reviewed and updated as appropriate?
- Is there documentation of the minutes of each committee meeting?
- Does the Plan follow the State of Nevada's Records Retention requirements?

IV. Investment Management – Does the Committee engage in regular monitoring of the following:

- Investment Structure:
 - Is the investment structure appropriate for underlying participants?
 - Are the number of investment options appropriate?
 - Do the investment options span the risk return spectrum?
 - Can the participants understand the investment options?
 - Are there any voids in the current investment lineup?
- Qualified Default Investment Option (QDIA) (target date funds) Review:
 - Has a QDIA been adopted and ensure that an investment qualifying as a QDIA is appropriate as a single investment capable of meeting a worker's long-term retirement savings needs and the Plan's financial wellness goals and objectives
 - Review the Plans employee demographics of the Plan and the current allocation by age
 - Does the Committee regularly examine the asset allocation of the current QDIA to ensure it is appropriate for the generational employment demographic of the participating workforce of the Plan?
 - Regularly review the current QDIA versus comparable vehicles
- Conduct at least an annual IPS Review
- Engage in an Investment Fund Performance Analysis: (at least quarterly):
 - Review fund performance and risk measures vs. benchmarks and peer groups
 - Review plan level fund and contribution asset allocations

- Assess fund performance and attributes vs. Investment Policy Statement criteria
- Provide fund recommendations: Additions, Replacements, Watch List
- Conduct a Global Capital Market Review:
 - Review of activity in domestic and foreign markets
 - Review of returns for various domestic, foreign and fixed income asset classes to include observations and trends
- Conduct regular Fee Monitoring & Benchmarking (at least annually): versus plans in same industry and with similar number of participants and program demographics
 - Review participant, record keeper/administrative and investment fees for transparency and competitiveness
 - Are the fees deemed "reasonable"?
- Regularly review trends, developments, legal updates within the defined contribution environment as part of a compliance audit, review, or a provision of the Recordkeeping Services and/or Investment Consultant Contract(s).

V. Plan Administration and Compliance

- Are the plan documents and supporting documents (SPD, FICA Plan Doc, etc.):
 - Regularly reviewed to ensure compliance with its terms?
 - Regularly updated and amended to comply with legal and regulatory requirements?
 - Available for easy review by participants and/or beneficiaries?
- Are there written procedures in place for the following:
 - Preventing/correcting operational errors
 - Processing contributions timely
 - Monitoring various statutory limits
 - Conducting an annual financial audit
 - Processing and management of Plan loans
 - Processing and management of QDROs
 - Processing and management of Unforeseeable Emergency/Hardship distributions

VI. Plan Safeguards

- Although the Plan is NOT subject to ERISA Section 404(c), are the following safeguards considered or established if adopted:
 - Are participants provided with the following:
 - The right to direct their own investments, if applicable
 - Reasonable opportunity to provide investment direction to the record keeper on a timely basis
 - A diversified range of investments to choose from
 - Investment education
- Are plan expenses monitored and benchmarked against industry averages?

- Are vendors providing and updating 408(b)(2) disclosures
- Is a Qualified Default Investment Alternative ("QDIA") provided under the plan?
- Are QDIA notices distributed on a timely basis?
- Is a Fidelity bond required by the State of Nevada? If so, has it been purchased and regularly renewed?
- Is the plan covered by fiduciary liability insurance?
- Does the employer have cyber security insurance, and/or does it require its contractors to maintain cyber security insurance?

VII. Communications

- Is there a written and adopted communication plan?
- Are participants provided with timely distribution of the following documents:
 - Summary Plan Document
 - Summary of Material Modifications
 - Annual Plan Report
- Are participants provided with all required notices on a timely basis (during the established on-boarding period and at least annually thereafter); including, but not limited to:
 - Enrollment materials
 - Quarterly benefit statements (Annual Benefits Statement for FICA Alternative Plan)
 - Annual and quarterly 404(a)(5) disclosures (if required)
 - 30-day notice for changes to investment fund lineup
 - Automatic contribution arrangement notice, (if applicable)
 - Blackout notices (if applicable)
 - Safe harbor notices (if applicable)
- Is the effectiveness of investment education materials being measured regularly?

State Contracting Policies and Procedures

Homa Sayyar Woodrum, General Counsel, Nevada State Purchasing Division

2023 Boards and Commissions Training

October 17, 2023

Key Concepts



Watch for Promises Made or Exchanged



Government Contracting is Different from the Private Sector



Good Stewardship of State Resources



Care and be Careful about Contracting



Fairness and Transparency



Be Engaged Throughout Procurement and Contracting



Use Resources to Supplement Your Knowledge

Personal Responsibility



NRS 333.810(1)

Contracts contrary to NRS 333 are void
Personal liability for agency head and
employee not following the rules



NRS 353.260(2)

Misdemeanor 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)

Roadmap

- ▶ Mindset
 - ▶ Perspective
 - ▶ Ethics
 - ▶ How Government Contracts are Different
- ▶ Resources
- ▶ Where to Start (and Why)
 - ▶ Authority
 - ▶ Competition/Transparency
 - ▶ Negotiation
- ▶ Contracting Forms/Vehicles

Perspective Matters

- ▶ If you view state policies and procedures as. . .
 - ▶ Red tape
 - ▶ You will try to cut through it
 - ▶ A safety/seat belt
 - ▶ You will put it on and keep it on for your journey




vs.



What do you want your headline to be?

Red Tape vs. Safety/Seat Belts

- ▶ “We already know which vendor we want; I don’t see why we need to get quotes.”
- ▶ “Let’s go the fastest route to get started.”

- 
- ▶ “We can just use a retroactive contract.”
 - ▶ “Nothing bad will happen, I don’t see why the vendor needs insurance.”



- ▶ “Let’s see if we can get the best quality and price for the state.”
- ▶ “A little extra time will get us to a solid contract.”
- ▶ “Good business partners secure authorization and funding first.”
- ▶ “We shouldn’t do business with people who won’t back up their work.”

State Ethical Considerations

Compliance with state procurement rules relates back to ethical obligations of public officers and employees:

- ▶ “A public office is a public trust and shall be held for the sole benefit of the people.” NRS 281A.020(1)(a).
- ▶ “...faithful and impartial discharge of the public officer’s or employee’s public duties.” NRS 281A.400(1). See also NRS 281A.400(3) re: contracts.
- ▶ NRS 281A.430 - Contracts in which public officer or employee has interest prohibited; exceptions; request for relief from strict application.
- ▶ NRS 281A.540 - Governmental grant, contract or lease and certain actions taken in violation of chapter are voidable; prohibited contract is void; recovery of benefit received as result of violation.

Note: Licensed professionals have additional ethical requirements (e.g., Nevada Rules of Professional Conduct for licensed attorneys).

Basic Contracting



- ▶ Who are the parties?
- ▶ What is the deal at hand?
- ▶ When do you start? Finish?
- ▶ Where is the contract based?
- ▶ Why are the parties contracting?
- ▶ How will the parties pay/perform?

Government Contracting is Different



Who the state does business with is determined by law

Contractors must agree to state terms and meet state requirements



What the state contracts for is determined by law

Goods and services the state is permitted to purchase



When the state contracts is determined by law

Guidelines for frequency of re-solicitation and approval timing (BOE)



Where the state contracts is determined by law

Nevada choice of law (and venue) is a must



Why the state must follow contract rules is determined by law

Void contracts mean unenforceable terms for clients



How the state contracts is determined by law

Competitive processes and special approval requirements

Contracting Law and Government Contracts Co-exist

- ▶ If you do not follow Government Contracting rules, a contract could still be created, but the parties may not be who you think:
 - ▶ NRS 333.810 - Personal liability for contracts not following state processes
 - ▶ NRS 353.260 - Misdemeanor to exceed budget authority
- ▶ Watch for promises you can't make - for example:
 - ▶ You tell a vendor to start work now, before the contract is fully approved
 - ▶ You promise a vendor you'll work with them without competition
 - ▶ You tell a vendor with a contract to add a project and that they'll be paid
 - ▶ You promise a vendor payment in advance before work is performed

Procurement Law Includes State Contracting Law



Nevada Revised Statutes

332 - Purchasing: Local Governments

333 - Purchasing: State

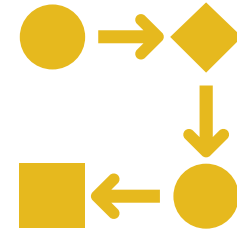
333A - State Performance Contracts

334 - Purchasing (Generally)

338 - Public Works

353.500-353.630 - Installment
Purchase/Lease-Purchase

277.080-277.180 - Interlocal Agreements



State Administrative Manual

Contracts

Solicitation Requirements

Board of Examiners Requirements

Insurance

SAM 0326(8) Repealed in 09/2021

Where to Start?

- ▶ Authority (and Limitations on Authority)
 - ▶ Agency/board/commission statutes
 - ▶ Applicable chapters can depend on the parties
- ▶ Competition/Transparency
 - ▶ Formal/Informal
 - ▶ Threshold amounts
- ▶ Negotiation
 - ▶ Minimizing Risk/Protecting the State
 - ▶ Red Flags

Hypothetical: Licensing Fees

- ▶ The Nevada Superhero Licensing Board mentions wanting to build an online licensing system before next calendar year for at least 2,000 licensees at their June meeting.
- ▶ The new Executive Director emails her friend at Interesting Software and is excited to learn that they can set up a system to charge each licensee \$50 each year and the fees will fund the system while leaving \$25 per applicant in revenue for the board.
- ▶ The E.D. thinks this is a perfect solution and signs a four-year auto-renew contract with a cap on liability for the revenue amount Interesting Software estimates owing the State on a vendor prepared form with Interesting Software in July.
- ▶ At the next Board meeting in October, the E.D. reports that the system is already accepting applications and has brought in \$25,000 in revenue from 1,000 users.
- ▶ In November, 1,500 licensees report that their secret identities have been compromised. When the E.D. calls Interesting Software, she learns there has been a data breach and Interesting Software does not carry cyber insurance.

Who What When Where Why How

Ask Questions and Follow the Process

- ▶ In our hypothetical, the right mindset would have helped
- ▶ Perceived delay in getting a project started doesn't appreciate what the solicitation and negotiation process can do to help you succeed
- ▶ Following the process (and law) protects the State and Nevadans
- ▶ Best value and the most protection
 - ▶ For the Board
 - ▶ For the Licensees
 - ▶ For the Public

Hypothetical: Licensing Fees Reimagined

- ▶ The new Executive Director emails State Purchasing before the meeting with a licensing system on the agenda for the Nevada Superhero Licensing Board. Purchasing talks her through the process and suggests that she also touch base with board counsel about any administrative or statutory requirements for licensing as well as what delegated authority she has to work on the project.
- ▶ After talking to counsel, the E.D. learns that there is a regulation allowing the board to charge no more than \$25 per license, but credit card processing fees are permitted. She writes out the requirements for the system (including the pricing limitations) and gets board approval for the Request for Proposal document.
- ▶ Radioactive Software scores highest among the proposals and can customize their software for \$25,000 in total staff time and an annual \$12,500 software licensing fee for the four-year term. This will register unlimited users.
- ▶ The resulting contract is on the State form with insurance requirements approved by Risk Management, including heightened cyber coverage, and goes to the Board of Examiners for final signature after the parties and the Deputy Attorney General sign off.
- ▶ After the system goes online, Radioactive Software alerts the E.D. that someone has been attempting to access the system. They've blocked the attempt, but Radioactive Software uses their cyber policy coverage to bring in an outside forensic team to verify if any users are affected so that they can cover any required notices or damages per the contract.

Authority (and Limitations)

- ▶ What your public body can do
- ▶ What your public body is budgeted to do
- ▶ *Having the ability to do something, and the budget to do it, is not the end of the story*
- ▶ What do you have to do in order to perform your functions?
 - ▶ Limits on authority
 - ▶ Process requirements within that authority
 - ▶ Competition, transparency, signature authority, etc.
- ▶ What do you have to do with the funds you have?
 - ▶ Possible limitations depending on funding source
 - ▶ Specific rules about obligated funds
- ▶ Watch for rulemaking issues

Competition

- ▶ All plans for purchasing goods, services, or a combination of goods and services should start with determining your project scope internally
- ▶ For large or small projects, allowing competition helps to ensure best value for the State along with appropriate protections
- ▶ Informal competition for smaller projects can be as simple as getting quotes from vendors
- ▶ Formal competition allows you to “go slow to go fast”
 - ▶ No one wants to realize that their project vision doesn’t match industry options halfway through the budget with no system in sight
- ▶ The free Certified Contract Managers course covers the RFP (Request for Proposals) process

Negotiation

- ▶ Don't negotiate against yourself by attempting to skip competition
- ▶ Accept that Vendors and the State have disparate goals
 - ▶ Vendor goal: profit
 - ▶ State goal: best value and quality (plus performance)
- ▶ NRS 333 bars certain terms entirely
 - ▶ Indemnity by the state is not permitted
 - ▶ Requiring litigation or arbitration in another state or nation is not permitted
 - ▶ No boycott of Israel
- ▶ Counsel for State Purchasing safeguards process concerns, Counsel for the Agency should be involved for client-specific concerns

(Some) Negotiation Red Flags



Vendors who want to disclaim any warranty

What are you actually purchasing when someone won't promise that their work meets standards?



