

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

THE COMMISSION ON ETHICS OF THE	)	
STATE OF NEVADA	)	
	)	<b>Supreme Court Case No. 53064</b>
Appellant,	)	
	)	First Judicial District Court
vs.	)	Case No. 08 OC00381 1B
	)	
WARREN B. HARDY II, in his official capacity	)	
as Nevada State Senator for Clark County	)	
Senatorial District No. 12	)	
	)	
Respondent.	)	

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**APPELLANT’S OPENING BRIEF**

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1 **I. ISSUES PRESENTED**

2 Whether the District Court erred in holding that because of separation of powers and legislative  
3 immunity, the Nevada Commission on Ethics is enjoined from conducting further administrative  
4 proceedings on the allegations that Senator Warren B. Hardy II violated NRS 281A.420, the conflicts-  
5 of-interest statute of the Ethics in Government Law, considering that it was the Legislature that  
6 empowered the Commission with authority to regulate the ethics of state legislators.  
7

8 **II. STATEMENT OF THE CASE**

9 **A. Nature of the Case, Course of Proceedings, and Disposition Below.**

10 This case originally arises out of a citizen’s complaint filed with the Nevada Commission on  
11 Ethics (Commission) under NRS 281A.440(2) requesting an opinion whether the conduct of a state  
12 legislator, Senator Warren B. Hardy II (Hardy), violated the Ethics in Government Law, NRS Chapter  
13 281A (Ethics Law), specifically regarding NRS 281A.420(4) (disclosure) and 281A.420(2)  
14 (abstention). The complaint triggered the Commission’s statutory obligation to investigate, interpret  
15 and enforce the Ethics Law to prevent public officers from using their public office for private gain and  
16 to preserve the people’s faith in the integrity and impartiality of public officers. This appellate  
17 proceeding arises out of Hardy’s efforts to prevent the Commission from acting on the citizen  
18 complaint.  
19  
20

21 This appeal is from an Order and Judgment of the First Judicial District Court, the Honorable  
22 William A. Maddox presiding. The Order granted Hardy’s Petition for Judicial Review and issued a  
23 Permanent Injunction enjoining the Commission from conducting further proceedings against Hardy in  
24 Request for Opinion No. 08-04C (ethics complaint).  
25

26 The Commission asserts that, as a matter of law, the District Court erred in concluding that: (1)  
27 because of separation of powers and legislative immunity, the Commission is barred, as a matter of law,  
28

1 from conducting further administrative proceedings against Senator Hardy on the remaining ethics  
2 allegations; (2) under the separation-of-powers provision of the Nevada Constitution, members of the  
3 Legislature are protected by legislative immunity as a state constitutional right, even though there is no  
4 speech or debate clause in the Nevada Constitution; (3) the Commission is an agency of the Executive  
5 Department and, under the doctrine of separation of powers, it cannot usurp, exercise or infringe upon  
6 functions constitutionally committed to the exclusive power of the Legislative Department; (4) there  
7 has not been an institutional waiver of legislative immunity through the enactment of NRS 281A.420;  
8 and (5) the Standing Rules of each House concerning disclosure of conflicts, voting and abstention take  
9 precedence over NRS 281A.420, and the determination of whether Senator Hardy violated the Standing  
10 Rules is a matter reserved exclusively to the Nevada Senate. (JA517-546).  
11

12 On appeal, the Commission challenges each of the District Court's determinations. The District  
13 Court's conclusions concerning institutional waiver and standing rules are particularly faulty as post-  
14 hoc rationalizations the District Court adopted as a part of counsel-prepared judgment. Waiver was  
15 expressly not considered by the District Court, and standing rules were raised only in Hardy's reply  
16 after Commission response and thus, without fair or full consideration by the District Court. (JA509;  
17 JA507 at 6). The District Court also expressly observed that the standing rules argument was "not any  
18 part of my decisions." (JA507 at 9-10). The Commission opposed the expansion of the proposed  
19 judgment as being inconsistent with the District Court's admonishment against an overly broad order.  
20 (JA515 at 4).  
21

22  
23 **B. Facts.**

24 **1. The Ethics in Government Law.**

25 The events that have taken place over the last 24 years, as they relate to the Ethics Law, are  
26 essential to this Court's understanding of what has occurred since the time the Legislature first adopted  
27  
28

1 the Ethics Law and created the Commission.

2 In 1975, following the Watergate scandal and in response to a national movement to establish  
3 government ethics laws, the Nevada Legislature adopted the Ethics Law. In 1976, the Nevada Supreme  
4 Court declared the Ethics Law unconstitutional, **not** because of separation-of-powers issues, but  
5 because it found the financial disclosure law to be vague. Dunphy v. Sheehan, 92 Nev. 259 (1976).  
6

7 In 1977, the Nevada Legislature re-enacted the Ethics Law and made a promise to the people of  
8 Nevada that conflicts of interest would have no place in government. NRS 281A.020; Statutes of  
9 Nevada, 59<sup>th</sup> Session (1977).

10 The Ethics Law provided for two separate ethics commissions, a legislative commission with  
11 exclusive jurisdiction over state legislators and an executive commission with jurisdiction over all other  
12 public officers and public employees. A.B. 450, 59<sup>th</sup> Session (1977).  
13

14 In 1985, after assessing their respective roles, functions and operational costs, the Legislature  
15 made the informed decision to abolish the Legislative Ethics Commission and the Executive Ethics  
16 Commission and, instead, form a single, merged ethics commission. S.B. 345, 63<sup>rd</sup> Session (1985).  
17

18 Since 1985, the Legislature has amended the Ethics Law numerous times. Among the changes,  
19 it has made specific carved-out provisions to accommodate state legislators (NRS 281A.020(2)(c); NRS  
20 281A.400(8); NRS 281A.420(6), (7); NRS 281A.410(2), (3)), thereby evincing its settled determination  
21 to include its members under the aegis of the Ethics Law.

## 22 **2. The Commission.**

23 The Commission is comprised of eight members, four appointed by the Legislative Commission  
24 and four appointed by the Governor. NRS 281A.200. The Legislature intended for the Commission to  
25 be an independent body. In fact, until this month, when the State organizational chart was  
26 coincidentally revised, the Commission had always been characterized therein as an “independent  
27  
28

1 legislative-executive commission.”<sup>1</sup> Now, the Commission has been placed under “other boards and  
2 commissions” in the organizational chart. Id. However, the Commission continues to function as an  
3 independent entity, just as it has in the past.

4           The Commission is statutorily charged with interpreting and enforcing the Ethics Law. NRS  
5 281A.290; NRS 281A.440. The Commission’s duties include rendering advisory opinions to public  
6 officers and employees seeking guidance on the application of the statutory ethical standards to their  
7 past, present or future conduct. NRS 281A.440(1). The Commission also investigates citizens’  
8 complaints of alleged violations of the Ethics Law by public officers and employees. NRS  
9 281A.290(3). Additionally, the Commission collects and reviews financial disclosure statements of  
10 appointed public officers, including certain staff members of the Legislature. NRS 281A.240(2)(b);  
11 NRS 281A.600. Further, although the Ethics Law does not otherwise apply to members of the  
12 judiciary, the Commission collects and publishes financial disclosure statements of members of the  
13 judiciary. NRS 281A.610(4). Finally, the Commission is required to educate public officers and  
14 employees and the public about the Ethics Law. NRS 281A.290. The Commission is merely complying  
15 with its statutory obligation willingly and responsibly established by the Legislature itself. The  
16 Commission is performing its mission precisely as the Legislature intended and is what its creator  
17 endowed it to be.  
18  
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21           **3.       The underlying ethics complaint against Hardy.**

22           On March 5, 2008, Richard B. Miller (Miller), a member of the public who is a citizen of the  
23 State of Nevada and a constituent of Senator Hardy, filed an ethics complaint with the Commission.  
24 (JA1). Miller’s complaint alleged that Hardy violated the conflicts-of-interest provisions of the Ethics  
25 Law (NRS 281A.420), namely: the subsections dealing with disclosure, voting and abstention, when he  
26

27 \_\_\_\_\_  
28 <sup>1</sup> <http://www.leg.state.nv.us/lcb/research/Publications/LegManual/2009/StateOrgChart.pdf>

1 acted upon 13 legislative measures during the 2003, 2005 and 2007 legislative sessions. (JA1-107).  
2 According to Miller's complaint, the measures allegedly affected Associated Builders & Contractors,  
3 Inc., Las Vegas Chapter (ABC-LV) and its contractor members. Id. ABC-LV is an association of non-  
4 union general and specialty construction contractors. Id. Hardy is the President of ABC-LV. Id.

