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**IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR CARSON CITY**

WARREN B. HARDY II, in his official capacity as  
Nevada State Senator for Clark County Senatorial  
District No. 12,

Petitioner,

vs.

THE COMMISSION ON ETHICS OF THE  
STATE OF NEVADA,

Respondent.

**ORDER AND JUDGMENT GRANTING  
THE PETITIONER'S PETITION FOR JUDICIAL REVIEW  
AND ISSUING A PERMANENT INJUNCTION**

**PROCEDURAL HISTORY**

1. On November 3, 2008, the Petitioner, Nevada State Senator Warren B. Hardy II, filed a  
Petition for Judicial Review pursuant to the Administrative Procedure Act (NRS Chapter 233B or APA)  
and the Nevada Ethics in Government Law (NRS Chapter 281A or Ethics Law). Senator Hardy's  
Petition requests judicial review of an order of the Respondent, the Nevada Commission on Ethics  
(Commission), entered in a contested case designated as "Request for Opinion No. 08-04C." In the  
order, the Commission denied Senator Hardy's motion to dismiss or for summary judgment based on the

1 affirmative defense of separation of powers and legislative immunity under Article 3, Section 1 and  
2 Article 4, Section 6 of the Nevada Constitution. (Pet. Ex. A.)

3 2. The Commission scheduled an administrative hearing for December 11, 2008, to hear the  
4 merits of the allegations against Senator Hardy. (Pet. Ex. C.) The Commission also denied Senator  
5 Hardy's request to stay the administrative hearing pending judicial review. (Mot. at 6; Mot. Ex. D.) As  
6 a result, on the same day that he filed his Petition for Judicial Review, Senator Hardy also filed an  
7 Emergency Motion for a Preliminary Injunction and a Stay Enjoining the Commission on Ethics from  
8 Conducting Further Proceedings in Request for Opinion No. 08-04C Pending Judicial Review.

9 3. Senator Hardy's Petition and Emergency Motion involve the same issue of constitutional law,  
10 namely, whether the Commission is barred as a matter of law from conducting further administrative  
11 proceedings against Senator Hardy in Request for Opinion No. 08-04C based on the affirmative defense  
12 of separation of powers and legislative immunity under Article 3, Section 1 and Article 4, Section 6 of  
13 the Nevada Constitution.

14 4. On November 4, 2008, the Court conducted a telephone conference call with the parties.  
15 Because Senator Hardy's Petition and Emergency Motion involve the same issue of constitutional law,  
16 the parties stipulated and the Court agreed to consolidate a hearing on the Emergency Motion with a  
17 hearing on the merits of the pleadings pursuant to N.R.C.P. 65(a)(2).

18 5. On November 6, 2008, the Court issued an order confirming the parties' stipulation that "the  
19 Emergency Motion and the merits of the pleadings before the Court would be briefed and heard at the  
20 same time." The Court also established an expedited briefing schedule and set a consolidated hearing on  
21 the Emergency Motion and the merits of the pleadings for November 24, 2008. As directed by the  
22 Court's order, the Commission filed an Opposition to the Emergency Motion and an Answer to the  
23 Petition on November 14, 2008. Also as directed by the Court's order, Senator Hardy filed a Reply on  
24 November 20, 2008.



1 Senator Hardy violated NRS 281A.420 of the Ethics Law by failing to disclose sufficient information  
2 regarding certain alleged conflicts and by failing to abstain from voting on various bills during the 2003,  
3 2005 and 2007 Legislative Sessions.

4 12. On April 10, 2008, and June 30, 2008, a Panel consisting of two members of the  
5 Commission held hearings pursuant to NRS 281A.440(3) to determine whether just and sufficient cause  
6 existed for the Commission to render an opinion in the matter. The Panel dismissed the allegations in  
7 the ethics complaint pertaining to the 2003 Legislative Session, and the Panel also dismissed various  
8 allegations relating to the 2005 Legislative Session and the 2007 Legislative Session. 1st Amended  
9 Notice of Hearing and Panel Determination (July 29, 2008) (Pet. Ex. B). However, the Panel found that  
10 just and sufficient cause existed for the Commission to hold a hearing and render an opinion concerning  
11 possible violations of NRS 281A.400(2), 281A.420(2) and 281A.420(4) in connection with Senate Bill  
12 No. 467 of the 2005 Legislative Session (S.B. 467), and Senate Bill No. 509 of the 2007 Legislative  
13 Session (S.B. 509). Id.