Vendors who want to cap liability to contract value

What are the actual concerns for the project and does the amount being paid align with the risk involved?



Vendors who want to reduce insurance requirements

Consider the risk the State takes on for every reduction in Vendor responsibility



Vendors who won't agree to State non-appropriation provisions

Remember: contracts cannot exceed authority



Vendors who attempt to limit audits and/or public records activity

You have obligations that can't be contracted away

Contract Forms

- ▶ Always download the latest version (updated versions in the works)
 - ▶ <https://purchasing.nv.gov/Contracts/ToolBox/#Forms/Templates>
- ▶ Short Form
 - ▶ Under \$100,000 (template still says \$50,000)
 - ▶ Lacks precedence language for attachments if unedited
- ▶ Long Form
- ▶ Amendments and Assignments
- ▶ Interlocal
 - ▶ Don't let the vendor declare that they are a public entity - check!

Review and Approval of Forms

- ▶ Contracts must be reviewed by your counsel at the Nevada Attorney General's Office per the State Administrative Manual
 - ▶ This includes when there no signature line for counsel
 - ▶ License agreements
 - ▶ Purchase orders with click through terms
 - ▶ Vendor template contracts
 - ▶ You may also need to work with Nevada Risk Management related to insurance provisions
- ▶ Your counsel's review does not take the place of following the process
 - ▶ Approval as to form does not mean approval as to substance or compliance with solicitation requirements
 - ▶ Remember: you could be personally liable
- ▶ Your counsel should work with you about legal questions in the process

Memorandums of Understanding, Letters of Agreement, and More

- ▶ Memorandums of Understanding containing promises are contracts
- ▶ Letters of Agreement are contracts
- ▶ Signing MOUs or LOAs without authority could subject you to personal liability or be a misdemeanor
- ▶ MOUs are great for communication plans with no actual promises or consequences, but some agencies try to use them to circumvent contracting rules (and even Deputy Attorney General review)
- ▶ Volunteer Agreements still have risk implications
- ▶ Grants are often contracts
- ▶ Licenses to use State facilities

Thank you!



Resources are available to help every step of the way



Ask questions early and often



Plan for the worst, hope for the best



<http://Purchasing.NV.Gov>

State Contracting Basics Video <https://www.youtube.com/watch?v=sAJhNVZIx4E>



Nevada Public Records Act (NPRA)

Leslie Nino Piro
General Counsel
Office of the Attorney General

October 2023

This presentation is for educational purposes only. The information provided in these slides is not intended to be and should not be construed as legal advice or counsel.



TODAY'S AGENDA

- 1 **Overview**
- 2 **Nevada Public Records Act (NPRA) – NRS Chapter 239**
Purpose, Defining a Record, Records Retention, PRR Procedures
- 3 **The 5-Day Rule and Beyond**
Acknowledgement, Clarification, Referral, Estimated Response Date
- 4 **Example Procedure for Processing Public Records Requests**
- 5 **Legal Authorities for Confidentiality**
Exemptions, Common Law Privileges, Balancing Tests
- 6 **Administrative Procedures for Government Agencies**
Denying Requests / Withholding Records, Fee Schedule, Actual Costs
- 7 **Judicial Review of NPRA Decisions**
Relief Available
- 8 **Checklist / Questions for Responding to Requests**
- 9 **Recent NPRA Case Law**
- 10 **Q & A**



NPRA Overview

The Nevada Public Records Act (NPRA) gives the public broad access to most government records

- NPRA codified at NRS Chapter 239
- NPRA \neq FOIA (*federal* Freedom of Information Act)
 - But NPRA and FOIA have a similar purpose

What's the Purpose of the NPRA?

NRS 239.001
NRS 239.0107(1)(c)

1

Transparency in government

2

Prompt access to records

– *“as expeditiously as possible”*

3

Liberal statutory construction

– *maximize the public's right of access to agency records*

4

Narrow reading of any exemption or exception



Records Retention and Archiving

Agencies are required to maintain records pursuant to records management programs (State & agency specific)

- **Records Retention Schedule** – provides the minimum retention period for an agency's records
- At the appropriate time:
 - Destroy securely, or
 - Send to State Library and Archives

For more information, visit:
https://nsla.nv.gov/state_records_services and find the retention schedule you need.

What is a “Public Record”?

No comprehensive definition of a “record” or “official state record”

Recorded evidence of business operations

Information an agency *creates or receives* to transact public business, which the agency maintains as evidence of its functions, policies, decisions, procedures, operations, or other activities

NRS 239.005, NAC 239.705(1).



What's NOT a Public Record?

General guide for what materials are not public records

- Informal notes and drafts
- Stationary and unused blank forms

Reference materials

- Reference texts, brochures, newsletters, magazines, newspaper articles, textbooks, presentation handouts, catalogs, etc.

Copies of policy and procedure manuals

Administrative and personal email & correspondence

- Meeting times, lunch dates, staff association memos, FYI memos, spam email, etc.

Personal materials

- Errand lists, bills, personal letters and/or photos

Ad hoc reports

Convenience copies

- Extra copies of official records

Publications for distribution

NAC 239.705(2)

For more guidance, see *Nevada Public Records Act: A Manual for Executive Branch Agencies*, available at https://nsla.nv.gov/id.php?content_id=56642757, and <https://nsla.nv.gov/public-records/>.

Non-record materials can—and *should be*—destroyed when they are no longer administratively needed!



SHRED



RECYCLE



Which Records are Subject to Public Records Requests?

Legislative Intent

ALL state agency records are public records unless declared confidential by Nevada law.

NRS 239.010.

- NPRA *presumes* an agency record is a public record, unless specific confidentiality restrictions apply

City of Sparks v. Reno Newspapers, 133 Nev. 398, 400 (2017).

How can Public Records Requests be Submitted?

Method and Medium for requesting records

The NPRA allows both written and verbal requests for public records. NRS 239.0107(1).

Agencies must provide:

- a *form* for requesting public records, *and*
- an alternative method for disabled individuals to submit a request

NAC 239.863.

A records request form should be posted on an agency's website and made available in-person.

NAC 239.862.

Example:

https://ag.nv.gov/Contact/Public_Records_Requests/

What Must Agencies Do in 5 Days?

The NPRA provides three options:



Acknowledgment and Estimated Response

If records cannot be made available within five (5) days, a written *acknowledgement* and estimated response date must be provided.

NRS 239.0107(1)(c).



Respond with No Responsive Records or a Referral

Tell requester the agency does not have responsive records and, if known, provide the contact information for a government entity that does.

NRS 239.0107(1)(b).



Full Response and Records Release

Provide a copy of the records requested

NRS 239.0107(1)(a).



Acknowledgments & Readily Available Records

Written communications are **REQUIRED** by the NPRA

Acknowledgement: Agencies must respond in writing within **five (5) business days** after a request is received. NRS 239.0107(1).

When a record is “**readily available**,” agencies must provide a copy of the record within *five (5) business days*.

- Does your agency have policies and procedures to ensure the 5-day time frame is met?

Request for Clarification

NPRA Requests **≠** requests for production of documents under civil procedure rules



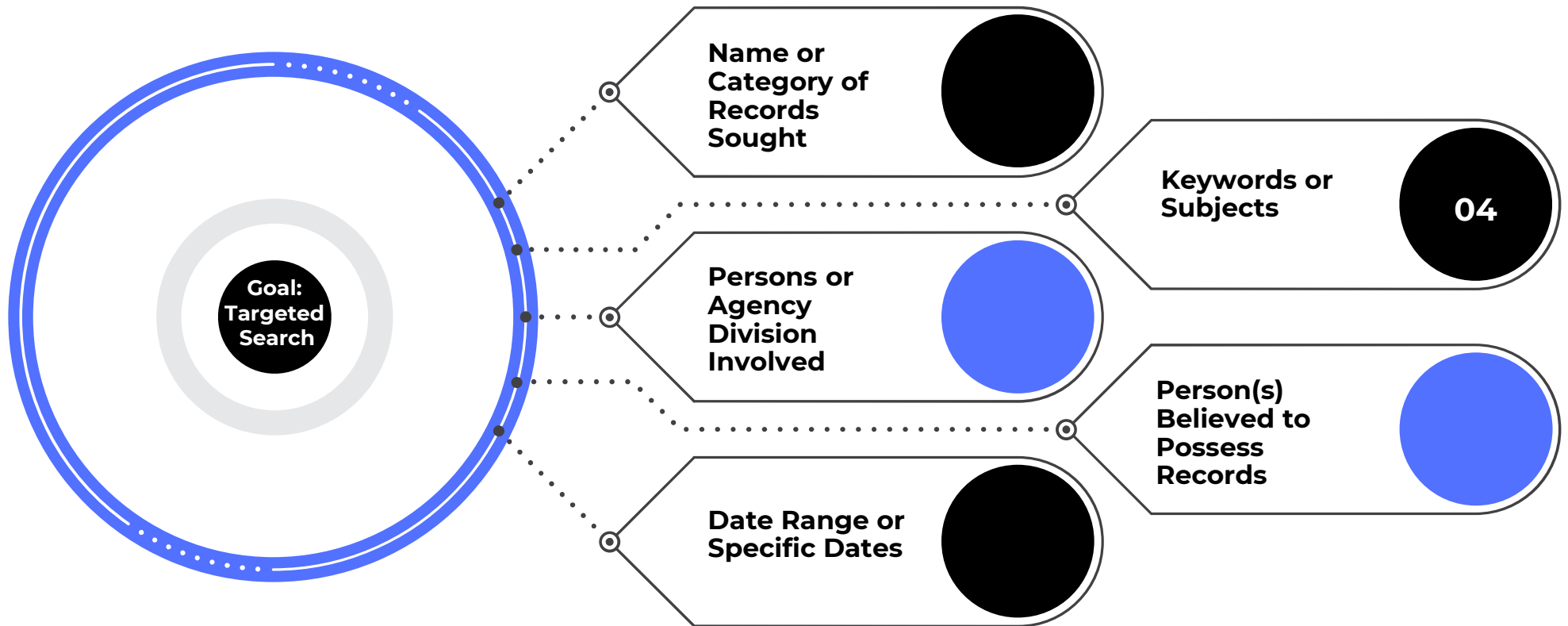
Reasonable requests for public records

When a request is overbroad or unreasonable, the agency is obligated to **request a clarification and narrowed time frame**. NRS 239.0107(1)(c)(2).

- Agencies must make a reasonable effort to assist the requester to maximize the likelihood the requester will receive a copy of the record as expeditiously as possible.

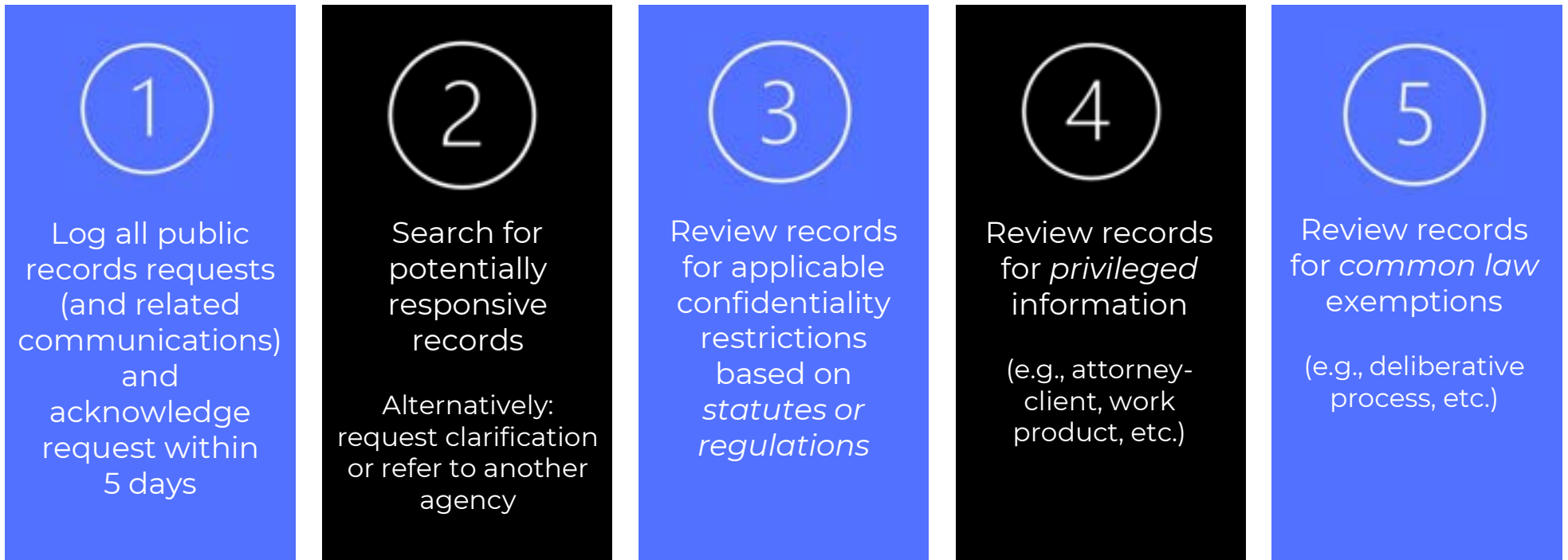
Records must be identifiable and requests must not be overbroad. *Freedom Watch, Inc. v. Dep't of State*, 925 F. Supp. 2d 55, 62 (D. D.C. 2013).