5 On April 10, 2008 and again on June 30, 2008, a Panel of two members of the Commission held  
6 proceedings, pursuant to NRS 281A.440(3), to determine whether just and sufficient cause existed to  
7 hold a hearing on Miller's ethics complaint. (JA204). The Panel found that sufficient evidence  
8 existed for the Commission to hold a hearing and render an opinion on four of the allegations. The  
9 Panel determined that there was insufficient evidence for the Commission to hold a hearing and render  
10 an opinion on the remaining allegations in Miller's complaint. Those allegations were dismissed. Id.

11 On September 11, 2008, in response to Hardy's Motion to Dismiss or for Summary Judgment  
12 on the Allegations in the 1<sup>st</sup> Amended Notice of Hearing and Panel Determination (the Motion), the  
13 Commission held a hearing, received oral argument from Hardy's counsel, and deliberated the merits of  
14 the Motion. (JA268-359). On October 7, 2008, the Commission issued its Order denying Hardy's  
15 request to dismiss or for summary judgment on the pending allegations. (JA360-370).

16 The Commission, however, dismissed all the allegations but two. The only allegation remaining  
17 from Miller's complaint is that Hardy failed to adequately disclose a conflict of interest and then voted  
18 on S.B. 509 in 2007, in violation of subsections 2 and 4 of NRS 281A.420. The Commission has  
19 neither heard the merits of the remaining allegations in the complaint nor made a final decision  
20 concerning Hardy's alleged unethical conduct.

21 The Commission had an administrative hearing scheduled for December 11, 2008; however, on  
22 November 24, 2008, Judge Maddox entered an order from the bench granting Hardy's Petition for  
23 Judicial Review and announced that he would issue a Permanent Injunction enjoining the Commission  
24

1 from conducting further proceedings against Hardy on Miller’s complaint. (JA517-546).

2 **C. Standard of Review.**

3 The matter before this Court presents questions of law. Questions of law are reviewed de novo.  
4 State Indus. Ins. Sys. v. United Exposition Servs. Co., 109 Nev. 28 (1993), cited, Pulley v. Preferred  
5 Risk Mut. Ins. Co., 111 Nev. 856, at 858 (1995). Consequently, no deference is given to the lower  
6 court’s interpretation. Carson City District Attorney v. Ryder, 116 Nev. 502, 505 (2000).

8 **III. ARGUMENT**

9 **A. Summary of Argument**

10 The Commission asserts that, as a matter of law, the District Court erred in concluding that  
11 separation of powers and legislative immunity require enjoining the Commission from acting on a  
12 citizen’s ethics complaint against Hardy for several reasons.

14 First, the Legislature’s enactment of the Ethics law was and remains an **intentional** waiver of  
15 legislative immunity. The District Court expressly chose not to fully evaluate the waiver issue and  
16 consequently erred in concluding that institutional waiver has not occurred or was not established.

17 Second, the Commission is not an agency of the executive branch, but rather has been, is and  
18 functions as, an independent agency equally comprised of legislative and gubernatorial appointees.  
19 Even if the Commission were deemed to be an executive agency, the authority delegated to the  
20 Commission under the Ethics Law is a constitutional delegation of legislative authority. This  
21 delegation by the Legislature contains clear delineation of policy and substantive standards that satisfy  
22 constitutional procedural concerns and preclude arbitrary or capricious agency action. The  
23 constitutional concept of separation of powers does not require a finding that legislative immunity  
24 arises in general or in particular in the circumstances of this case. The constitutional concept of  
25 separation of powers is an evolutionary one suggesting that the traditional notion of separate and  
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1 distinct roles for the branches of government should remain inviolate has changed over time to reflect  
2 the growing interrelationship of the branches with the increasing recognition of sharing and transferring  
3 of powers among the branches to facilitate the efficient operation of government. Public concerns  
4 render Ethics as an inter-governmental issue just as much as an intra-branch issue.

5 Third, the District Court's reliance on two cases (In re Arnold and Irons v. R.E. Ethics Comm'n)  
6 is erroneous because the holding in those cases rely on a speech or debate clause. The Nevada  
7 Constitution has no such clause.  
8

9 Finally, the standing rules of the Senate were expressly not material or relevant to the decision  
10 of the District Court, and should not be for a decision by this Court on appeal. Apart from the fact the  
11 District Court did not consider the standing rules as part of its decision, the rules themselves would not  
12 support injunctive relief against the Commission, since such rules, even characterized as "standing"  
13 expire when the legislative body adjourns *sine die*. Moreover, there is no process for citizen access  
14 during or after the session or mechanism or statute of limitations that would allow carry-over of an  
15 ethics charge from one session to the next, two years later.  
16

17 The District Court erred in evaluating the evolution of the constitutional concept of separation  
18 of powers to conclude that it automatically gives rise to legislative immunity for Hardy in this case and  
19 affords a basis for injunctive relief against the Commission for acting on a citizen complaint.  
20

21 The following discussion details the Commission's arguments.

22 **1. The Legislature's enactment of the Ethics Law amounts to an intentional**  
23 **institutional waiver of legislative immunity.**

24 The District Court erred when it ignored the clear intent of the Legislature and determined that  
25 Hardy's legislative privilege was not waived. (JA540-544).

26 It was the Nevada Legislature that determined that conflicts-of-interest regulation was necessary  
27  
28

1 because, unlike Congressmen, state legislators are citizen legislators who serve in a part-time capacity.  
2 By enacting the Ethics Law, the Legislature delegated its duty to the Commission to regulate certain  
3 conduct of state legislators that falls under the provisions of Chapter 281A. The enactment amounted  
4 to an explicit and unequivocal expression of a waiver of legislative immunity.

5 The issue of an institutional waiver of the legislative privilege under the Speech or Debate  
6 Clause of the U.S. Constitution was explored by the U.S. Supreme Court in United States v. Johnson,  
7 383 U.S. 169, 181 (1966). There, a former Congressman was convicted of violating the federal  
8 conflicts-of-interest statute and of committing conspiracy to defraud the United States relating to a  
9 speech he had made. Id. at 170. Although the Court found the Speech or Debate Clause provided  
10 immunity under the criminal law involved, it left open the question of a law enacted for the purpose of  
11 regulating the conduct of its members:  
12  
13

14 We emphasize that our holding is limited to prosecutions involving circumstances such  
15 as those presented in the case before us. Our decision does not touch a prosecution  
16 which, though as here founded on a criminal statute of general application, does not  
17 draw in question the legislative acts of the defendant member of Congress or his motives  
18 for performing them. And, without intimating any view thereon, we expressly leave  
19 open for consideration when the case arises a prosecution which, though possibly  
20 entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn  
21 statute passed by Congress **in the exercise of its legislative power to regulate the  
22 conduct of its members.** Id. at 185 (emphasis added).