14 13. On August 18, 2008, the Commission issued a 2nd Amended Scheduling Order. (Pet. Ex.  
15 C.) In that scheduling order, the Commission scheduled an administrative hearing for December 11,  
16 2008, to hear the merits of the allegations against Senator Hardy in the 1st Amended Notice of Hearing  
17 and Panel Determination pursuant to NRS 281A.440. Id.

18 14. On August 19, 2008, Senator Hardy filed a Motion to Dismiss or for Summary Judgment on  
19 the Allegations in the 1st Amended Notice of Hearing and Panel Determination. (Supp'tl Ex. H.) In his  
20 motion, Senator Hardy raised several affirmative defenses, including the affirmative defense of  
21 separation of powers and legislative immunity. Id.

22 15. On September 11, 2008, the Commission held a hearing on the motion and received oral  
23 argument from Senator Hardy's counsel. (Supp'tl Ex. I.) On October 7, 2008, the Commission issued a  
24 written order ruling on the motion. (Pet. Ex. A.) In its order, the Commission dismissed the allegations

1 against Senator Hardy concerning his conduct occurring prior to and including the 2005 Legislative  
2 Session as being time-barred by the statute of limitations. Id. Therefore, no allegations concerning  
3 S.B 467 of the 2005 Legislative Session are pending against Senator Hardy.

4 16. With regard to S.B. 509 of the 2007 Legislative Session, the Commission dismissed the  
5 allegations that Senator Hardy used his position in government to secure or grant unwarranted  
6 privileges, preferences, exemptions or advantages for himself and/or ABC-LV in violation of NRS  
7 281A.400(2). (Pet. Ex. A.) The Commission dismissed these allegations after finding that the evidence  
8 was such that the Commission would not meet its burden to show, by a preponderance of the evidence,  
9 that Senator Hardy used his official position in violation of NRS 281A.400(2). Id.

10 17. The Commission did not dismiss the remaining ethics allegations against Senator Hardy  
11 involving S.B. 509 of the 2007 Legislative Session and alleged violations of NRS 281A.420 concerning  
12 disclosure of conflicts, voting and abstention. (Pet. Ex. A.) In particular, the remaining ethics  
13 allegations against Senator Hardy are that he violated:

14 NRS 281A.420.2 by failing to abstain from voting on S.B. 509, a bill that related to certain  
15 lease-purchase and installment-purchase agreements and as amended by the Assembly  
16 would have clarified the types of public works projects on which prevailing wages must be  
17 paid and which would affect ABC-LV's members.

17 NRS 281A.420.4 by failing to adequately disclose his pecuniary interest and private  
18 commitment to ABC-LV on S.B. 509, a bill that related to certain lease-purchase and  
19 installment-purchase agreements and as amended by the Assembly would have clarified the  
20 types of public works projects on which prevailing wages must be paid and which would  
21 affect ABC-LV's members.

20 (Pet. Ex. A & B.)

21 18. With regard to the remaining ethics allegations involving S.B. 509 of the 2007 Legislative  
22 Session, Senator Hardy contends that he did not violate any provisions of NRS 281A.420 concerning  
23 disclosure of conflicts, voting and abstention. However, because the Commission has not held a hearing  
24 on the merits or rendered a final decision in the matter, the Court expresses no opinion on that issue.

1 19. Instead, the Court must decide whether the Commission is barred as a matter of law from  
2 conducting further administrative proceedings against Senator Hardy on the remaining ethics allegations  
3 based on the affirmative defense of separation of powers and legislative immunity. On this issue,  
4 Senator Hardy argues that: (1) the remaining ethics allegations involve legislative actions taken by him  
5 within the sphere of legitimate legislative activity; (2) those legislative actions are protected by the  
6 constitutional doctrines of separation of powers and legislative immunity; and (3) the Nevada Senate is  
7 the only governmental entity that may question or penalize him regarding those legislative actions.