Specific Requests for Clarification



Example Procedure for Processing Public Records Requests

* Note that each agency should develop agency-specific protocols in coordination with counsel.



Example Procedure for Processing Public Records Requests

* Note that each agency should develop agency-specific protocols in coordination with counsel.

6

Consider the appropriate *balancing test* if no specific privileges or confidentiality statutes apply

7

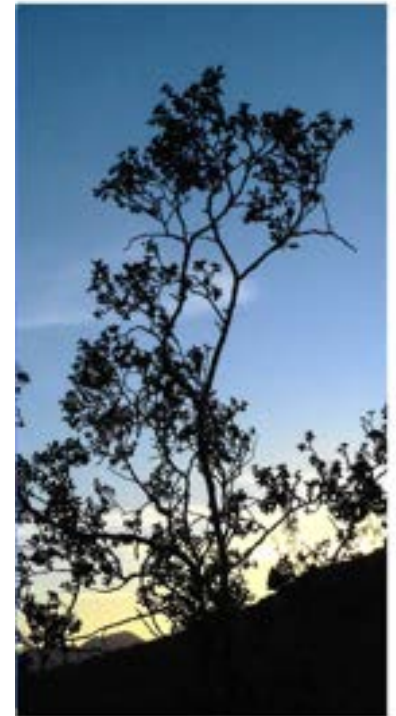
Confer with agency counsel to confirm all applicable legal restrictions on release, if needed

8

Redact any personal privacy information (PII) or other privileged or confidential information from responsive records, if needed

9

Release the records and/or cite applicable legal authority for withholding records, if needed



Regulatory Authority to Withhold Records or Redact Information

Regulatory exemptions are stated in the NAC or agency regulations

- Agencies may adopt regulations declaring certain records confidential.

NRS 233B.040(1)(a) (reasonable regulations appropriately adopted by an agency “*have the force of law*”); *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 227 (2001).

- *E.g.*, NAC 441A.335(2) protects certain health information, medical records, or reports
- **But beware:** Nevada Supreme Court has held that NACs do not limit the scope of the NPRA

Comstock Residents Ass'n v. Lyon Cty. Bd. of Commissioners, 134 Nev. 142, 414 P.3d 318 (2018); *Clark Cty. Sch. Dist. v. Las Vegas Rev.-J.*, 134 Nev. 700, 429 P.3d 313 (2018).





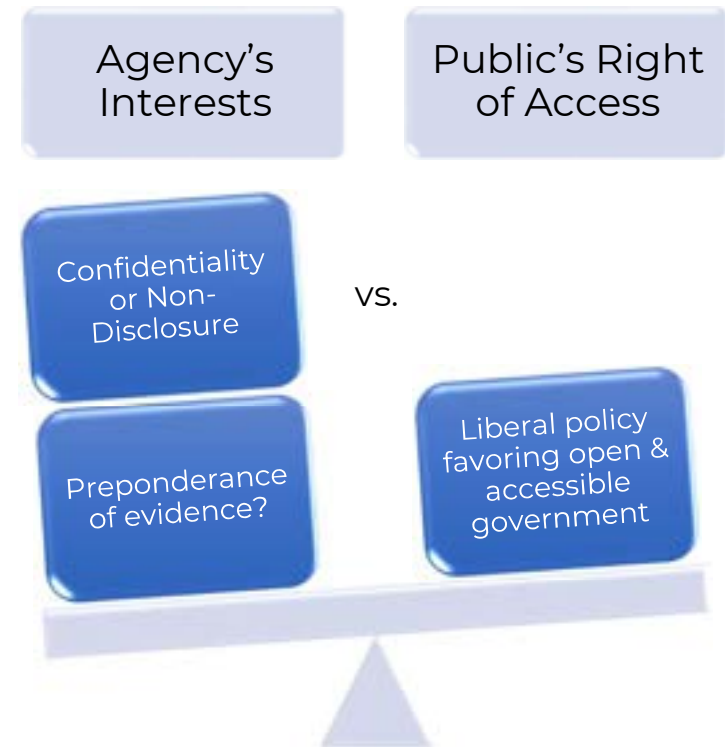
Nevada's General Balancing Test

The General Balancing Test *must be* used by government agencies to determine if a withholding is justified when a record is not explicitly made confidential by statute

Donrey of Nevada, Inc. v. Bradshaw, 106 Nev. 630 (1990)
Reno Newspapers, Inc. v. Gibbons, 127 Nev. 873 (2011)

- Government must explain why the records are not disclosed and provide *specific legal authority* justifying withholding
- Government interest in withholding must outweigh the public interest in disclosure by a “preponderance of the evidence.” NRS 239.0113.
- Test generally should not be used to withhold record in its entirety

This test “weighs”:



Personal Privacy Balancing Test

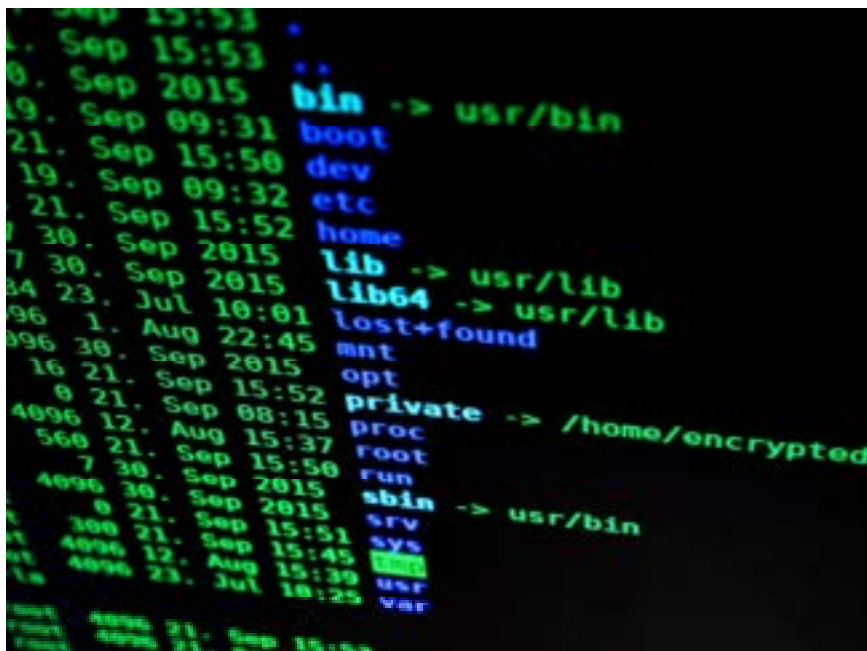
Basic two-part inquiry for withholding information based on **personal privacy interests**:

1. Government must establish a “*nontrivial*” personal privacy interest —interest = “*more than de minimis*”
2. If successful, the *burden shifts* to the requester to show that disclosure/info sought are likely to advanced a significant public interest



Clark Cnty. School Dist. v. Las Vegas Rev.-J., 34 Nev. 700 (2018) (adopting the Ninth Circuit’s test in *Cameranesi v. U.S. Dep’t of Defense*, 856 F.3d 626 (9th Cir. 2017) (personnel and medical files may be shielded from public disclosure to prevent an unwarranted invasion of personal privacy)).

Personal Privacy Balancing Test - *reaffirmed*



NVSC has reaffirmed key parts of the personal privacy balancing test:

- Test applies whenever the government asserts a nontrivial personal privacy interest
- **Threshold to show a nontrivial privacy interest is low**
- “avoidance of harassment is a cognizable privacy interest”
 - embarrassment, stigma

Las Vegas Metro. Police Dep't v. Las Vegas Rev.-J., 478 P.3d 383 (Nev. 2020) (discussing *Clark Cnty. School Dist. v. Las Vegas Rev.-J.*, 34 Nev. 700 (2018), and *Cameranesi v. U.S. Dep't of Defense*, 856 F.3d 626 (9th Cir. 2017)).

Denying a Request or Withholding Records

Statutory or regulatory authority justifying confidentiality:

- State statutes: NRS 239.010 and other NRS provisions
- Federal statutes
- State NACs (use with a balancing test!)

Common Law

- Privileges

Balancing Tests

- General Balancing test (*Bradshaw/Gibbons*)
- Personal Privacy Balancing test (*CCSD/Cameranesi*)





Denying a Request or Withholding Records

Provide specific citations

Agencies must provide a written response and a specific citation to statute or other legal authority making a record confidential.
NRS 239.0107(d).

Privilege Log or Index

Agencies are *not* required to produce a log or “Vaughn index” of confidential records *unless and until* the requester files a lawsuit.
Gibbons, 127 Nev. at 881–83.

- NVSC declined to define the precise form that a log must take or what it must contain
- “adequate log” will vary depending on the circumstances of each case

Helpful Questions for Responding to Public Records Requests



1

Are records
(or
information)
responsive to
the request?

2

Do the
requested
records
exist?

3

Does the
agency have
legal custody
or control of
the requested
records?

4

Do any
statutory
exceptions
apply? (state
or federal)

Helpful Questions for Responding to Public Records Requests

5

Do any **common law** privileges or confidentiality doctrines apply?

6

Do the **general** or **personal privacy** balancing tests favor withholding?

7

Are responsive records confidential *in their entirety*?

8

Do the responsive records require **redactions**?



Common Personal Privacy Info (PII) for Redaction

Redactions should be “narrowly tailored” to fit only the protected info

- Social Security Number or Tax ID Number
- Driver’s license number or identification card number
- Name of a minor child
- Date of birth and place of birth
- Race or Gender
- Home address
- Personal e-mail address (*i.e.*, any non-government email address)
- Signature, fingerprint, or any other biometric record
- User name or unique personal identifier
- Direct telephone number (*e.g.*, direct line, an assistant, or cell phone)
- Ride Share (*i.e.*, Uber/Lyft) pickup or drop-off address
- Medical identification number or a health insurance identification number
- Airline flight, ticket, or confirmation numbers, and departure/arrival times
- Financial account number or credit/debit card number
- Bank name and associated information (address, phone, routing number, etc.)
- Tracking number and package signer for any shipping carrier (*e.g.*, Fed Ex, UPS, U.S. Postal Service, DHL, etc.)
- Video conference meeting IDs, passcodes, phone conference IDs, and video conference device links (*e.g.*, Teams, Zoom, Lifesize)
- Criminal Justice Information (CJI) (*e.g.*, personal data, property data, other information related to incidents and cases)
- Criminal History Record Information (CHRI), (*e.g.*, arrest descriptions and notations, conviction status, etc.)

See, e.g., NRS 603A.040; 34 C.F.R. § 99.3; Fed. R. Civ. P. 5.2; D. Nev. LR IC 6-1; EDCR 5.214.

Fee Schedule – List of Fees

Fees charged to fulfill public records requests can be a very contentious issue for government agencies

NRS 239.052(3)

An agency must prepare and *maintain a list of its fees* for providing public records and post the list in a conspicuous place in each of its offices.

NRS 239.053(2)

If applicable, the agency's list of fees must also include per page fee for court reporter transcripts.

Meetings: Minutes & Recordings



No Charge for Minutes and Recordings

- Minutes or audiotape recordings of meetings must be made available to the public within *30 working days*. NRS 241.035(2).
- Upon request, a copy of the minutes or audio recordings must be made available to a member of the public at *no charge*. NRS 241.035(2).
- Agencies must retain five (5) years of minutes. The remainder may be sent to State Archives. NRS 241.035(2).

Charging “Actual Costs”

- Providing copies of public records is part of agencies’ regular duties
- But, the NPRA still allows agencies to recover *actual costs* NRS 239.052
- Actual costs = include, *but are not limited to*, the “direct cost” incurred in responding to a records request, such as those for ink, toner, paper, media, and postage NRS 239.005
 - 2019: Legislature repealed “Extraordinary Use” fees NRS 239.055

★ ACTUAL COSTS CHARGED MUST BE EXACT ★

- It may be difficult to ascertain these costs unless an agency has a dedicated public records employee(s)

Charging “Actual Costs”

- “Actual cost” does *not* include a cost an agency “incurs regardless of whether or not a person requests a copy of a particular public record” NRS 239.052
 - Discourages agencies from depending on such fees to make up annual budget shortfalls
- In 2019, the **Legislature expressly considered and chose not to exclude overhead, personnel, and labor costs** from the definition of actual costs
 - Legislators found such costs appropriate when requests are “*incredibly onerous*” or “*incredibly large*”
 - Flexibility to recoup costs for broad requests that disproportionately utilize agency resources, so costs are *not borne taxpayers but are made the requester’s responsibility*

June 3, 2019 Mins. Assembly Comm. on Gov’t Affairs, SB 287

Judicial Review by the District Court

A requester may file a petition for review before the district court involving their NPRA request on three grounds:

1. Denial of a request
2. Unreasonable delay
3. Excessive or Improper fees

NRS 239.011

Relief available?