23 In United States v. Helstoski, 442 U.S. 477 (1979), a case involving allegations of political  
24 corruption under 18 U.S.C. § 201 against a former member of the House of Representatives,  
25 Representative Helstoski claimed legislative immunity under the Speech or Debate Clause. In  
26 response, the Government argued there had been an institutional waiver by Congress in enacting 18  
27 U.S.C. § 201 in that Congress made a conscious decision and enlisted the Executive Branch and the  
28 courts to assist Congress in disciplining its members, a legislative power under Article 1, Section 5 of

1 the Constitution.<sup>2</sup> The Court held that if “Congress could constitutionally waive the protection of the  
2 Clause for individual Members, such waiver could be shown only by **an explicit and unequivocal**  
3 **expression.”** *Id.* at 493 (emphasis added). In stark contrast to the legislative history of the instant case,  
4 in *Helstoski*, the Court found no evidence of such a waiver in the language or the legislative history of  
5 18 U.S.C. § 201. *Id.*

6  
7 In 1984, the Supreme Court assessed common-law principles of legislative and judicial  
8 immunity and acknowledged that such privilege can be waived but “should not be abrogated absent  
9 **clear legislative intent** to do so.” *Pulliam v. Allen*, 466 U.S. 522, 529 (1984) (emphasis added).

10 In 1996, The Court of Appeals for the Ninth Circuit recognized that “**Congress can override**  
11 **legislative immunity.”** *Chappell v. Robbins*, 73 F.3d 918, 922 (1996) (citing *In re Perry*, 882 F.2d  
12 534, 543 (1<sup>st</sup> Cir. 1989) (“Personal common-law immunities—which Congress can lawfully override if  
13 it chooses to do so—**must bend to the Congressional will**”) (emphasis added).

14  
15 In line with the reasoning in these cases, the California Court of Appeal recently held that the  
16 executive branch could inquire into the legislative activities of a member of the legislative branch.  
17 *Robert D’Amato v. Superior Court of Orange County*, 167 Cal.App.4<sup>th</sup> 861, 876 (2008), *Review denied*,  
18 *Request denied*, *D’Amato (Robert) v. S.C. (People)*, 2009 Cal. LEXIS 408 (Cal., Jan. 14, 2009).

19  
20 To establish whether an institutional waiver existed, the Court in *D’Amato* relied on *Pulliam v.*  
21 *Allen*.<sup>3</sup> In *D’Amato*, the Court looked at whether the Legislature, in enacting the statute at issue,  
22 Government Code 1090,<sup>4</sup> “clearly intended to empower the executive to challenge legislative acts and,  
23

24 <sup>2</sup> Article 1, Section 5 of the Constitution is analogous to Article 4, Section 6 of the Nevada Constitution at issue in this case.  
25 Like Congress enlisting the Executive Branch with the enactment of 18 U.S.C. § 201, the Legislature made a conscious  
26 decision to have the Commission assist in regulating the conduct of legislators with the enactment of the Ethics Law.

27 <sup>3</sup> 466 U.S. 522, 529 (1984) (holding that legislative immunity should not be abrogated absent clear legislative intent to do  
28 so).

<sup>4</sup> Section 1090 of the California Government Code prohibits members of the legislative branch from financially benefitting  
from a contract made by them or by a public body in which they serve in their official capacity.

1 if so, whether the Legislature provided some limits on this authority.” 167 Cal.App.4<sup>th</sup> 861, 872.

2 In the instant case, by enacting the Ethics Law, the Legislature clearly intended to empower the  
3 Commission to challenge certain legislative acts. Additionally, the Legislature provided limits on this  
4 authority. These actions demonstrate the Legislature’s explicit and unequivocal expression to waive  
5 legislative immunity as it relates to the Ethics Law.

6 The legislative findings and declarations in the Ethics Law provide:

7  
8 1. It is hereby declared to be the public policy of this State that:

9 (a) **A public office is a public trust and shall be held for the sole benefit of the people.**

10 (b) **A public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves.**

11 2. The Legislature finds that:

12 (a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests.

13 (b) **To enhance the people’s faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.**

14  
15 (c) **Members of the Legislature** serve as “citizen Legislators” who have other occupations and business interests. Each Legislator has particular philosophies and perspectives that are necessarily influenced by the life experiences of that Legislator, including, without limitation, professional, family and business experiences. Our system assumes that Legislators will contribute those philosophies and perspectives to the debate over issues with which the Legislature is confronted. **The law concerning ethics in government is not intended to require a member of the Legislature to abstain on issues which might affect his interests, provided those interests are properly disclosed and that the benefit or detriment accruing to him is not greater than that accruing to any other member of the general business, profession, occupation or group.**

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22 NRS 281A.020 (emphasis added).

23 In enacting this provision, the Legislature empowered the Commission to regulate the conduct  
24 of **all** public officers in Nevada, expressly including state legislators, as it relates to conflicts of interest,  
25 and established guidelines for dealing with such conflicts. Additionally, the Legislature specifically  
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28

1 carved out an exception to the general rule on disclosure and abstention for state legislators, who serve  
2 as “citizen legislators.” NRS 281A.020(2)(c).

3 Next, the code of ethical conduct provides:

4 NRS 281A.400 General requirements; exceptions. A code of ethical standards is hereby  
5 established to govern the conduct of public officers and employees:

6 7. A public officer or employee, **other than a member of the Legislature**, shall not use  
7 governmental time, property, equipment or other facility to benefit his personal or  
8 financial interest. This subsection does not prohibit...

8 **8. A member of the Legislature shall not:**

9 (a) Use governmental time, property, equipment or other facility for a  
10 nongovernmental purpose or for the private benefit of himself or any other person. This  
11 paragraph does not prohibit:

12 (1) A limited use of state property and resources for personal purposes if:

13 (I) The use does not interfere with the performance of his public duties;

14 (II) The cost or value related to the use is nominal; and

15 (III) The use does not create the appearance of impropriety;

16 (2) The use of mailing lists, computer data or other information lawfully  
17 obtained from a governmental agency which is available to members of the general  
18 public for nongovernmental purposes; or

19 (3) The use of telephones or other means of communication if there is not a  
20 special charge for that use.

21 **(b) Require or authorize a legislative employee, while on duty, to perform  
22 personal services or assist in a private activity, except:**

23 **(1) In unusual and infrequent situations where the employee’s service is  
24 reasonably necessary to permit the Legislator or legislative employee to perform  
25 his official duties; or**

26 **(2) Where such service has otherwise been established as legislative policy.**

27 (Emphasis added).

28 Under the code of ethical conduct, although Legislators are subject to the prohibition against  
personal use of governmental resources, the Legislature specifically limited the Commission’s authority  
to regulate Legislators’ conduct on their use of employees for personal purposes. NRS 281A.400(8)(b).

Finally, the Legislature not only intended for its members to be subject to the conflicts-of-  
interest statute, which sets standards on disclosure, abstention and voting, but the Legislature took  
careful steps to provide specific protections for its members when enacting the statute. These

1 protections were designed to preserve the process of representing the views of the Legislators'  
2 constituents and are narrowly crafted to achieve that end.

3 NRS 281A.420 provides in relevant part:

4 NRS 281A.420 Additional standards: Voting by public officers; disclosures required of  
5 public officers and employees; effect of abstention from voting on quorum; Legislators  
6 authorized to file written disclosure.

7 ...