8 20. Because the protection of legislative immunity is vital to the separation of powers under  
9 Article 3, Section 1 of the Nevada Constitution and because each House of the Legislature has the  
10 exclusive power to determine the rules of its legislative proceedings and to punish its members for  
11 improper conduct related to those legislative proceedings under Article 4, Section 6 of the Nevada  
12 Constitution, the Court is compelled to agree with Senator Hardy that the Commission is barred as a  
13 matter of law from conducting further administrative proceedings against him on the remaining ethics  
14 allegations.

15 **Scope of the Court's decision.**

16 21. In concluding that the Commission is barred as a matter of law from conducting further  
17 administrative proceedings against Senator Hardy on the remaining ethics allegations, the Court must  
18 emphasize several important points regarding the scope of its decision. First, the Court is not holding  
19 that Senator Hardy's legislative actions concerning disclosure of conflicts, voting and abstention are  
20 immune from scrutiny. Rather, based on the constitutional doctrines of separation of powers and  
21 legislative immunity, the Court is holding that any inquiry into the ethical propriety of Senator Hardy's  
22 legislative actions concerning disclosure of conflicts, voting and abstention must be conducted by the  
23 Legislative Department of State Government under Article 4, Section 6 and cannot be conducted by an  
24 administrative agency of the Executive Department of State Government, such as the Commission.

1           22. Second, the Court emphasizes that legislative immunity applies only to actions that fall  
2 within the sphere of legitimate legislative activity and are an essential part of the legislative function. In  
3 this case, the remaining ethics allegations against Senator Hardy involve the legislative action of voting  
4 and other actions taken by Senator Hardy during the course of processing legislation, which is the  
5 quintessential legislative function. This is acknowledged by the Commission which "does not refute  
6 that the ethics allegations at issue against Hardy involve actions taken by him within the sphere of  
7 legitimate legislative activity, namely, disclosure, voting and participation on a legislative matter."  
8 (Opp'n at 4-5.) Therefore, because the parties agree that this case involves actions taken by Senator  
9 Hardy within the sphere of legitimate legislative activity, the Court is not required to express an opinion  
10 on whether other actions unrelated to the processing of legislation are covered by legislative immunity.

11           23. The Court notes, however, that courts in other jurisdictions have found that legislative  
12 immunity does not provide state legislators with blanket immunity from prosecution under state ethics  
13 laws and that state legislators remain subject to such laws for conduct falling outside the sphere of  
14 legitimate legislative activity. See, e.g., State v. Gregorio, 451 A.2d 980, 988 (N.J. Super. Ct. Law Div.  
15 1982) (falsifying financial disclosure statements); People v. Obrenstein, 565 N.E.2d 493, 500-01 (N.Y.  
16 1990) (defrauding the State by placing employees on the state payroll who never performed work for the  
17 state); People v. Norman, 789 N.Y.S.2d 613, 643-44 (N.Y. Sup. Ct. 2004) (falsifying travel  
18 reimbursement vouchers); State v. Chvala, 678 N.W.2d 880, 891-94 (Wis. Ct. App. 2004) (directing  
19 state employees to use state time and resources to work on political campaigns), *aff'd*, 693 N.W.2d 747  
20 (Wis. 2005).

21           24. Finally, the Court emphasizes that Senator Hardy is a *state* legislator who is a constitutional  
22 officer of the Legislative Department of State Government under Article 4, Section 4 of the Nevada  
23 Constitution. Legislative immunity exists under the Federal and State Constitutions to preserve the  
24 separation of powers among coequal branches of government. See United States v. Gillock, 445 U.S.

1 360, 368-70 (1980); Guinn v. Legislature, 119 Nev. 460, 472 (2003) (“Guinn II”). Unlike members of  
2 the Nevada Legislature, members of local or regional legislative bodies are not part of a coequal branch  
3 of Nevada State Government. See Lincoln County, Nev. v. Luning, 133 U.S. 529, 530-31 (1890); State  
4 v. Coulon, 3 So. 2d 241, 243 (La. 1941). In addition, the doctrine of separation of powers generally  
5 does not apply to local or regional legislative bodies. See People ex rel. Att’y Gen. v. Provines, 34 Cal.  
6 520, 523-40 (1868); Holley v. County of Orange, 39 P. 790, 792 (Cal. 1895); Mariposa County v.  
7 Merced Irrig. Dist., 196 P.2d 920, 925-26 (Cal. 1948); La Guardia v. Smith, 41 N.E.2d 153, 155-56  
8 (N.Y. 1942); Poynter v. Walling, 177 A.2d 641, 645 (Del. Super. Ct. 1962). Therefore, nothing  
9 contained in the Court’s decision applies to members of local or regional legislative bodies.