- Compel agency or person with legal custody to provide a copy of the record
- Provide relief relating to fees
- Award attorneys' fees & costs
 - Requester *must* prevail

Immunity from damages liability for acting in good faith



Civil Penalties for *Willful* Violations

If a court decides that an agency willfully failed to comply with the NPRA, the court must impose a civil penalty:

1. First violation = \$1,000
2. Second violation = \$5,000
3. Third or subsequent violation = \$10,000

NRS 239.340(1) (violations within 10-year period)

- Penalty is imposed on agency
- Money goes toward improving access to public records



Recent NVSC Decisions

LVRJ v. LVMPD, 139 Nev. Adv. Op. 8 (Nev. 2023)

- *Background*: newspaper seeks records of LVMPD's criminal investigation of an NHP trooper
- *Holding*: Confidential Informant (CI) privilege (NRS 49.335) does not justify withholding records in their entirety; LVMPD failed to demonstrate government interests in confidentiality “**clearly outweighed**” public interests favoring disclosure

Key takeaways for public agencies:

- If withholding records under general balancing test, be prepared to provide a **detailed** explanation of risks and harms that may stem from disclosure
- Avoid tendency to minimize public interest in access to records
- **Consider redact and release approach** if no confidentiality statute or privilege applies and arguments to withhold under general balancing test are weak

Recent NVSC Decisions

Conrad v. Reno Police Dep't,
139 Nev. Adv. Op. 14 (Nev. 2023)

- *Background*: news website sought RPD's unredacted body camera footage
- *Holding*: unredacted body camera footage is exempt from disclosure under NRS 289.025

Key takeaways for public agencies:

- NRS 289.025 provides that any photograph of a peace officer in the possession of a law enforcement agency is confidential and “not public information”
- Any body camera footage responsive to a PRR that identifies officers' faces must be redacted prior to release

There were
NO
2021 or 2023
Legislative
Amendments
to the NPRA!



Public Records Q & A



Administrative Rulemaking in Nevada

Office of Attorney General CLE

Pierron Tackes, Senior Deputy Attorney General

October 2023

A Few of My Favorite Things

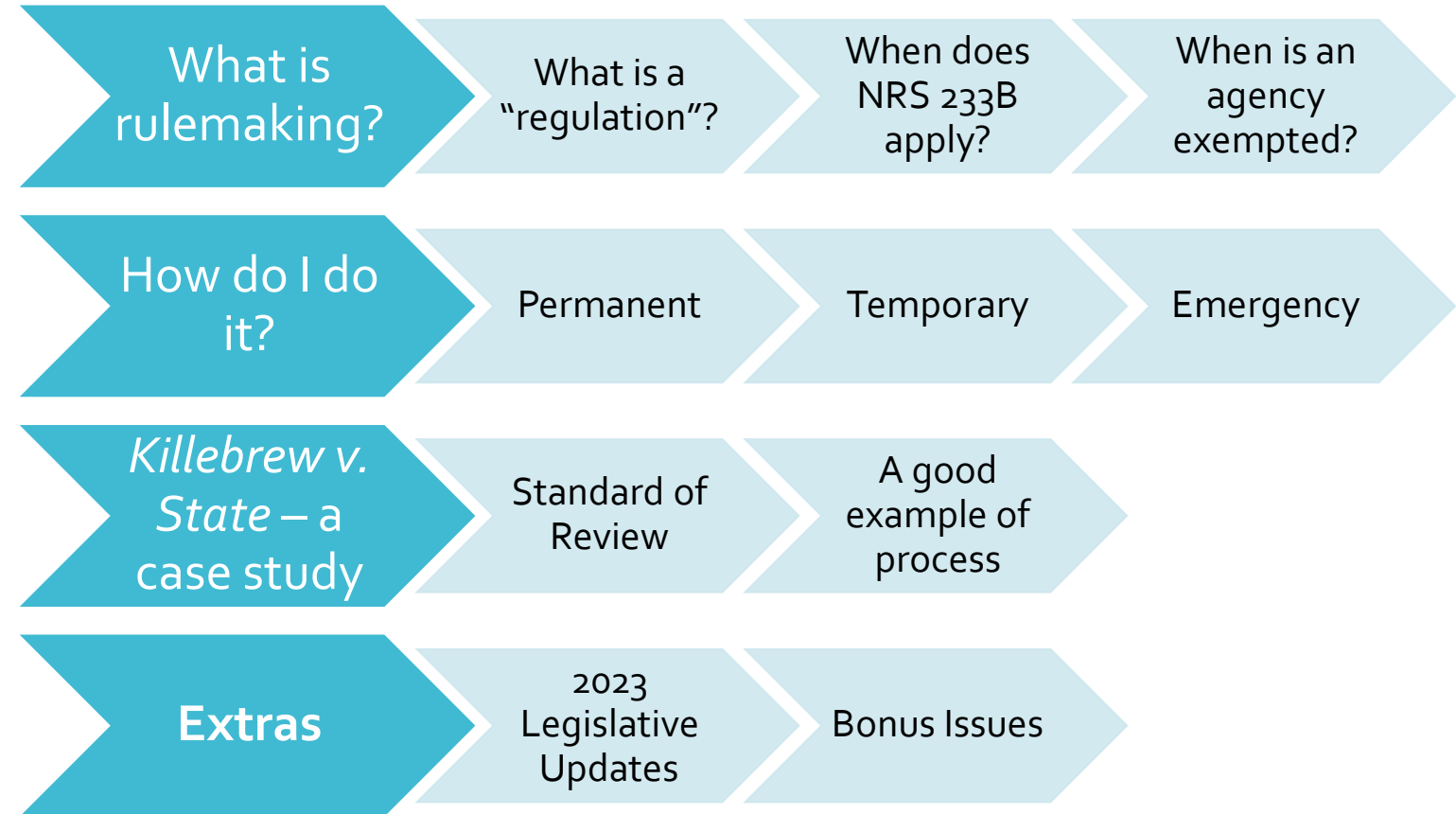
Resources



- AGO Administrative Rulemaking Manual, Tenth Edition (2023)
<https://ag.nv.gov/Publications/Manuals/>
- State of Nevada Register of Administrative Regulations
<https://www.leg.state.nv.us/register/>
- Legislative Council's Preface to the NRS
<https://www.leg.state.nv.us/Division/Research/Documents/LegislativeCounselsPreface.pdf>
- *Killebrew v. State of Nevada*, 139 Nev. Adv. Op. 43 (2023)
https://nvcourts.gov/supreme/decisions/advance_opinions

Road Map:

Overview of administrative rulemaking under NRS Chapter 233B



What is a “regulation”?

NRS 233B.038 “Regulation” defined

1. “Regulation” means:

- (a) An agency rule, order, or statement of general applicability which describes the policy, or describes the organization, of any agency;
- (b) A rule, order, or statement of a written policy, which describes the manner in which a person is to comply with a law, in order to assess a fine, mo



What are we really talking about?

Let's start with the basics.

- The Legislature passes laws (“statutes”), which are codified in the Nevada Revised Statutes (NRS).
- Regulations (also referred to as rules) are created by the Executive Branch agencies, boards and commissions, and explain how that body intends on carrying out or administering the statutes.
- Regulations are codified into the Nevada Administrative Code (NAC), and carry with them the “force of law and must be enforced by all peace officers.” *See NRS 233B.040.*
- NRS Chapter 233B, passed by the Legislature, sets forth the process for state agencies to create regulations.

What is a “regulation”?

NRS 233B.038 “Regulation” defined.


1. “Regulation” means:

(a) 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;

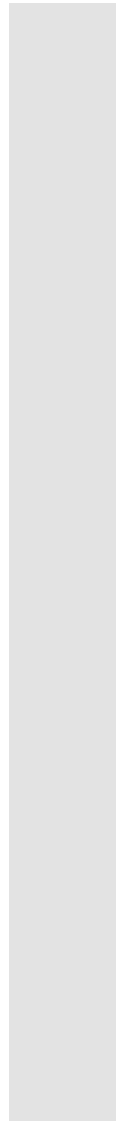
(b) A proposed regulation;

(c) The amendment or repeal of a prior regulation; and

(d) The general application by an agency of a written policy, interpretation, process or procedure to determine whether a person is in compliance with a federal or state statute or regulation in order to assess a fine, monetary penalty or monetary interest.



“General Applicability”

- Applies to the public in general or to all licensees.
 - Contains a mandatory requirement or standard that the agency will use.
 - Affects private rights or procedures available to the public.
- 

“General Applicability” Case Law

- *Public Service Com’n of Nevada v. Southwest Gas Corp.*, 99 Nev. 268, 273, 662 P.2d 624, 627 (1983).
 - If the rule affects other licensees and the public, as well as a general policy decision of the agency, it must be a regulation.
 - “Major policy concern” and “such significance to all licensees and consumers that it cannot be characterized as a simple adjudication in a contested case.” *Id.*
- *Coury v. Whittlesea-Bell Luxury Limousine*, 102 Nev. 302, 305, 721 P.2d 375, 377 (1986).
 - “An agency makes a rule when it does nothing more than state its official position on how it interprets a requirement already provided for and how it proposes to administer its statutory function.”
- *Dunning v. Nevada State Board of Physical Therapy Examiners*, Nevada Supreme Court Case No. 67322, filed May 26, 2016.
 - “[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)

General vs. Specific

- Declaratory, decisional, advisory, and fact-specific interpretive rulings are NOT regulations. *Dunning*, at 4 citing NRS 233B.038(2)(b), (e), (f) and (h).
- It becomes “general” when the intent is that everyone must follow the ruling or interpretation.

What ISN'T a "regulation"?

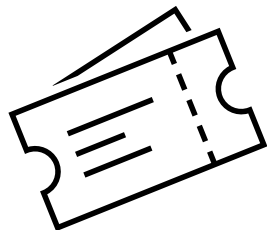
2. The term does not include:
 - (a) A statement concerning only the internal management of an agency and not affecting private rights or procedures available to the public;
 - (b) A declaratory ruling;
 - (c) An intraagency memorandum;
 - (d) A manual of internal policies and procedures or audit procedures of an agency which is used solely to train or provide guidance to employees of the agency and which is not used as authority in a contested case to determine whether a person is in compliance with a federal or state statute or regulation;
 - (e) An agency decision or finding in a contested case;
 - (f) An advisory opinion issued by an agency that is not of general applicability;
 - (g) A published opinion of the Attorney General;
 - (h) An interpretation of an agency that has statutory authority to issue interpretations;
 - (i) Letters of approval, concurrence or disapproval issued in relation to a permit for a specific project or activity;
 - (j) A contract or agreement into which an agency has entered;
 - (k) The provisions of a federal law, regulation or guideline;
 - (l) An emergency action taken by an agency that is necessary to protect public health and safety;
 - (m) The application by an agency of a policy, interpretation, process or procedure to a person who has sufficient prior actual notice of the policy, interpretation, process or procedure to determine whether the person is in compliance with a federal or state statute or regulation in order to assess a fine, monetary penalty or monetary interest;
 - (n) A regulation concerning the use of public roads or facilities which is indicated to the public by means of signs, signals and other traffic-control devices that conform with the manual and specifications for a uniform system of official traffic-control devices adopted pursuant to [NRS 484A.430](#);
 - (o) The classification of wildlife or the designation of seasons for hunting, fishing or trapping by regulation of the Board of Wildlife Commissioners pursuant to the provisions of title 45 of NRS; or
 - (p) A technical bulletin prepared pursuant to [NRS 360.133](#).

Also excluded...

- NRS 233B.039 further exempts:
 - The Governor
 - The Department of Corrections (in some but not all cases)
 - The Nevada System of Higher Education.
 - The Office of the Military.
 - The Nevada Gaming Control Board.
 - AND MORE!

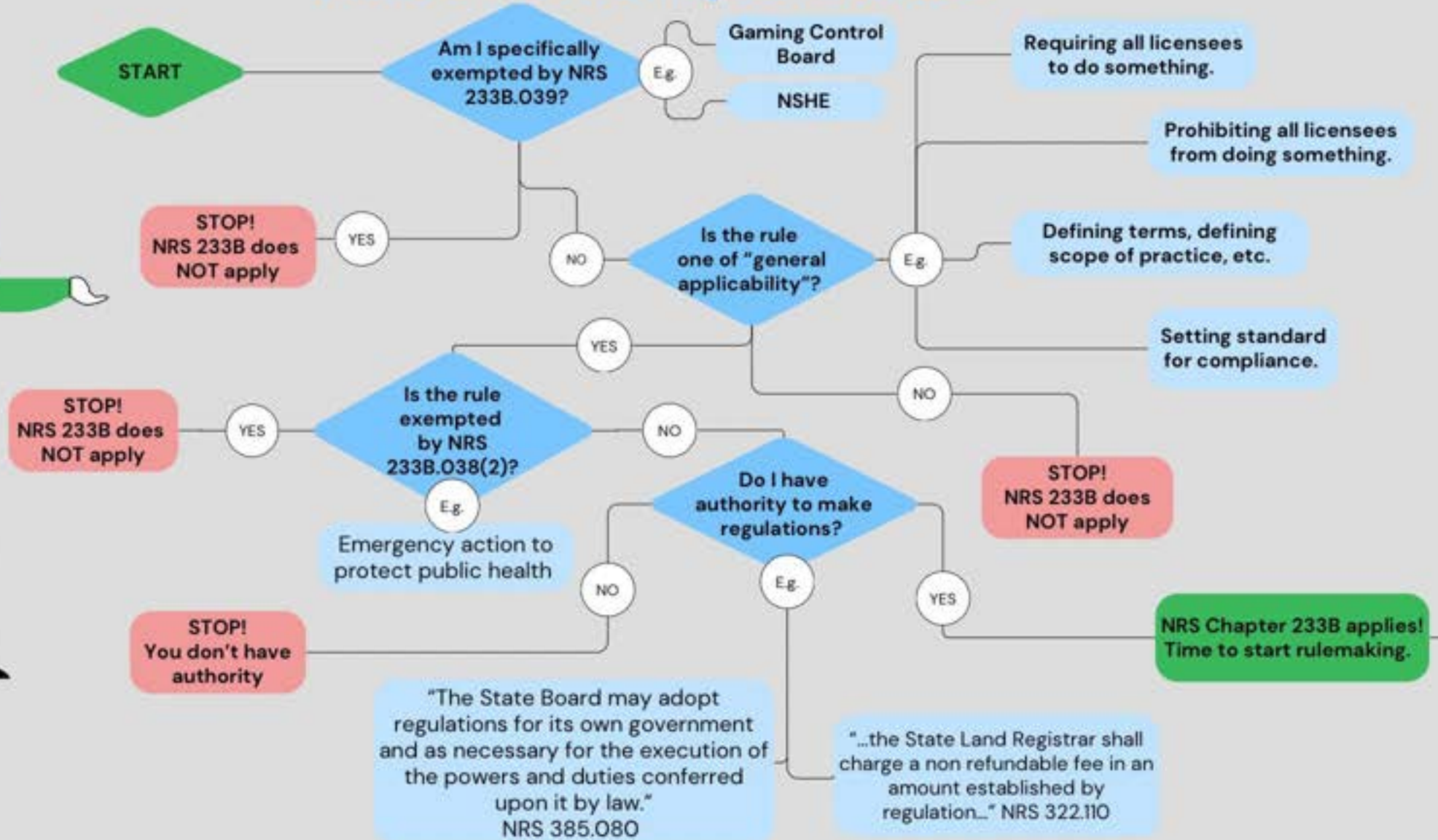
Oh, one more
thing....