8 **6. After a member of the Legislature makes a disclosure pursuant to subsection**  
9 **4, he may file** with the Director of the Legislative Counsel Bureau a **written statement**  
10 **of his disclosure.** The written statement must designate the matter to which the  
11 disclosure applies. After a Legislator files a written statement pursuant to this  
12 subsection, he is not required to disclose orally his interest when the matter is further  
13 considered by the Legislature or any committee thereof. A written statement of  
14 disclosure is a public record and must be made available for inspection by the public  
15 during the regular office hours of the Legislative Counsel Bureau.

16 **7. The provisions of this section do not, under any circumstances:**

17 **(a) Prohibit a member of the legislative branch from requesting or introducing**  
18 **a legislative measure; or**

19 **(b) Require a member of the legislative branch to take any particular action**  
20 **before or while requesting or introducing a legislative measure.** (Emphasis added).

21 The Legislature has amended NRS 281A.420 seven times, namely: in 1987, 1991, 1995, 1997,  
22 1999, 2003 and 2007. The significance of the Legislature amending the provisions that set standards on  
23 voting and abstention—core legislative functions—without clarification as to the Commission's  
24 jurisdiction on questioning legislators on these activities cannot be ignored. Nor can it be ignored that  
25 these amendments had to pass both houses. Had the Legislature believed that it was immune from NRS  
26 281A.420, it would have amended the statute accordingly. It had seven opportunities to do so, but it  
27 did not.

28 The words carefully selected by the Legislature in the Ethics Law could not be any clearer. The  
Legislature intended to empower the Commission to challenge certain legislative acts. Further, the  
Ethics Law provides limits on the Commission's authority. Therefore, under an analysis similar to the

1 California Court of Appeal’s in D’Amato, the Nevada Legislature waived legislative immunity from the  
2 Ethics Law.

3 Similarly, if this Court applied the waiver analysis used by the Michigan Court of Appeals, the  
4 conclusion would be the same. The Michigan Court of Appeals, in determining whether the Legislature  
5 waived a legislator’s immunity under the Speech or Debate Clause through the passage of the Open  
6 Meeting Act (OMA), relied on Helstoski and looked at the language of the OMA to see if its definition  
7 of “public official” included legislators. Wilkins v. Gagliardi, 219 Mich. App. 260, 271 (1996). It did  
8 not. Id. Therefore, the Court held that the enactment of the OMA did not waive the legislator’s  
9 protection under the Speech or Debate Clause. Id.

11 In contrast, here, the Ethics law defines “public officer” as “a person elected or appointed to a  
12 position which is established by the Constitution of the State of Nevada, a statute of this State or an  
13 ordinance of any of its counties or incorporated cities and which involves the exercise of a public  
14 power, trust or duty.” NRS 281A.160. Therefore, state legislators are subject to the Ethics Law.  
15 Further, the Ethics Law includes provisions specifically applicable only to state legislators. Therefore,  
16 by enacting the Ethics Law, the Legislature waived legislative immunity.  
17

18 Should any doubt still remain, the history of the Ethics Law illustrating the clear intent of the  
19 Legislature to delegate its duty to regulate certain ethical conduct of its members, thereby waiving  
20 legislative immunity, cannot be ignored.  
21

22 Prior to 1985, the Legislature had its own ethics commission. However, it was the Legislature  
23 that, after much deliberation, made the conscious decision to abolish its Legislative Ethics Commission  
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1 and create one commission with authority over state legislators included. S.B. 345, 63<sup>rd</sup> Session  
2 (1985).<sup>5</sup>

3 Over the last 24 years, the Legislature has undertaken great efforts to provide certain protections  
4 in the Ethics Law specific to state legislators, as illustrated above. Yet, just as easily, the Legislature  
5 could have amended the conflicts-of-interest provisions to exclude state legislators, as they have done  
6 in the present legislative session with the proposed S.B. 160.<sup>6</sup>

7  
8 Instead, over the last 24 years, the Legislature amended NRS 281A.420 in detail to provide  
9 when state legislators are to disclose conflicts of interest, how to disclose, and with whom to file  
10 written disclosure statements. See, NRS 281A.420(6) (providing for legislators to file written  
11 disclosures with the Director of the Legislative Counsel Bureau (LCB)). In fact, the LCB Director has  
12 at least 52 written conflict-of-interest disclosure statements from state legislators filed with his office  
13 between 2003 and 2007. Each of these 52 statements begins with “[i]n accordance with subsection 6 of  
14 NRS 281.501...” (NRS 281.501 was re-codified to the present NRS 281A.420). For example, Hardy’s  
15 statement from 2003 provides in part:  
16

17 **In accordance with subsection 6 of NRS 281.501**, I hereby submit to you the following  
18 written statement of my disclosure regarding the sale of my lobbying business...I have  
19 made the prerequisite oral disclosure of this statement during the Senate Government  
20 Affairs Committee hearing on April 2, 2003, when Senate Bill No. 487 was considered.  
21 Therefore I ask that you retain a copy of this disclosure as a public record and make it  
22 available for public inspection **in accordance with provisions of subsection 6 of NRS  
23 281.501**. I understand that once I have filed this written statement with you, I am not  
24 required to disclose orally this information again. (Emphasis added).

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25 <sup>5</sup>“Through the combined wisdom and efforts of Senators Wagner and Wilson, the Senate Government Affairs and Finance  
26 Committees, members of the two Ethics Commissions, and the input of hundreds of concerned Nevadans, SB 345 comes  
27 before you and your Assembly Committee for consideration.” Letter to Ways and Means Committee from members of the  
28 Executive Ethics Commission, Assembly Ways & Means, 63<sup>rd</sup> Leg., Exhibit D (May 30, 1985).

<sup>6</sup> See, <http://leg.state.nv.us/75th2009/Reports/history.cfm?ID=438>.

1 Had the Legislature not intended to empower the Commission with authority to oversee  
2 legislators' conduct pertaining to conflicts of interest, there would be no need for its members to  
3 comply with NRS 281A.420(6). There would be no need to submit 52 written conflicts-of-interest  
4 disclosure statements. And why would a large number of legislators have felt the need to make oral  
5 disclosures of conflicts of interest during the 25th Special Session on December 8, 2008?<sup>7</sup>

6  
7 The Legislature also included in statute a provision indicating that legislators are not prohibited  
8 from "requesting or introducing" legislative measures, even when the legislator has a conflict of interest  
9 on the measure. NRS 281A.420(7). In other words, during the time a legislator is requesting or  
10 introducing a measure, he does not have to make a disclosure. Again, the Legislature took great pains  
11 to indicate the specific times legislators are not subject to the conflicts-of-interest provisions. However,  
12 at all other times when acting on a measure, legislators are subject to NRS 281A.420.

13  
14 State legislators have been subject to the Ethics Law, have submitted themselves to its  
15 provisions, and have conformed their conduct in accordance with it for more than 24 years. Indeed, as  
16 illustrated in the following table, in the past 24 years, state legislators have both requested advisory  
17 opinions on the propriety of their ethical conduct, and, in response to complaints filed by third parties,  
18 have been investigated by the Commission on allegations of violations of the Ethics Law, including  
19 NRS 281A.420. This does not include the numerous third-party complaints filed against state  
20 legislators that were dismissed by the Commission.

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<b>NCOE Opinion Year-No.</b>	<b>Legislator Name(s)</b>	<b>Nature of request or allegation:</b>	<b>Commission Holding:</b>
86-2A	Hypothetical opinion	COI/D&A	Advice provided
86-3A	Hypothetical opinion	COI/D&A	Advice provided
87-1A	Hypothetical opinion	COI/D&A	Advice provided

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24  
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26 <sup>7</sup> For example, the Assembly Journal, alone, shows that 20 legislators made conflicts-of-interest disclosures.  
27 <http://leg.state.nv.us/25thSpecial/Journal/Senate/Final/sj001.pdf>.