10 **Jurisdiction, justiciability and ripeness.**

11 25. As a preliminary matter, the Court must ensure that it has jurisdiction to consider Senator  
12 Hardy’s request for injunctive relief and judicial review and that the issues are justiciable and ripe for  
13 judicial review. Allstate Ins. Co. v. Thorpe, 123 Nev. ---, 170 P.3d 989, 993-94 (2007); Nevada Power  
14 Co. v. Dist. Ct., 120 Nev. 948, 959 (2004).

15 26. Pursuant to NRS 33.010 and N.R.C.P. 65, the Court has jurisdiction to grant injunctive relief  
16 to enjoin an agency from acting in excess of its authority or jurisdiction. Labor Comm’r v. Littlefield,  
17 123 Nev. ---, 153 P.3d 26, 28 (2007); Clark County v. State Equal Rights Comm’n, 107 Nev. 489, 490-  
18 92 (1991); City Council v. Reno Newspapers, Inc., 105 Nev. 886, 890 (1989). Such injunctive relief  
19 should be granted where the agency’s actions, if allowed to continue, would cause irreparable harm for  
20 which there is no adequate remedy at law. Id.; Univ. Sys. of Nev. v. Nevadans for Sound Gov’t, 120  
21 Nev. 712, 721 (2004).

22 27. In addition, pursuant to NRS 233B.130(1), the Court has jurisdiction under the APA to  
23 review agency decisions in contested cases. Mineral County v. State Bd. of Equalization, 121 Nev.  
24 533, 534 (2005). In conducting judicial review of an agency decision, the Court has “very broad

1 supervisory powers,” including the power to grant injunctive and other equitable relief. Clark County  
2 Liquor & Gaming Bd. v. Clark, 102 Nev. 654, 658 (1986).

3 28. Before the Court may exercise its jurisdiction to provide injunctive relief and judicial review  
4 of an agency decision, the case must be justiciable and ripe for review. Allstate Ins. Co., 123 Nev. at ---,  
5 170 P.3d at 993-94; City of Henderson v. Kilgore, 122 Nev. 331, 336-37 & n.10 (2006). Ordinarily, a  
6 case will not be justiciable and ripe for review until the petitioner has first exhausted available  
7 administrative remedies and the agency has entered a final decision in the matter. NRS 233B.130(1);  
8 Malecon Tobacco, LLC v. State, Dep’t of Taxation, 118 Nev. 837, 839 (2002). However, several  
9 important exceptions exist to the exhaustion requirement.

10 29. First, the Court may excuse the exhaustion requirement pursuant to NRS 233B.130(1),  
11 which provides that “[a]ny preliminary, procedural or intermediate act or ruling by an agency in a  
12 contested case is reviewable if review of the final decision of the agency would not provide an adequate  
13 remedy.” In applying this exception, the Court may excuse the exhaustion requirement when the agency  
14 has taken actions that clearly exceed the limits of its authority or jurisdiction. See Dep’t of Human Res.  
15 v. UHS of the Colony, Inc., 103 Nev. 208, 209-10 (1987); Boulware v. State, Dep’t of Human Res., 103  
16 Nev. 218, 219 (1987). This is because “the doctrine of exhaustion of remedies does not require one to  
17 initiate and participate in proceedings where an administrative agency clearly lacks jurisdiction, or  
18 which are vain and futile.” Engelmann v. Westergard, 98 Nev. 348, 353 (1982). Thus, when an  
19 aggrieved party establishes that an agency is acting in contravention of its enabling statute or applicable  
20 constitutional limitations, the Court may grant the aggrieved party appropriate judicial relief without  
21 requiring exhaustion of administrative remedies. See State, Dep’t of Taxation v. Scotsman Mfg., 109  
22 Nev. 252, 254-56 (1993).