Authority

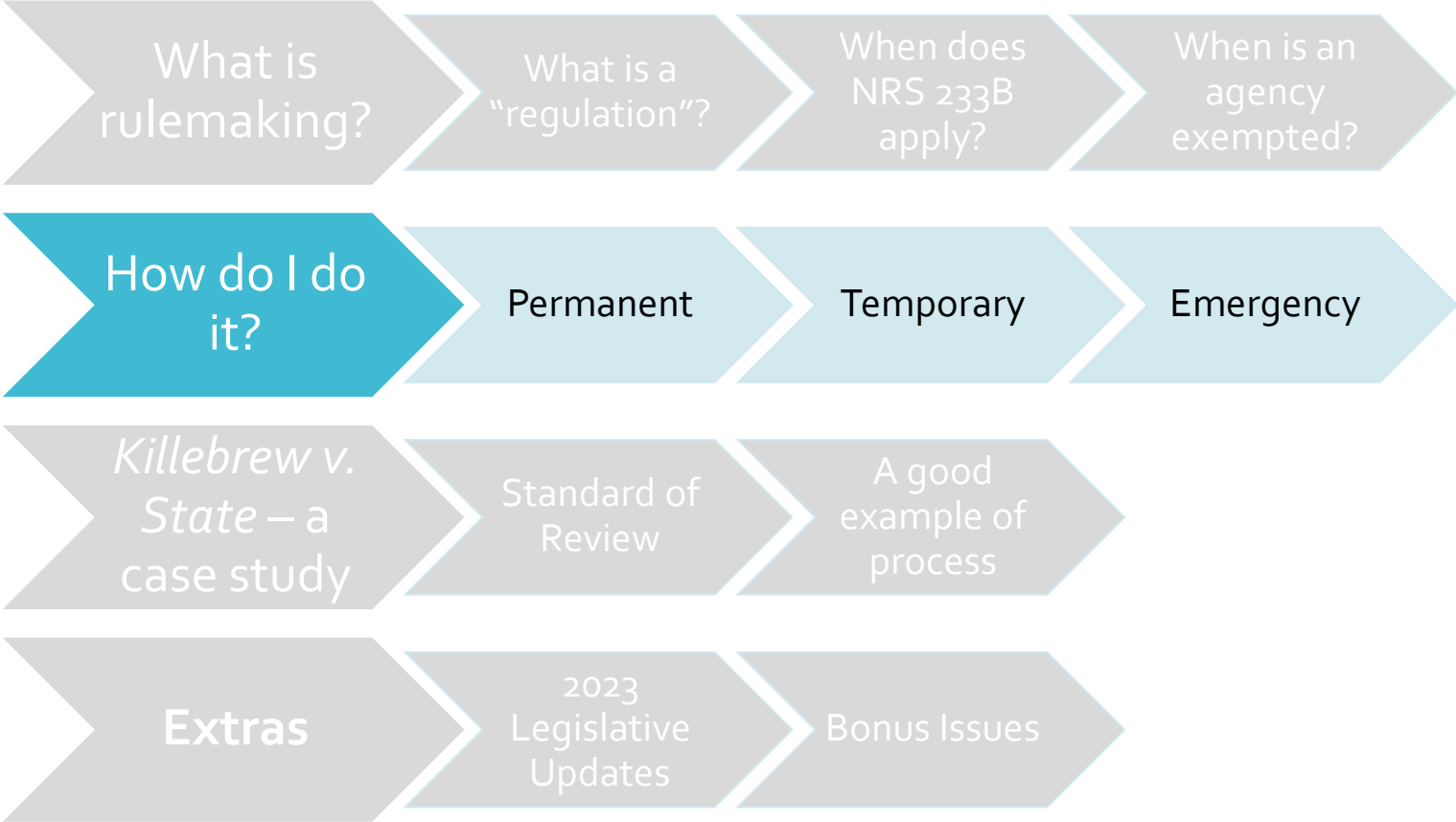
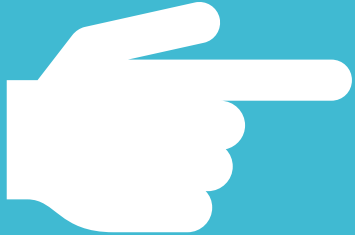


- An agency must be specifically authorized to pass regulations
- The enabling statute will set forth the agency's scope of authority relating to regulations
 - May be broad, e.g. NRS 385.080: State Board of Education is authorized to “. . .adopt regulations for its own government and as necessary for the execution of the powers and duties conferred upon it by law.”
 - Or specific, e.g. NRS 441A.410: State Board of Health “shall adopt regulations governing the control of rabies” providing for “the periodic inoculation of animals . . .”

Do I need to follow the process for rulemaking under NRS Chapter 233B?



Road Map:

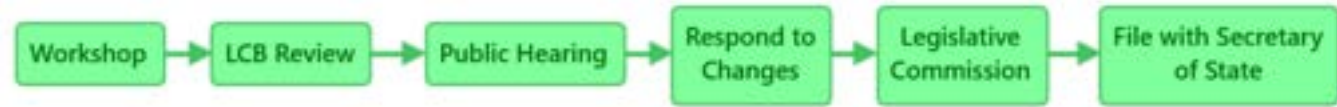


Permanent vs. Temporary:

What day is it??

Permanent Regs

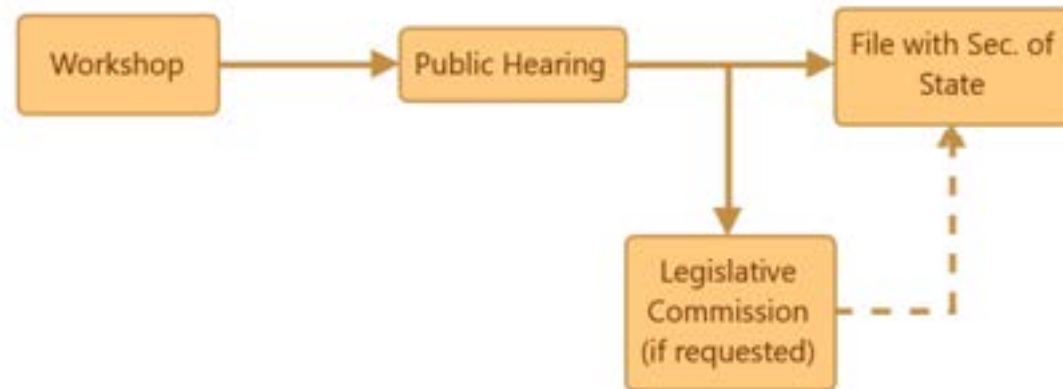
(Must submit between July 2 of an odd-numbered year and June 30 the following even-numbered year)



**Order of Workshop and LCB Review can be reversed, based on agency discretion

Temporary Regs

(May submit from August 1 of an even-numbered year to July 1 the following odd-numbered year. Valid through Nov. 1 of the odd-numbered year)



Permanent Regs

*pages 7-9 AGO Administrative
Rule Making Manual*

- Conduct survey of impact on small business
- Draft Small Business Impact Statement (NRS 233B.0609) and post at least 15 days before public workshop is held
- Post Notice of Workshop at least 15 days before workshop is held.
- Hold Workshop (comply with Open Meeting Law)
- Send agency draft to LCB
 - Email to regulations@lcb.state.nv.us
 - This is the trigger that officially starts the rulemaking. NRS 233B.060
 - Regulation will be assigned an R#
- Post Notice of Intent to Act upon Regulation 30 days prior to public hearing
- Hold Public Hearing (comply with Open Meeting Law)
- Submit to LCB: agency approved regulations, an informational statement, the Form for Filing Administrative Regulations, and Notice of Adoption of Regulation
- Approval by Legislative Commission. If approved, LCB will file automatically with Secretary of State

Temporary Regs

*pages 7-9 AGO Administrative
Rule Making Manual*

- Conduct survey of impact on small business
- Draft Small Business Impact Statement (NRS 233B.0609) and post at least 15 days before public workshop is held
- Post Notice of Workshop at least 15 days before workshop is held.
- Hold Workshop (comply with Open Meeting Law)
- Post Notice of Intent to Act upon Regulation 30 days prior to public hearing
- Hold Public Hearing (comply with Open Meeting Law)
- No Legislative Commission, unless requested by a Legislator.
- File with Secretary of State, no sooner than 35 days after the date the temporary regulation was adopted.
- Within 10 days after filing with the Secretary of State, deliver stamped copy to the State Library, Archives and Public Records Administrator.
- Within 10 days after filing with the Secretary of State, deliver stamped copy with Joint Interim Standing Committee on Health and Human Services if agency is a licensing board and regulation is regarding issuance or renewal of licenses, permits, or certificates.
- Expires on November 1 of the odd year, permanent regulation must be adopted to continue.

Small Business Impact Statements

NRS 233B.0608

"Show your work!"



- **Required!**
 - 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 defined**
 - A business conducted for profit which employs fewer than 150 full-time or part-time employees.” NRS 233B.0382
- The agency must **prepare a statement** identifying the method used by the agency to determine small business impact. NRS 233B.0608(3).
- SBIS must contain information as outlined in NRS 233B.0609. See *Appendix H of AGO Rulemaking Manual*

Legislative Commission

Who are they?

What do they review?



- The body that supervises LCB, and consists of 12 legislators, six from each house.
- ***Final approval:***
 - Permanent 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.
 - **Legislator may request to review temporary regulations. NRS 233B.0633.
- May object to regulation on one of the following grounds (NRS 233B.067(5)):
 - In the case of a regulation purportedly required by federal law, the regulation is not required by federal law;
 - The regulation does not conform to statutory authority;
 - The regulation does not carry out legislative intent; or
 - The agency did not provide a satisfactory explanation for the need for the regulation or the informational statement is insufficient or incomplete.
- If there is an objection, the agency must revise the regulation and return it to the LCB within 60 days.

Emergency Regs

- Valid for 120 days only (no extensions)



- What constitutes an “emergency”?
 - ***“If an agency determines that an emergency exists, it shall submit to the Governor a written statement of the emergency which sets forth the reasons for the determination. If the Governor endorses the statement of the emergency by written endorsement at the end of the full text of the statement of emergency on the original copy of a proposed regulation, the regulation may be adopted and become effective immediately upon its being filed in the Office of the Secretary of State. . .”*** NRS 233B.0618



Emergency Regs

- Reduces public comment. NRS 233B.0613
 - The agency shall, not later than 9 a.m. on the first working day before the date on which the emergency regulation is filed in the Office of the Secretary of State pursuant to subsection 3 of NRS 233B.070, make the emergency regulation available to the public by:
 - (a) Providing a copy of the emergency regulation to a member of the public upon request; and
 - (b) Making a copy of the emergency regulation available on its website on the Internet, if any.
 - If practicable, the agency shall, not later than 9 a.m. on the first working day before the date of any hearing at which the agency considers the emergency regulation, make the version of the proposed emergency regulation that will be considered at the hearing available to the public by:
 - (a) Providing a copy of the proposed emergency regulation to a member of the public upon request; and
 - (b) Making a copy of the proposed emergency regulation available on its website on the Internet, if any.