1	87-2A	Hypothetical opinion	COI/D&A	Advice provided
	88-1A	Abstract opinion	COI/D&A	Advice provided
2	89-1A	Abstract opinion	COI/D&A	Advice provided
	89-2A	Abstract	COI/D&A	Advice provided
3	89-5A	Abstract	COI/D&A	Advice provided
	90-2A	Abstract	COI/D&A	Advice provided
4	91-03A	Abstract	COI/D&A	Advice provided
	92-07C	Interim Finance Committee	COI/D&A	Just & sufficient cause
5	93-13C	Senator Matthew Callister	COI/D&A	No violation exists
	93-19C	Assemblywom'n Chris Guinchigliani	COI/D&A	No violation exists
6	93-20C	Senator Lori Lipman-Brown	COI/D&A	No violation exists
	93-33C	Assemblyman Richard Bennett	COI/D&A	No violation exists
7	93-39C	Assemblyman Robert Sader	COI/D&A	No violation exists
	94-75C	Assemblywomen-elect Chris Guinchigliani and Jan Evans	COI/D&A	No violation exists – Jurisdiction questioned
8	95-12C	Legislators (four Ranchers)	COI/D&A	Disclosure necessary, but not abstention.
9	95-67C	Senator William Raggio	UOP	No violation exists
10	96-21C	Assemblywoman Dianne Steel	UOP, Gfts, UIONKP, SE	No violation exists
	96-60C	Senator Dina Titus	UOP	No violation exists
11	98-02CP/98-03CP	Assemblyman Bob Beers	CP	Violation existed, fine assessed and later waived by Commission. Decision Overturned.
12				
13	98-08CP/98-09CP	Maurice Washington	CP	No violation exists.
14	99-31A	Abstract	COI/D&A	Advice provided
	01-10A	Assemblyman Lynn Hettrick	GTPE	Advice provided
15	02-15CP	Francis Allen (candidate)	CP	No violation exists.
	05-16 A	Senator Barbara Cegavske	UOP	Advice provided
16	05-21C	Senator Sandra Tiffany	UOP	Stipulated to violations
	07-49A	Senator William Raggio	UOP/GTPE	Advice provided

A = Advisory opinion  
C = Complaint  
CP = Campaign Practices

COI/D&A = Conflict of Interest/Disclosure & Abstention  
CP = Campaign Practices  
GTPE = Use of government time, property or equipment  
SE = Sought employment through use of position  
UOP = Use of position  
UOINKP = Use of information not known to public

Therefore, had the Legislature not intended to empower the Commission with authority to regulate legislators' conduct, it could have raised the issue during any of the numerous times where one of its members has come before the Commission. The Legislature's persistent failure to raise the issue evinces its clear intent to divest itself of legislative immunity, as it relates to the Ethics Law. Additionally, a review of the legislative history reveals extensive and in-depth discussion and testimony

1 by members of the Legislature and others regarding the application of the Ethics Law to state  
2 legislators, specifically NRS 281A.420.<sup>8</sup>

3 The very specific language of the Ethics Law, coupled with the history of the law,  
4 unambiguously demonstrate the intent of the Legislature to bestow the power upon the Commission to  
5 regulate specified conduct of state legislators and amount to an explicit and unequivocal expression of a  
6 waiver of legislative immunity.  
7

8 **2. The Commission is not an Executive agency, but even if it was, the Legislative**  
9 **authority delegated to the Commission under the Ethics Law does not violate**  
10 **Article 3, Section 1 of the Nevada Constitution.**

11 The District Court erroneously determined that because of separation-of-powers principles, the  
12 Commission is enjoined from proceeding on the underlying complaint alleging unethical conduct by  
13 Hardy. (JA530-546).

14 Article 3, Section 1 of the Nevada Constitution provides:

15 The powers of the Government of the State of Nevada shall be divided into three  
16 separate departments,--the Legislative,--the Executive and the Judicial; and no persons  
17 charged with the exercise of powers properly belonging to one of these departments  
18 shall exercise any functions, appertaining to either of the others, except in the cases  
19 expressly directed or permitted in this constitution.

20 Nev. Const. Art. 3, § 1.

21 “Legislative power” is power of law-making representative bodies to frame and enact laws, and  
22 to amend and repeal them. Nev. Const. Art. 3, § 1; Del Papa v. Steffen, 112 Nev. 369 (1996). On the  
23 other hand, “executive power” “extends to carrying out and enforcing laws enacted by the Legislature.  
24 Accordingly, “[t]he improper delegation of legislative power doctrine is primarily a substantive concept

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25 <sup>8</sup> i.e., Hearing on S.B. 345, before Senate Comm. on Gov’t Affairs, 63<sup>rd</sup> Leg. at 6 (Nev. Apr. 24, 1985); Hearing on S.B.  
26 345, before Comm. on Finance, 63<sup>rd</sup> Leg. at 7 (Nev. May 20, 1985); Journal of the Senate, 63<sup>rd</sup> Leg. at 1123-1124 (Nev.  
27 May 29, 1985); Hearing on A.B. 190, before Assembly Comm. on Leg. Functions, 66<sup>th</sup> Session Leg. at 37-40; 4 (Nev.  
28 March 5 & 14, 1991); Hearing on S.B. 214, before Senate Comm. on Gov’t Affairs, 69<sup>th</sup> Leg. at 1-9 (Nev. June 2, 1997);

1 prohibiting an administrative agency from ‘making law.’” Grygas v. New York State Ethics Com., 147  
2 Misc. 2d 312, 317 (1990). Except where there is a constitutional mandate or limitation, the Legislature  
3 may state which actions the executive shall or shall not perform.” Galloway v. Truesdell, 83 Nev. 13,  
4 20 (1967).

5 In the instant case, there has been no improper delegation of legislative power to the  
6 Commission. The Legislature decided what was proper and necessary for the regulation of the ethical  
7 conduct of its members and to effect its purpose, it created the Commission to execute the Ethics Law.

8 It was the Legislature that decided there would be an Ethics Law in Nevada. It was the  
9 Legislature that created ethics standards for public officers, including state legislators, to keep their  
10 private interests separate from their public duties. The Commission is left with the proper  
11 administrative function of carrying out and enforcing the Ethics Law.

12 Other courts have rejected similar separation-of-powers challenges as the one made by Hardy.  
13 D’amato v. Superior Ct., 167 Cal.App.4<sup>th</sup> 861, 876 (executive branch inquiring into the legislative  
14 activities of a member of the legislative branch would not offend separation of powers);<sup>9</sup> Joint Leg.  
15 Comm. on Ethical Standards v. Perkins, 179 N.J. A.2d 116 (J.J. App. 1981)(rejecting separation-of-  
16 powers challenge to Legislature’s delegation of power to joint legislative committee); Grygas v. New  
17 York State Ethics Comm’n, 147 Misc.3d 312 (1990)(Legislative delegation of power to ethics  
18 commission constitutional, “it is the Legislature itself that has determined there shall be an Ethics  
19 Law...what form it will take...and determined the parameters of inclusion.”); Cole v. State, 673 P.2d  
20 345, 349 (1983)(holding that Open Meeting Law does not conflict with Article V, Section 12 of the

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21 Hearing on S.B. 214, before Assembly Comm. on Elections Procedures and Ethics, 69<sup>th</sup> Leg. at 6-7; Ex. D (Nev. July 1,  
22 1997); Hearing on S.B. 478, before Senate Comm. on Gov’t Affairs, 70<sup>th</sup> Leg. at 76-114 (Nev. Apr. 7, 1999).