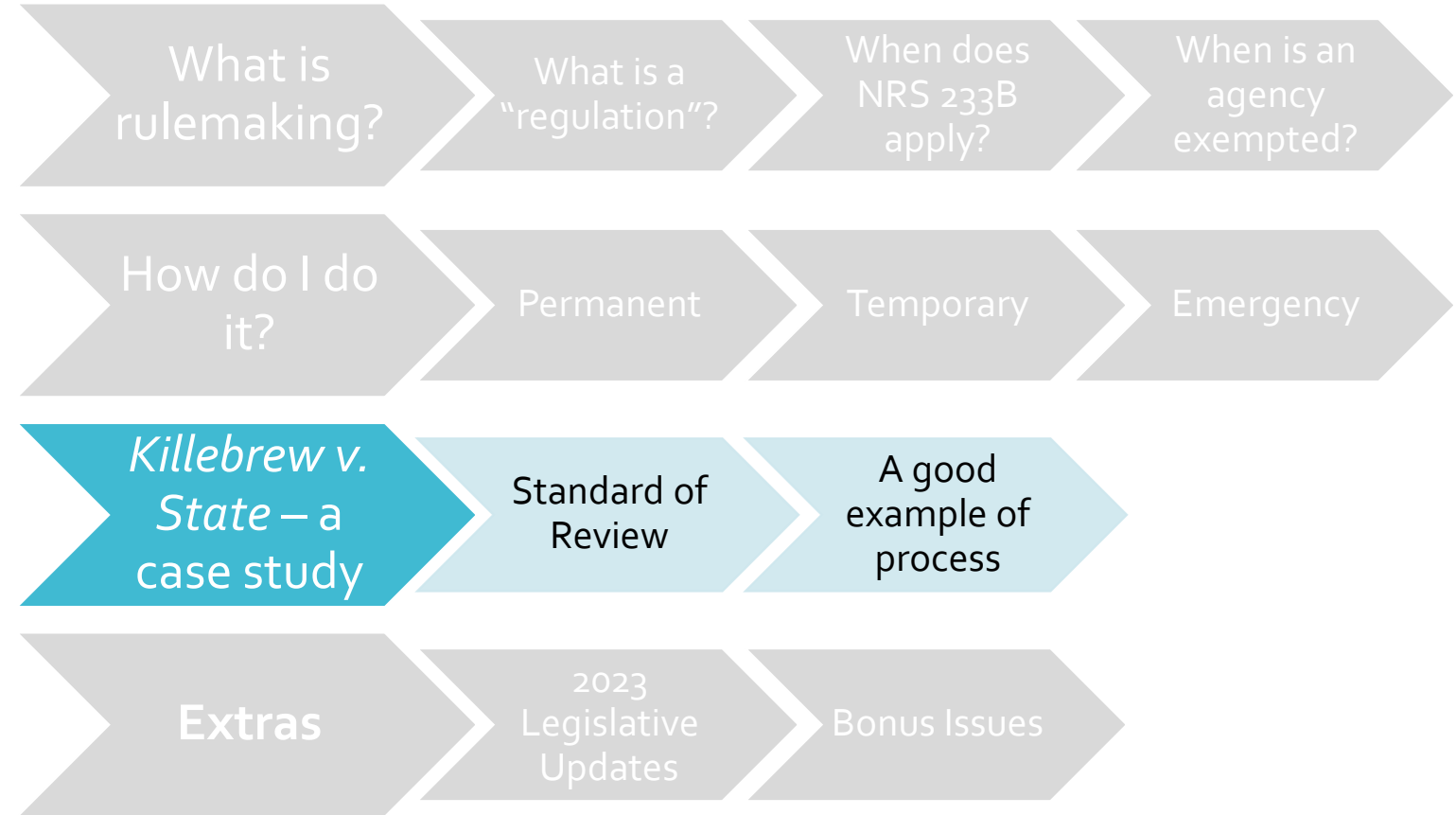
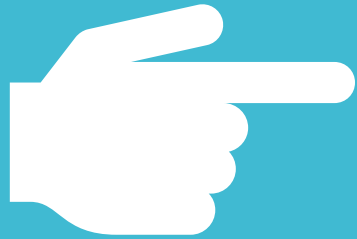


Drafting Tips



- Start with subject matter experts (e.g. the agency!)
 - Use DAG for review and problem solving
 - LCB will do more thorough review and edit
- Cite to the enabling NRS.
- Include the whole section of NAC being amended; but not necessary to include the whole chapter
- *See also* Legislative Counsel's Preface, page 7-8 for section formatting.
- Check NRS 233B.062 and 220.125 for terms preferred and not preferred
 - Gender neutral language.
 - Refer to person before disability.
- For text formatting, look at State Register for examples
 - New language in *color*;
 - deleted language in ~~[strikethrough]~~
- Double check LCB draft to ensure it conveys intent
- Caution: Be wary of "wishing for three more wishes."

Road Map:



Killebrew v. State
139 Nev. Adv. Op. 43
(2023)

*When a regulation is
challenged.*

- Question: What is the standard of review for challenges to the validity of an agency's regulation (Div. of State Lands)?

Killebrew v. State
139 Nev. Adv. Op. 43
(2023)

Facts

- In 2017, the Legislature amends NRS 322.120 to require the Registrar of the Div. of State Lands to establish the permit fee for piers and buoys by regulation.
 - The preamble of the bill stated “this fee schedule has not been modified since 1995” and that “the fees charged under this fee schedule are less than the fair market value for the use of state land and less than what other western states and agencies charge for comparable use.”
- Div. undertook rulemaking! In drafting the fee schedule, the Div. took into consideration five methodologies:
 - Historical review of statutory fees set in 1993
 - A comparative analysis of fees in other Western states;
 - An evaluation of fees charged by marinas and other businesses in NV adjacent states;
 - An in-house evaluation of method to estimate fair market value of piers on NV side;
 - An independent appraisal

Killebrew v. State
139 Nev. Adv. Op. 43
(2023)

Facts

- The Div. also:
 - solicited specific public comment from stakeholders such as the Tahoe Lakefront Owners Association (one of the Appellants);
 - Provided individual notice to all permittees;
 - Posted at every Nevada library;
 - Advertised in newspapers;
 - Held five public workshops.
- In response to comments, Div. reduced its proposed fee schedule and phased in fee increases over time.
- The fee schedule was approved by the Legislative Commission as follows:
 - A uniform annual fee for residential use of piers at \$750 and buoys at \$250 (an increase of previously set fees of \$50 for piers and \$30 for buoys)

Killebrew v. State
139 Nev. Adv. Op. 43
(2023)

Appeal & Issue

- Appellants own property in Nevada along the Lake Tahoe shoreline, and have piers or buoys on the lake.
- In March 2020, Appellants petitioned per NRS 233B.110 for a declaratory judgment that the fee-setting regulation was invalid.
- District Court granted summary judgment finding the regulation did not violate statutory or constitutional provisions and did not exceed the Division's statutory authority.
- Appellants appealed, arguing that the district court should have reviewed whether the regulation was "arbitrary or capricious."
- **Issue**: What is the standard of review for challenges to the validity of an agency's regulation (Div. of State Lands)?

Killebrew v. State
139 Nev. Adv. Op. 43
(2023)

Appeal & Issue

- **Reminder (footnote 1)**: This is not a petition for judicial review, reviewing an agency's final decision.

Killebrew v. State
139 Nev. Adv. Op. 43
(2023)

Footnote 2

- In order to remain within the authority provided by statute, an agency must articulate a basis or reason for the adoption of the challenged regulation that rationally relates to a reasonable interpretation of the agency's governing statutory authority.
 - See NRS 233B.040(1) - "To the extent authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid it in carrying out the functions assigned to it by law [This] power . . . is limited by the terms of the grant of authority pursuant to which the function was assigned."
 - *The Nev. Indep. v. Whitley*, 138 Nev. 122, 126, 506 P.3d 1037, 1.042 (2022) (stating that "regulations cannot contradict or conflict" with the statute they are intended to implement).
 - 73 C.J.S. Public Administrative Law and Procedure § 275 (2014) (noting that courts reviewing "whether a regulation that has been promulgated is consistent with the statutes" only defer when the agency's determination is reasonable and not arbitrary").

Killebrew v. State
139 Nev. Adv. Op. 43
(2023)

"Arbitrary and
capricious"
standard?

- *State, Division of Insurance v. State Farm Mutual Automobile Insurance Co.*, 116 Nev. 290, -995 P.2d 482 (2000).
- *Romano. v. Romano*, 138 Nev. 1, 501 P.3d 980 (2022)
- *Felton v. Douglas County*, 134 Nev. 34, 410 P.3d 991 (2018)
- *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 81 P.3d 516 (2003).

Killebrew v. State
139 Nev. Adv. Op. 43
(2023)

Standard

- The standard for reviewing the validity of a regulation is outlined in NRS 233B.110(1), which states that "[t]he court shall declare the regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency."
- Holding #1: "we clarify that the standard for reviewing the validity of a regulation under NRS 233B.110 is that which is provided for in NRS 233B.110(1)-whether the regulation 'violates constitutional or statutory provisions or exceeds the statutory authority of agency.'"

Killebrew v. State
139 Nev. Adv. Op. 43
(2023)

Application of
standard

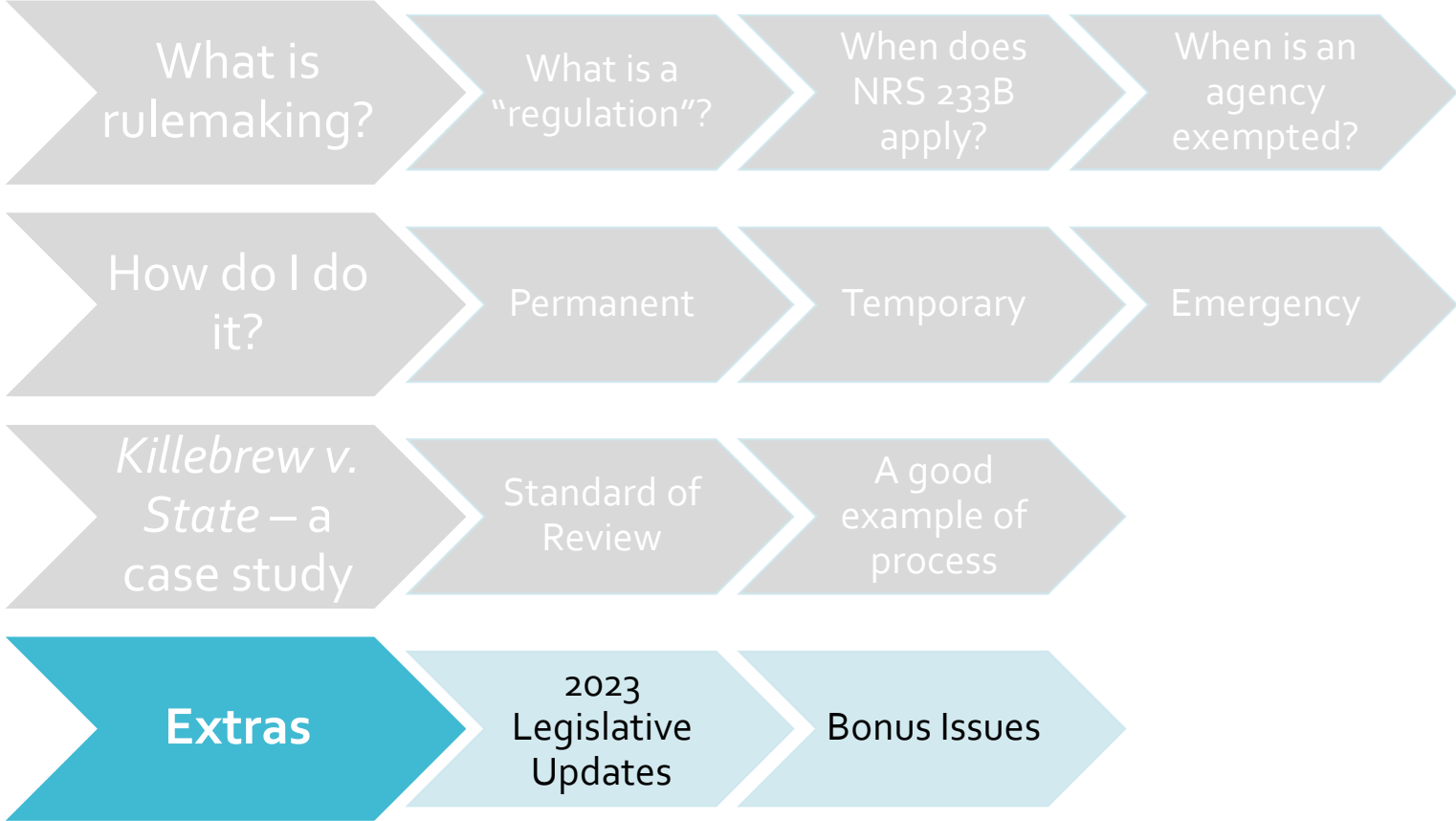
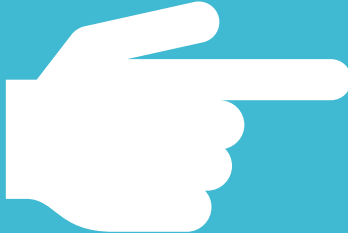
- NRS 322.100(1) provides that the fee charged for issuing a permit “for any lawful use of state land” be “in such an amount as the State Land Registrar determines to be reasonable based upon the fair market value of the use.”
 - Appellants argue that the “reasonable based upon the fair market value of the use” language in NRS 322.100(1)(b) means that the fee must be based solely on the fair market value of the state-owned submerged land that a pier or buoy occupies, without regard to other factors. Further, a uniform fee cannot be based on fair market value.
- Holding #2: the Division did not exceed its statutory authority by referencing multiple methodologies.
 - The statutes do not identify a particular formula for calculating the fair market value of the use of piers and buoys on state land. And the Division employed a range of approaches to obtain varying estimates. The Division then determined a reasonable amount to charge for pier and buoy permits based on those varying estimates. All of this was done within the authority provided by NRS 322.100 and NRS 322.120.

Killebrew v. State
139 Nev. Adv. Op. 43
(2023)

Takeaways

- Double check that enabling statute! Do you have authority to draft this regulation? Does it exceed that authority?
- Have you checked all the boxes? (And then some!)

Road Map:



Update: A.B. 219 (2023)



- Section 3 of AB 219 (2023) amends NRS 241.023 to include the following language:

4. Notwithstanding the provisions of subsections 1, 2 and 3, a public body may not hold a meeting to consider a contested case, as defined in NRS 233B.032 or a regulation as defined in NRS 233B.038 by means of a remote technology system unless there is a physical location for the meeting where members of the general public are permitted to attend and participate.

Bonus Issues!

- What if a member of the public thinks an agency should adopt, amend or appeal a regulation? Can they prompt an agency to start the rulemaking process?

- *Yes!*

NRS 233B.100(1) provides “Any interested person may petition an agency requesting the adoption, filing, amendment or repeal of any regulation and shall accompany the petition with relevant data, views and arguments. Each agency shall prescribe by regulation the form for such petitions and the procedure for their submission, consideration and disposition. Upon submission of such a petition, the agency shall within 30 days either deny the petition in writing, stating its reasons, or initiate regulation-making proceedings.”



Bonus Issues!

- If I have adopted temporary regulations and am promulgating the exact same language as a permanent language, do I need to redo the SBIS and public workshop?

- **No!**

NRS 233B.060(2) provides “[e]xcept as otherwise provided in subsection 3, if an agency has adopted a temporary regulation after notice and the opportunity for a hearing as provided in this chapter, it may adopt, after providing a second notice and the opportunity for a hearing, a permanent regulation, but the language of the permanent regulation must first be approved or revised by the Legislative Counsel and the adopted regulation must be approved by the Legislative Commission or the Subcommittee to Review Regulations appointed pursuant to subsection 6 of NRS 233B.067.”



Bonus Issues!



- Does the agency have to complete the rulemaking process in a certain amount of time?

- *Yes!*

NRS 233B.040(4) provides “An agency shall adopt a proposed regulation not later than 2 years after the date on which the proposed regulation is submitted to the Legislative Counsel pursuant to subsection 1 of NRS 233B.063. If an agency does not adopt a proposed regulation within the time prescribed by this subsection, the executive head of the agency shall appear personally before the Legislative Commission and explain why the proposed regulation has not been adopted.”

Bonus Issues!

- If an agency is enabled to promulgate regulations, can they also set fees?
- *Sometimes! But only if there is also specific authority enabling the agency to set the fees through regulation.*



Bonus Issues!

- Can an agency approve a draft regulation with changes not included in the LCB draft?
- ***Maybe! (But probably not)***
 - An Agency may change a proposed regulation and adopt it as changed as long as the changes are not substantive.
 - If the changes are substantive then the proposed regulation would need to be reviewed by LCB again and the adoption would be postponed, allowing the agency to re-notice the regulation and hold a new public hearing.



Bonus Issues!

- Is an agency required to review its regulations periodically?
- **Yes!**
 - Per NRS 233B.050, an agency must “review its regulations at least once every 10 years to determine whether it should amend or repeal any of the regulations. Within 30 days after completion of the review, the agency shall submit a report to the Legislative Counsel for distribution to the next regular session of the Legislature. The report must include the date on which the agency completed its review of the regulations and describe any regulation that must be amended or repealed as a result of the review.”





Questions?

NRS CHAPTER 233B DISCIPLINARY AND HEARING PROCEDURES



**STATE OF NEVADA, OFFICE OF THE
ATTORNEY GENERAL, BOARDS AND
COMMISSIONS TRAINING 2023**

**SOPHIA G. LONG
SENIOR DEPUTY ATTORNEY GENERAL**

Contested Case



- A proceeding in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed. NRS 233B.032.
- Requirements for contested cases are set by the Nevada Administrative Procedures Act (APA) in Nevada Revised Statutes (NRS) Chapter 233B.
- All title 54 agencies are also subject to the requirements in NRS Chapter 622A unless exempted. See NRS 622A.120.

Constitutional Issues



- A state issued license to practice a profession carries a constitutionally protected property interest.
 - *Gilman v. State Board of Veterinary Medical Examiners*, 120 Nev. 263, 269, 89 P.3d 1000,1004 (2004).
- Due Process clause prevents the state from depriving an individual of his protected property interest without a “fair trial in a fair tribunal.”
 - *In re Murchison*, 349 U.S. 133, 142 (1955).

Due Process



- Due process of law is required whenever the state deprives a person of “life, liberty, or property.” U.S. Const. amend. XVI, § 1; Nev. Const. art. 1, § 8.
 - Requires **reasonable notice** to the Respondent, which informs him/her of the pending legal and factual issues,
 - An **opportunity for a hearing**, including the opportunity to present evidence, call witnesses, and cross-examine opposing witnesses. (NRS 233B.121), and
 - An **impartial adjudicator** presiding over the hearing.

Contents of Notice



- Notice must include:
 - (A) A statement of the time, place and nature of the hearing.
 - (B) A statement of the legal authority and jurisdiction under which the hearing is to be held.
 - (C) A reference to the particular sections of the statutes and regulations involved.
 - (D) A short and plain statement of the matters asserted. NRS 233B.121(2)

Reasonable Notice



- “Reasonable notice” required.
 - NRS 233B.121; NRS 622A.300; AB52 (2023)
- Certified mail.
 - 14 calendar days to the **last known address** of licensee. NRS 241.033(2)(a)(2) and NRS 241.034(1)(b)(2).
- Personal delivery.
 - 7 calendar days. NRS 241.034(1)(b)(1).
- Attorney.
 - Personal delivery 7 calendar days. NRS 241.034(1)(b)(2).
- Sending an extra copy by regular mail.

Check for Specific Notice Provision



- For example, in Real Estate Division cases, a licensee must be given at least 30 days notice in writing.
 - Must give the date, time and place of the hearing,
 - A copy of the Complaint; and
 - Copies of all relevant documents in the Division's possession.
 - Must be served in person or by certified mail to last known address.

NRS 645.680.

- Virtual hearings update AB219

Summary Suspensions



- If the agency finds that **public health, safety or welfare imperatively** require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Such proceedings *must be instituted and determined within 45 days* after the date of the order unless the agency and the licensee mutually agree in writing to a longer period. NRS 233B.127(3).

Summary Suspensions



- Is there a threat to the public health, safety or welfare that is so imperative that an emergency action is required?
- Factual allegations are egregious, public is at risk now without action, and factual allegations are supported by evidence.
- Summary suspensions should be rare.
- License will be suspended without notice or full hearing.
- Potential to create liability for the State.
- Underlying hearing on the merits must be held within 45 days. NRS 233B.127(3).

Opportunity for Hearing



Requires opportunity to:

- Present evidence in support of legal position.
 - Call own witnesses.
 - Introduce exhibits.
- Cross-examine opposing witnesses.
- Present argument on all issues.
- Right to counsel (NRS 622A.310(1))

Impartial Adjudicator



Requires:

- ✦ No investigator or prosecutor may take part in the fact-finding and decision.
- ✦ No *ex parte* investigations by board members. NRS 233B.122, 233B.126 *Stivers v. Pierce*, 71 F.3d 732, 741-42 (9th Cir. 1995).
- Ethical rules preclude the participation of a person who has an interest in case. NRS 281A.420
- If one member of an adjudicating body is actually biased, or where circumstances create the appearance that one member is biased, the proceedings violate due process. *Stivers v. Pierce*, 71 F.3d 732, 741-42 (9th Cir. 1995).

Pre-Hearing Resolutions (1)



- **Stipulation of Fact**
 - Partial resolution, facts are stipulated, but not violations of law or penalty.
- **Stipulation of Facts and Liability**
 - Partial resolution, facts and violations of law are stipulated, but not penalty.
- **Stipulation for Settlement**
 - Full resolution of matter. Facts, violations of law, and penalty are stipulated.
 - MUST BE APPROVED IN A PUBLIC MEETING.
 - SETTLEMENT AGREEMENTS ARE PUBLIC RECORD.
 - ✦ NRS 622.330

Pre-Hearing Resolutions (2)



- **Voluntary Surrender of License in Lieu of Other Disciplinary Action.**
 - This is discipline. See NRS 233B.121(6).
 - Licensee surrenders license and is no longer an active licensee. Can be considered a revocation wherein the licensee agrees.
 - Generally, other penalties not imposed due to return of license.
 - Should include a period of time after which licensee may re-apply for licensure as a new applicant. Not required to grant licensure.
 - ✦ See NRS 622A.410.
- **Temporary Voluntary Surrender of License Pending Hearing.**
 - Usually done after first continuance, if a second continuance is requested.

Pre-Hearing Motions (1)



Request for continuance

- Practice has been that each side automatically gets one continuance
- Why?
 - To ensure due process is given
 - ✦ Counsel has conflicts
 - ✦ To get counsel
 - ✦ Witnesses not available
 - ✦ Heavy caseload

Pre-Hearing Motions (2)



Request for Discovery/Depositions

- Courts have upheld decisions of administrative adjudicators which have denied discovery or depositions to be taken
 - Administrative hearings are less formal
 - Depositions and other discovery, more typically used in court actions is costly and time consuming
 - NRS 622A.330 permits list of witnesses and documents to be exchanged, but no depositions or interrogatories without permission from the regulatory body

Subpoenas

Prepare for the Hearing



- ❑ Review Complaint, Notice of Hearing, Answer
- ❑ Evidence is not provided until hearing
 - Do not do independent investigation or research concerning the allegations
 - Do not prejudge the case. Wait until you've heard the evidence and arguments.
- Review statutes and regulations
- Determine what issues are going to be decided
 - Do you have authority to decide issues raised?
- Who has the burden of proof?

Burden of Proof for Contested Cases



- Board's case must be proven by **preponderance of the evidence**.
 - “Preponderance of the evidence” means evidence that enables a trier of fact to determine that the existence of the contested fact is more probable than the nonexistence of the contested fact.
 - ✦ NRS 233B.0375.
 - NRS 233B.121(9), NRS 233B.125, NRS 622A.370.
 - ✦ Findings of fact must be based exclusively on a preponderance of the evidence.
 - *Nassiri v. Chiropractic Physicians' Board*, 327 P.3d 487 (2014).

FTA/Default



- Respondent fails to appear for hearing and a continuance has not been requested or granted.
- Prosecution makes an offer of proof regarding service of Respondent with charging document.
- Determination made by fact-finder that proper legal notice was provided to Respondent.
- Matter heard and decided in Respondent's absence.
- Fact-finder may accept all allegations in charging document as true.
 - See NRS 622A.350.

Opening the Hearing



- Introduce public body members present.
- Call case name.
- Indicate the date, time, and place of hearing.
- Set out order of presentation.
- Indicate that the hearing is “on the record” or that it is being recorded.
- Have parties note appearances for the record.

HEARING OUTLINE.

Opening the Hearing (continued)



- Ask for any preliminary motion, issues or stipulations?
- Swear in witnesses.
 - Every witness is required to declare by oath or affirmation that he/she will testify truthfully. NRS 233B.123(3).
 - Court reporter.
 - Interpreter.
 - ✦ **Do you solemnly swear that you will interpret the following questions from English into (Language) and the answers from (Language) into English to the best of your ability**
- Sequester witnesses, if requested.
 - NRS 622A.380.
 - Be prepared if virtual hearing!

Order of Hearing



- Opening statements
- The Prosecutor goes first:
 - Calls witnesses;
 - Introduces exhibits;
 - Opposing party may then cross-examine.
- When parties have completed questioning, the Adjudicator may ask questions of the witness. NRS 622A.380.

Introduction of Evidence



RELIABILITY is the key. Is the evidence sought to be introduced reliable?

- Each type of evidence is sufficient to make a finding.
 - ✦ NRS 233B.123; NRS 622A.370.

- **Testimony by witnesses**

- Witness must be competent, i.e., personal knowledge.
- Hearsay?

- **Documents**

- Copies are allowed, use certified copies if possible; self authenticating.
- Opposing party can request to review original.
- Virtual hearing issues?

- **Tangible objects**

Exclusion of Evidence



- May exclude:
 - Irrelevant, immaterial or unduly repetitious evidence.
 - Privileged communications
 - ✦ Attorney/client, physician/patient, husband/wife.

Credibility of Witnesses



Consider all the evidence

- How do you decide if a witness is credible?
 - Does the story make sense?
 - Bias/interest in outcome.
 - Demeanor.
- Great deference is given to adjudicator's credibility determinations by reviewing Court.
- **Every decision should include a discussion of credibility.**

Hearsay Defined



- Hearsay is an out of court statement offered to prove the truth of the matter asserted.
- Witness testifies “Joe told me the car was red.”
- This is hearsay evidence that the car is actually red.
- This statement is admissible but, by itself, it is insufficient to establish the color of the car.
 - There must be additional evidence corroborating that car is red if that is an issue that needs to be proven in the case.