23 <sup>9</sup> The framers of Nevada’s Constitution modeled the Nevada Constitution after California’s. Cheung v. Eighth Judicial Dist.  
24 Court ex rel. County of Clark, 121 Nev. 867 (2005); State ex rel. Schur v. Payne, 57 Nev. 286 (1937). Nevada’s separation-

1 Colorado Constitution authorizing the General Assembly to establish its own rules); In re Platz, 60 Nev.  
2 296 (1940)(statute providing for disbarment proceedings before Board of Governors of State Bar does  
3 not violate constitutional separation of powers); Howard v. State Comm’n on Ethics, 421 So.2d 37, 39  
4 (Fla. Dist.Ct.App.1982)(“revolving door” provision does not encroach on Supreme Court’s power to  
5 regulate practice of law).

6  
7 Further, the Nevada Legislature already considered and rejected issues of separation of powers  
8 as it relates to the Ethics Law. In 1977 the Legislature considered A.B. 450. This bill proposed the  
9 revised Ethics law after the Nevada Supreme Court in Dunphy v. Sheehan, 92 Nev. 259 (1976) had  
10 invalidated the prior version enacted in 1975. In a letter to Assemblyman Lloyd Mann and to the  
11 Elections Committee, Deputy Attorney General Donald Klasic, on behalf of the Executive Ethics  
12 Commission, wrote about his concern that Section 5 of A.B. 450 would be a violation of Article 3 of  
13 the Nevada Constitution.<sup>10</sup> Section 5 of A.B. 450 permitted members of the Legislature to appoint  
14 members to the State Ethics Commission. Further, Mr. Klasic recommended that some “non-  
15 Legislative authority” make such appointments instead. Id. In a response letter to Assemblyman  
16 Mann, Legislative Counsel Frank Daykin disagreed with Mr. Klasic’s advice and stated that “the  
17 supreme court in Dunphy v. Sheehan discussed article 3 of the Nevada constitution without intimating  
18 any doubts about the composition of the commission.” Id. at 20.  
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21 Again in 1999, in response to questions from senators regarding whether the Commission  
22 inquiring into legislators’ legislative actions would violate separation of powers, Legislative Counsel  
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26 of-powers provision (Article 1, Section 3), at issue in the instant case, is nearly identical to California’s separation-of-  
27 powers provision (Article 3, Section 3).

28 <sup>10</sup> <http://www.leg.state.nv.us/lcb/research/library/1977/AB450,1977.pdf> at 25-26.

1 Brenda Erdoes explained that the Legislature’s Legal Division was working on an opinion on the  
2 topic.<sup>11</sup>

3 The exchange between the Attorney General’s office, the Legislature and its legal counsel  
4 illustrates that they considered whether any separation-of-powers implications were derived from the  
5 Commission and the Ethics Law. Yet, without concern to legislative immunity and rejecting any  
6 separation-of-powers issues, the Legislature chose to implement the Ethics Law that included state  
7 legislators within its jurisdiction.  
8

9 Certainly, “the doctrine of separation of powers is fundamental to our system of government.”  
10 Galloway v. Truesdell, 83 Nev. 13 (1967). However, “a strict application of the theory of separation of  
11 powers would make the very existence of [a typical administrative] agency unconstitutional.” Nevada  
12 Industrial Commission v. Reese, 93 Nev. 115, 120 (1977). This is because in today’s complex state  
13 government, administrative agencies exercise many types of power blended together. Norman J.  
14 Singer, Legislative Power, §3:6, Sutherland Statutes and Statutory Construction (West 2008).  
15

16 The Commission exercises many types of power blended together. For example, the  
17 Commission exercises legislative powers when it makes regulations and investigates. The Commission  
18 also exercises executive power when enforcing the Ethics Law. Finally, the Commission exercises  
19 judicial powers when it adjudicates contested ethics cases. And even though the Ethics Law does not  
20 apply to members of the judiciary, the Commission by law collects and publishes financial disclosure  
21 statements of members of the judiciary. NRS 281A.610(4). The Commission even collects and reviews  
22 financial disclosure statements from certain staff members of the Legislature. NRS 281A.240(2)(b);  
23 NRS 281A.600. Therefore, a strict application of the separation-of-powers doctrine would make the  
24 very existence of the Commission unconstitutional.  
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27 <sup>11</sup> Hearing on S.B. 478, before Senate Comm. on Gov’t Affairs, 70<sup>th</sup> Leg. at 42 (Nev. Apr. 7, 1999).  
28

1           Instead, this Court, like the legislative members of the last 24 years, should adopt a functionalist  
2 rather than a formalist view of separation of powers. “Formalism” is a process of analysis in which the  
3 Constitution is viewed narrowly. The focus is on three autonomous branches of government. Harold  
4 H. Bruff, The Incompatibility Principle, 59 Admin. L. Rev. 225, 226 (2007). On the other hand,  
5 “functionalism” allows for a diverse and complex government structure where a blending of power  
6 exists. Id. Although the intent of the Framers of the Constitution was to create a system of separated  
7 powers,<sup>12</sup> the Framers also intended to allow for blending of power within the three branches of  
8 government.<sup>13</sup> In fact, the modern view of separation of powers rejects metaphysical abstractions and  
9 subscribes instead to the more pragmatic, flexible and functional approach. Nixon v. Administrator of  
10 General Services, 408 F. Supp. 321 (D.D.C. 1976), *Judgment aff’d*, 433 U.S. 425 (1977).

11  
12           The United States Supreme Court, rejecting an "archaic view of the separation of powers as  
13 requiring three airtight departments of government," articulated the following test to determine whether  
14 a separation-of-powers violation exists:

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16           [In determining whether the Act [of Congress] disrupts the proper balance between the  
17 coordinate branches, the proper inquiry focuses on the extent to which it prevents the  
18 [affected branch] from accomplishing its constitutionally assigned functions. Only where  
19 the potential for disruption is present must we then determine whether that impact is  
20 justified by an overriding need to promote objectives within the constitutional authority  
21 of Congress.

22           Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977) (citations omitted).

23           In the instant case, it was the Legislature that, by enacting the Ethics Law, struck a balance  
24 between the need for conflicts-of-interest regulation and fulfilling its constitutionally assigned

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25 <sup>12</sup> The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (stating that “[t]he accumulation of all  
26 powers, legislative, executive, and judiciary, in the same hands, ...may justly be pronounced the very definition of  
27 tyranny”).

28 <sup>13</sup> The Federalist No. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961) (“[Montesquieu] did not mean that these  
departments ought to have no partial agency in, or no control over, the acts of each other.”).

1 functions without undue constraint. The Ethics Law does not, nor has it in the last 24 years, prevented  
2 the Legislature from accomplishing its constitutionally assigned functions.