Hearsay



- Hearsay is generally admissible in administrative hearings. However, a party may not rely on hearsay evidence to supply a critical element of his case. There must be corroborating evidence.

Biegler v. Nevada Real Est. Div, 95 Nev. 691, 695, 601 P.2d 419, 422 (1979).

- **Evidence must consist of more than hearsay.**

Objections



The President or Chairperson makes the ruling on any objections during a hearing

- **Sustain**
 - Agree with objection, evidence will not be admitted.
- **Overrule**
 - Disagree with objection, evidence will be admitted.
- **Note objection for record**

Record on Objections



- Require party making objection to state reason why evidence should not be admitted.
- Allow opponent to state why evidence should be admitted.
- Seek assistance from counsel if needed.

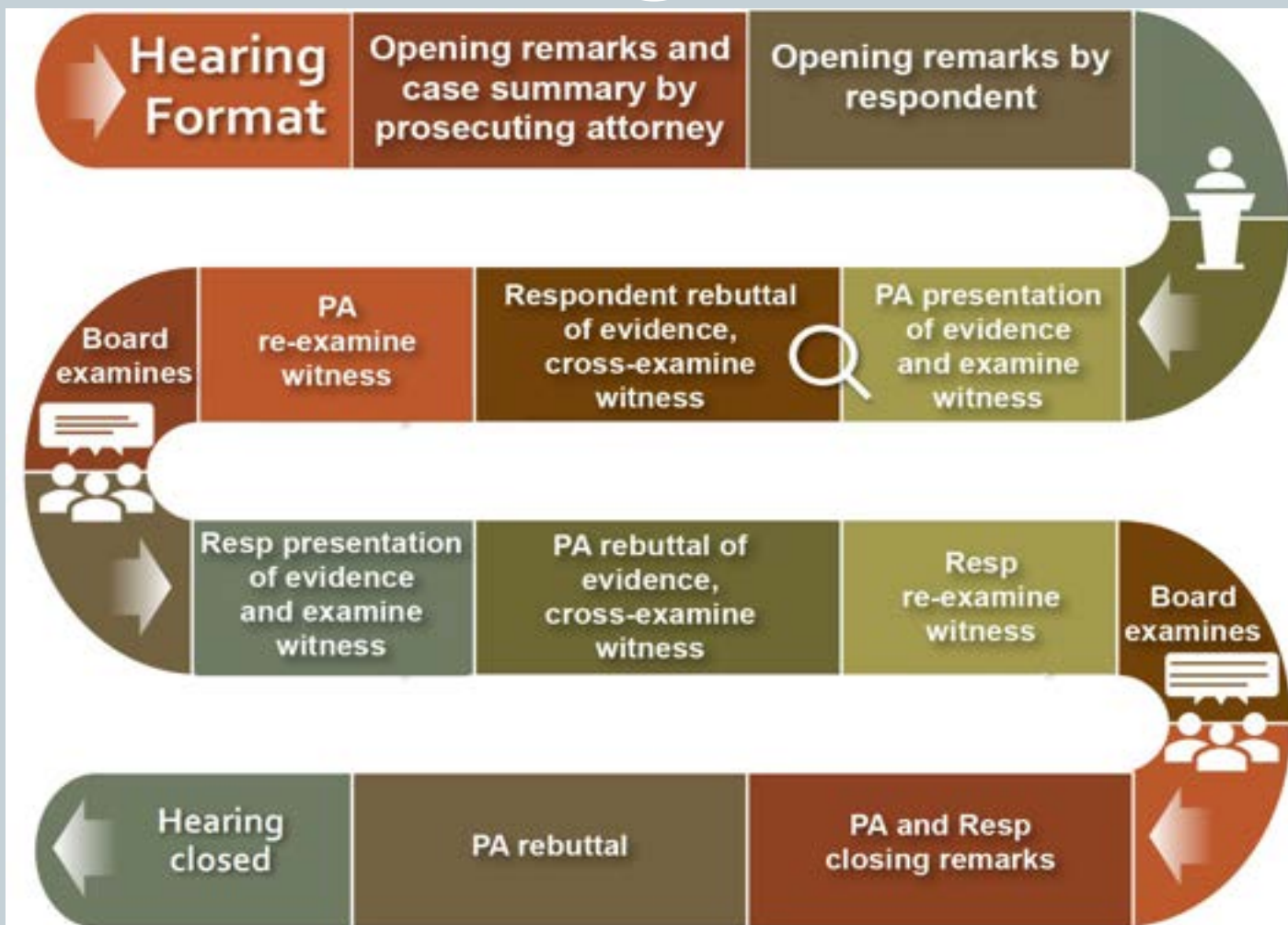


Ex Parte Communications



- Unless required for the disposition of ex parte matters authorized by law, **members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party**, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity to all parties to participate.
- This is why public comment is not allowed for pending cases until those cases are heard and decided by the body.
 - NRS 233B.126; NRS 622A.340.

Hearing Format



Post-Hearing



Deliberations

- Once the parties have introduced their evidence and made closing arguments the Board needs to determine whether substantial evidence establishes that the Respondent has committed the violations of law alleged in the complaint.

Post-Hearing



Substantial Evidence

- Evidence is that which “a reasonable mind might accept as adequate to support a conclusion.” *State Employment Sec. Dep’t v. Hilton Hotels Corp.*, 102 Nev. 606, 608 (1986).
- A violation may be established by circumstantial evidence.



Post-Hearing



Record of deliberations

- Before taking a vote on the alleged violations, the Board should discuss the evidence which they believe establishes or doesn't establish that a violation occurred.
 - If particular documents or testimony weighs toward a particular finding that evidence should be discussed on the record.
 - If particular witnesses were credible that should be discussed on the record.

Post-Hearing



Deliberation process

- A motion that some, all or none of the violations alleged in the Complaint have been proven can be made.
- It will vary from case to case what makes the most sense.
 - ✦ Go through the alleged violations one at a time.
 - ✦ Go through multiple or all violations.
 - ✦ Can be considered in one motion.

Discipline Imposed



- Hold a full discussion on the record of reasons for particular discipline imposed.
 - Consider the seriousness of the violations.
 - Consider previous discipline.
 - Other similar cases
- Discipline in accordance with your statutes.
 - May be:
 - ✦ Public Reprimand.
 - ✦ Fines.
 - ✦ Probation.
 - ✦ Suspension or revocation.
 - ✦ Other (check your statutes!)

Cost Recovery Authorized



- Boards may recover from a person reasonable attorney's fees and costs as part of its investigative, administrative and disciplinary proceedings against the person if the regulatory body. NRS 622.400
 - Fees and costs itemized statement review
 - Necessary, reasonable and actually incurred.
- Costs recovered must be the actual amount expended and a true reimbursement to the agency.
 - Not permitted to disguise a fine by calling it costs.
- Costs are often important for licensing boards to reimburse the board for actual costs expended on the case.
 - Fines are deposited in the general fund, but costs are retained by the board as reimbursement.

Revocation of a License



- NRS Chapter 622A requires that if a license is revoked, the Order prescribe a period of time during which the Respondent may not apply for reinstatement of that license.
- The prescribed period must be at least 1 year but not more than 10 years.
 - NRS 622A.410.

Reasoned Decision



- **Must include:**
 - Findings of Fact.
 - ✦ Must include concise and explicit statement of the underlying facts supporting the findings.
 - ✦ Facts supporting decision must be in the record and must be supported by a preponderance of evidence.
 - Conclusions of Law
 - Both must be stated separately.
 - See NRS 233B.125.

Reasoned Decision



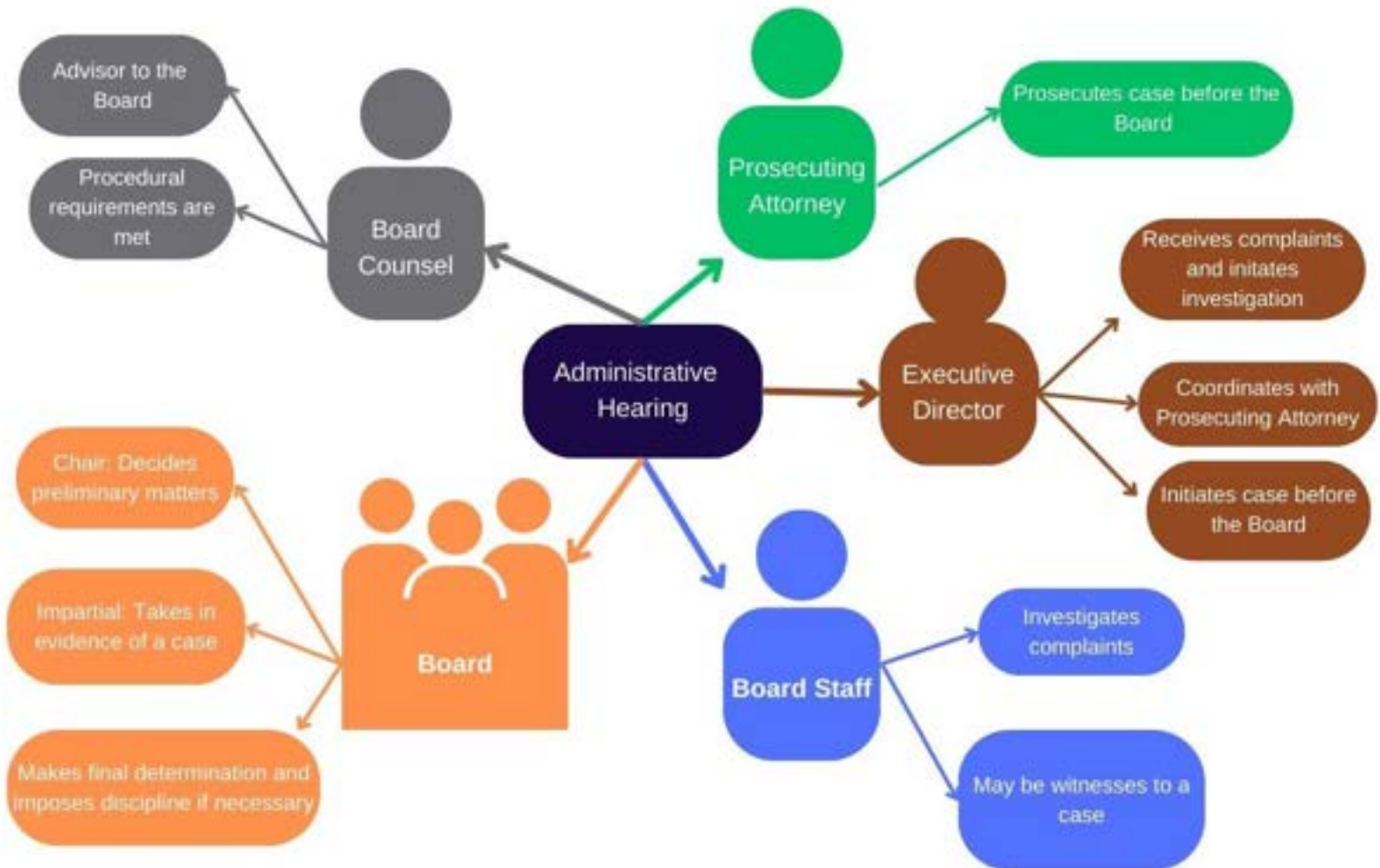
- Adjudicator should determine both the findings and the conclusions.
- Decision must be in writing or stated in record.
- Served by personal service or certified mail.
 - **BEST PRACTICE**: Also served by regular U.S. mail, even if no statutory requirement to do so.
- Within statutory time limits; under chapter 622A, time allowed is 60 days.
 - NRS 622A.380(I).

Duties of Adjudicator in a Hearing



- **Responsible to develop full record. NRS 233B.121(7). Includes:**
 - All pleadings, motions and intermediate rulings,
 - Evidence received or considered,
 - A statement of matters officially noticed,
 - Questions and offers of proof and objections, and rulings thereon,
 - Proposed findings and exceptions, and
 - Any decision, opinion, or report of the of hearing officer
- **Explain reasoning for a decision on the record.**

Roles and Duties in a Hearing



Appeal to Board or Other Public Body



- Some agencies allow Respondents to appeal decisions rendered in contested cases to the Board or other public body, if that body was not the fact-finder.
 - See NRS 641.325.
 - Exhaust administrative remedies

Judicial Review



- Must be filed within 30 days after service of the final decision.
 - NRS 233B.130.
- Confined to record of hearing.
 - NRS 233B.135.
- Burden of proof on the party attacking the decision.
- Disciplinary Order is not stayed unless the party files a Motion for Stay and such Stay is granted by the Court.
 - NRS 233B.140.
 - Motion for Stay must be filed at the same time the Petition for Judicial Review is filed.
 - ✦ NRS 233B.140(1).

Judicial Review



- **Court considers whether decision:**
 - Violates constitutional or statutory provisions,
 - Exceeds agency's statutory authority,
 - Made upon unlawful procedure,
 - Affected by legal error,
 - Is clearly erroneous in view of reliable, probative and substantial evidence in the records, or
 - Is arbitrary, capricious, or characterized by abuse of discretion, i.e., was the decision based on evidence from which a reasonable person could draw the same conclusion?

NRS 233B.135.