3         Assuming, *arguendo*, that the potential for disruption is presented by a legislator’s fear “that the  
4 legislator’s decision to support, oppose or vote on legislation will be investigated, prosecuted,  
5 adjudicated and potentially punished by another branch of government,”<sup>14</sup> that impact is justified by the  
6 Legislature’s overriding objective when it enacted the Ethics Law—to uphold the public’s trust in the  
7 ethical conduct of its public officers by avoiding conflicts of interest. Further, even if conflicts-of-  
8 interest regulation was internal, as it will be with the passage of S.B. 160, presumably there would still  
9 be the fear of a possible ethics complaint filed against the legislator. The only difference is that, now, it  
10 would be adjudicated by the legislator’s peers. This supposed potential for disruption is not legitimate.  
11 The Ethics Law does not disrupt the Legislature in accomplishing its constitutionally assigned  
12 functions. Therefore, the Ethics Law is a constitutional delegation of the Legislature’s power to  
13 regulate the conduct of its members and does not violate Article 3, Section 1.  
14  
15

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17         **3.         The District Court’s reliance on In re Arnold and Irons v. R.I. Ethics Comm’n**  
18         **is erroneous because the holding in those cases is dependent on a speech or debate**  
19         **clause.**

20         The District Court’s Order states: “The Arnold and Irons cases are particularly persuasive  
21 because they are so factually similar.” (JA535 at 56). The Court then goes on to illustrate why the  
22 cases are so similar to the instant case, including that the cases involve a state legislator accused of  
23 violating ethics laws and who is claiming legislative immunity. Id. What the Court failed to point out  
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28         <sup>14</sup> See Respondent’s Emergency Motion to Expedite The Appeal and Decision and For En Banc Consideration and Oral  
Argument, p. 4, lns. 18-24.

1 is that both states where these cases take place, Louisiana and Rhode Island, have almost identical  
2 speech or debate clauses in their respective constitutions. Nevada has no such clause.

3 Through speech and debate clauses, legislators are afforded a legal privilege for actions taken  
4 within the sphere of legitimate legislative activities. The U.S. Constitution contains the Speech or  
5 Debate Clause that protects members of Congress from liability on such actions. Art. I, §6. Over forty  
6 states adopted a speech or debate clause similar to the federal clause. Steven F. Huefner, The  
7 Neglected Value of the Legislative Privilege in State Legislatures, 45 Wm. & Mary L. Rev. 21, 308  
8 (2003).

9  
10 Both Louisiana’s and Rhode Island’s speech or debate clause provide that for any speech in  
11 debate in either house, “no member shall be questioned **in any other place.**” Irons v. R.I. Ethics  
12 Comm’n, C.A. No. PC 07-6666, 2008 R.I. Super. LEXIS 137,11 (R.I. Super. Ct. Oct. 29, 2008); In re  
13 Arnold, 991 S. 2d 531 (La. Ct. App. 2008), *review denied*, 992 So. 2d 990 (La. 2008) (emphasis added).

14  
15 In Arnold, the Court held, “pursuant to LSA-Const. art. III, sec. 8 [**speech or debate clause**],  
16 where a legislator’s actions within the legislative sphere, such as speech, debate, and voting on matters  
17 before the legislature constitute an alleged violation of the Code of Governmental Ethics, the Board of  
18 Ethics is without jurisdiction to question or punish such action.” In re Arnold, 991 S. 2d 531. The  
19 Court there found legislative immunity based on the speech or debate clause.  
20

21 In Irons, the Court held “Irons is not asking the Court to find legislative immunity in the  
22 penumbras or emanations of a vaguely worded constitutional provision. The Speech in Debate Clause  
23 is a plainly worded provision that has been a part of the Rhode Island Constitution since its founding.”  
24 C.A. No. PC 07-6666, 2008 R.I. Super. LEXIS 137, 32. The Court there, like in Arnold, found  
25 legislative immunity because of the existing speech or debate clause in the state’s constitution.  
26

27 The Nevada Constitution does not contain a speech or debate clause prohibiting a member of  
28

1 the Legislature “to be questioned in any other place.” Instead, the District Court found legislative  
2 immunity for Hardy in the “penumbras or emanations” of Article 3, Section 1 and Article 4, Section 6  
3 of the Nevada Constitution. Therefore, this Court should decline to afford legislative immunity to  
4 Hardy in this matter.

5 **4. The Ethics Law does not violate Article 4, Section 6 of the Nevada Constitution**  
6 **because the Legislature properly delegated its authority to the Commission to**  
7 **regulate the conduct of state legislators through the Ethics Law.**

8 The Commission objected to the form and substance of the Order prepared by Hardy’s counsel  
9 and approved by Judge Maddox. One objection was that Hardy’s argument on the Standing Rules was  
10 raised for the first time on Hardy’s Reply Brief, giving the Commission no opportunity to respond. At  
11 the hearing, Commission’s Counsel raised an objection on the issue. The exchange between  
12 Commission’s counsel and Judge Maddox is as follows:

13  
14 THE COURT: Miss Fralick, did you have something short you wanted to respond?  
15 MS. FRALICK: Just real quick, Your Honor, because the argument about the standing rules has  
16 been raised for the first time on reply.  
17 THE COURT: That’s not any part of my decisions.  
(JA507 at 4-10).

18 Although Judge Maddox stated that the Standing Rules were not part of his decision, the  
19 District Court’s Order dedicates more than a page on the issue of the Standing Rules.

20 The District Court’s ruling that the Standing Rules of each House of the Legislature take  
21 precedence over the Ethics Law’s conflicts-of-interest provisions defies common sense and should be  
22 summarily rejected.  
23

24 Article 4, Section 6 of the Nevada Constitution provides:

25 Each House shall judge of the qualifications, elections and returns of its own members,  
26 choose its own officers (except the President of the Senate), **determine the rules of its**  
27 **proceedings and may punish its members for disorderly conduct, and with the**  
28 **concurrence of two thirds of all the members elected, expel a member.**

1 Nev. Const. art. 4 § 6 (emphasis added).

2 The Nevada Senate adopted Standing Rules 32 and 44 during the 2007 Legislative Session (the  
3 remaining allegations in the underlying ethics complaint concern the 2007 Legislative Session). The  
4 Rules provide:  
5

6 **Rule No. 32. Manner of Election—Voting.**

7 1. In all cases of election by the Senate, the vote must be taken viva voce. In other cases,  
8 if a vote is to be recorded, it may be taken by oral roll-call or by electronic recording.

9 2. When a recorded vote is taken, **no Senator may:**

10 (a) Vote except when at his seat;

11 (b) **Vote upon any question in which he is in any way personally or directly  
12 interested;**

13 (c) Explain his vote or discuss the question while the voting is in progress; or

14 (d) Change his vote after the result is announced.

15 3. The announcement of the result of any vote must not be postponed.

16 Statutes of Nevada 1973, 1867; A 1979, 1926; 1999, 3820 (emphasis added).

17 **Rule No. 44. Committee on Legislative Operations and Elections.**

18 The Standing Committee on Legislative Operations and Elections shall recommend by  
19 resolution the appointment of all attaches and employees of the Senate not otherwise  
20 provided for by law. It may suspend any attache or employee for incompetency or  
21 dereliction of duty, pending final action by the Senate. **It shall hear complaints on  
22 alleged breaches of ethics and conflicts of interest, brought by Legislators and  
23 others, and it may advise Legislators on questions of breaches of ethics and  
24 conflicts of interests.** All proceedings by the Committee on matters of ethics or conflicts  
25 of interest are open to the public unless otherwise authorized to be closed to the public  
26 by Section 15 of Article 4 of the Constitution of the State of Nevada.

27 Statutes of Nevada 1973, 1868; A 1987, 2332; 1995, 2828; 2005, 2943; Senate Resolution No. 1 of the  
28 2007 Session (File No. 5) (emphasis added).

29 The New Jersey Superior Court flatly rejected a similar argument as the one made by Hardy that  
30 Standing Rules take precedence over statutory ethical standards. Joint Legislative Committee on  
31 Ethical Standards v. Perkins, 432 A.2d 116 (1981). New Jersey has a nearly identical constitutional  
32 provision as Nevada's Article 4, Section 6. In Perkins, New Jersey's Joint Legislative Committee on

1 Ethical Standards (Joint Committee), an administrative agency empowered with authority to enforce the  
2 state’s conflicts-of-interest law, sued a state legislator to collect a fine for his violation of the law. 432  
3 A.2d 116. The legislator argued that the Legislature’s delegation of power to the Joint Committee to  
4 enforce the state’s conflicts-of-interest law was unconstitutional, since the state’s constitution gave  
5 exclusive authority to each house of the Legislature to punish its members. Id. at 120. The Court  
6 disagreed and reasoned that the state conflicts-of-interest law, a general legislative enactment, was  
7 applicable to all state officers, including legislators. Id. Further, the Court likened the conflicts-of-  
8 interest law to criminal law, in that any person, including a legislator is subject to it. Id. The New  
9 Jersey court, therefore, rejected the idea that the Legislature’s constitutional rule-making authority  
10 overrides the enactment of general laws.  
11

12 Similarly, in this case, the Legislature delegated to the Commission the power to enforce the  
13 Ethics Law, a law applicable to all public officers, including legislators. Therefore, such delegation is  
14 not in violation of Article 4, Section 6.  
15

16 Further, the Nevada Senate also adopted Standing Rule 90 providing that Mason’s Manual of  
17 Legislative Procedure shall govern the Senate. (JA544, fn. 1). Mason’s Manual provides that a  
18 “legislative body cannot make a rule which evades or avoids the effect of a rule prescribed by the  
19 constitution or **statutes** governing it.” Mason’s Legislative Manual, §21, p. 2 (1979) (emphasis added).  
20 If in fact Rules 32 and 44 take precedence over NRS 281A.420, then the rules avoid the effect of NRS  
21 281A.420 and specifically the disclosure provisions, since Rules 32 and 44 do not even provide for  
22 disclosure. This is directly in conflict with the Senate’s own Standing Rule 90.  
23

24 The members of the 74<sup>th</sup> Legislative Session (2007 Session) could not have possibly intended  
25 for Rules 32 and 44 to control over the Ethics Law. Instead, the Legislature intended the provisions of  
26 NRS 281A.420 as its “rules” for governing conflicts of interest.  
27  
28

1 First, there are no provisions in Rules 32 and 44 for disclosure of conflicts of interest. It has  
2 long been established that disclosure is essential for transparency in government. City of Reno v. Reno  
3 Gazette-Journal, 119 Nev. 55 (2003); DR Partners v. Board of County Comm’rs, 116 Nev. 616 (2000);  
4 Donrey of Nevada v. Bradshaw, 106 Nev. 630 (1990). The Legislature made great efforts to provide  
5 for specific standards for its members on disclosure of conflicts of interest. Therefore, on the matter of  
6 disclosure in 2007, NRS 281A.420 controls.  
7

8 Second, Mason’s Manual provides that the rules “adopted by a state legislature expire at the end  
9 of the session at which they were adopted.” Mason’s Legislative Manual, §21, p. 7 (1979). Therefore,  
10 Rule 44 expired at the end of the 2007 Legislative Session. Rule 44 provides that the Standing  
11 Committee on Legislative Operations and Elections would hear complaints on breaches of ethics and  
12 conflicts of interests. However, the rule is silent on the procedures **after** the 2007 Legislative Session.  
13 Rule 44 does not state whether there would be an interim Standing Committee on Legislative  
14 Operations and Elections to handle ethics complaints filed after the session. Further, Rule 44 does not  
15 state who would serve on that interim committee if, for example, the original members are no longer in  
16 office. The rule is also silent as to a statute of limitations and on the committee’s jurisdiction over a  
17 legislator after he is no longer in office. Also, if someone filed a complaint with the Commission  
18 instead of the Legislature, Rule 44 provides no procedure for such scenario. In the instant case, at no  
19 time did Hardy request that the Commission refer the underlying ethics complaint to the Senate.  
20 Instead, Hardy requested and the District Court granted an injunction from proceeding on the  
21 complaint.  
22

23  
24 Had the Legislature intended Rules 32 and 44 to control, it would have provided for procedures  
25 to deal with these issues, but it did not. Instead, the Legislature provided rules to deal with such issues  
26 under the Ethics Law. NRS 281A.200 (provides for the creation, appointment and qualifications of  
27  
28

1 Ethics Commissioners, including 4 appointed by the Legislative Commission); NRS 281A.160 (defines  
2 persons under the Commission’s jurisdiction, including state legislators); NRS 281A.400 (the code of  
3 ethical standards with specific provisions for state legislators); NRS 281A.210, NRS 281A.440,  
4 281A.460 (provides procedures for handling ethics complaints); NRS 281A.420 (provides standards for  
5 disclosure, voting, participation and abstention, with specific provisions for state legislators).  
6

7 The enactment of a conflicts-of-interest law does not limit the Legislature’s power to oversee  
8 the conduct of its members. In fact, legislatures in all 50 states have some form of internal ethics  
9 committees, and 33 states, including Nevada, also have external ethics commissions with jurisdiction  
10 over the legislative branch.<sup>15</sup> Together, internal and external ethics oversight bodies are essential in  
11 ensuring the public’s trust in an ethical government.  
12

13 At no time in the last 24 years, until now, as a result of this case, has the Legislature sought to  
14 exempt itself from NRS 281A.420. Both the Senate and the Assembly have accepted the Ethics Law as  
15 the “rules” for governing conflicts of interest. Therefore, NRS 281A.420 does not conflict with Article  
16 4, Section 6. The assertion that Rules 32 and 44 take precedence over the Ethics Law’s conflicts-of-  
17 interest provisions flies in the face of the intent of those members of the Legislature of the past 24 years  
18 and should be summarily rejected.  
19

#### 20 **IV. CONCLUSION**

21 The goal of enhancing the people’s faith in the integrity and impartiality of public officers is  
22 served by preserving the Commission’s process of conducting a hearing on Request for Opinion No.  
23 08-04C concerning Hardy’s alleged unethical conduct. Immunity from actions under the Ethics Law is  
24 incompatible with the purpose and policy of the law that, “[a] public office is a public trust and shall be  
25 held for the sole benefit of the people...adequate guidelines are required to show the appropriate  
26  
27  
28

1 separation between the roles of persons who are both public servants and private citizens” NRS  
2 281A.020.

3 Therefore, the Commission respectfully requests that this Court find that the Commission is not  
4 barred by separation of powers and legislative immunity from proceeding with the remaining ethics  
5 allegations, concerning the 2007 Legislative Session, against Hardy and reverse the District Court’s  
6 Order that granted Hardy Judicial Review and issued a Permanent Injunction enjoining the Commission  
7 from conducting further administrative proceedings.  
8

9 Dated this 16<sup>th</sup> day of March, 2009.  
10

11  
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20 **ATTORNEY’S CERTIFICATE**

21 I hereby certify that I have read this appellate brief, and to the best of my knowledge,  
22 information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that  
23 this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P.  
24 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a  
25 reference to the page of the transcript or appendix where the matter relied on is to be found. I  
26

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<sup>15</sup> [http://www.ncsl.org/programs/ethics/whats\\_the\\_difference.htm](http://www.ncsl.org/programs/ethics/whats_the_difference.htm).  
28

1 understand that I may be subject to sanctions in the event that the accompanying brief is not in  
2 conformity with the requirements of the Nevada Rules of Appellate Procedure.

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Dated this 16<sup>th</sup> day of March, 2009.

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**CERTIFICATE OF SERVICE**

I certify that I am an employee of the Nevada Commission on Ethics, and that on this 16<sup>th</sup> day of  
March, 2009, I caused the foregoing Appellant's Opening Brief to be delivered by personal delivery to  
the following:

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