23 30. Second, the Court may excuse the exhaustion requirement when the issues raised by the case  
24 “relate solely to the interpretation or constitutionality of a statute.” Malecon Tobacco, 118 Nev. at 839

1 (quoting State v. Glusman, 98 Nev. 412, 419 (1982)). In applying this exception, the Court will  
2 generally require exhaustion if consideration of the constitutional or statutory issues would require  
3 factual determinations which fall within the special expertise of the agency. Id. at 840-41. Under such  
4 circumstances, the factual determinations should be made, in the first instance, by the agency because of  
5 its specialized skill and knowledge concerning the subject matter. Id. However, when there are no  
6 factual determinations which require agency expertise or when the parties do not disagree on the  
7 underlying facts, the Court may consider and rule on the constitutional or statutory issues without  
8 requiring exhaustion of administrative remedies. Id.

9 31. In this case, the Court finds that even though the Commission has not held a hearing on the  
10 merits of the remaining allegations or rendered a final decision in the matter, Senator Hardy has  
11 established the jurisdictional prerequisites for the Court to grant injunctive relief and judicial review  
12 without requiring exhaustion of administrative remedies.

13 32. When a legislator raises legislative immunity as an affirmative defense in a motion to  
14 dismiss, the motion should be resolved at the earliest possible stage in the proceedings. Eastland v. U.S.  
15 Servicemen's Fund, 421 U.S. 491, 511 n.17 (1975). If the motion shows that the legislator is entitled to  
16 legislative immunity, the action must be dismissed as a matter of law before a hearing on the merits is  
17 conducted. Tenney v. Brandhove, 341 U.S. 367, 370-79 (1951). Prompt dismissal is essential to  
18 preserve the proper separation of powers among the branches of government, and "such motions [must]  
19 be given the most expeditious treatment by district courts because one branch of Government is being  
20 asked to halt the functions of a coordinate branch." Eastland, 421 U.S. at 511 n.17.

21 33. If the legislator's motion to dismiss is denied, the legislator has a right to an immediate  
22 appeal because the protection of legislative immunity "would be irreparably lost if an appeal had to  
23 await the final judgment." United States v. McDade, 28 F.3d 283, 288 (3d Cir. 1994). An immediate  
24 appeal is permitted "because the doctrine is designed to protect legislators not only from ultimate

1 liability, but also from the cost and inconvenience of litigation.” Gross v. Winter, 876 F.2d 165, 166 n.1  
2 (D.C. Cir. 1989). Thus, because the protection of legislative immunity is vital to the separation of  
3 powers and because such protection would be irreparably lost if an appeal had to await a final decision,  
4 the United States Supreme Court and lower federal courts have repeatedly held that the denial of a  
5 motion to dismiss based on legislative immunity is immediately appealable and subject to interlocutory  
6 judicial review. Helstoski v. Meanor, 442 U.S. 500, 506-08 (1979); Fields v. Office of Johnson, 459  
7 F.3d 1, 4 n.1 (D.C. Cir. 2006); Youngblood v. DeWeese, 352 F.3d 836, 838-39 (3d Cir. 2003); Larsen v.  
8 Senate of Pa., 152 F.3d 240, 245 (3d Cir. 1998); Chateaubriand v. Gaspard, 97 F.3d 1218, 1220 (9th Cir.  
9 1996); Williams v. Brooks, 945 F.2d 1322, 1325 (5th Cir. 1991); Agromayor v. Colberg, 738 F.2d 55,  
10 57-58 (1st Cir. 1984).

11 34. If Senator Hardy is not allowed immediate judicial review of the denial of his motion to  
12 dismiss, then Senator Hardy will be forced to participate in an administrative hearing on the merits  
13 before the Commission, and the protection to which he is entitled under the doctrine of legislative  
14 immunity will be irreparably lost. Consequently, the Court finds that the Commission’s order denying  
15 Senator Hardy’s motion to dismiss is the type of “preliminary, procedural or intermediate act or ruling  
16 by an agency” that is subject to interlocutory judicial review under NRS 233B.130(1) because making  
17 Senator Hardy wait for judicial review until after a hearing on the merits and a final decision by the  
18 Commission would not provide an adequate legal remedy or allow Senator Hardy to defend his right to  
19 legislative immunity in a prompt and efficient manner.

20 35. Additionally, with regard to the legal issues raised in this case, there are no factual  
21 determinations which require the Commission’s expertise, and the parties do not disagree on the  
22 underlying facts that are necessary to resolve the issues of separation of powers and legislative  
23 immunity. Therefore, because this case involves pure issues of law that do not require the resolution of  
24 any contested factual matters, the Court finds that it is appropriate to consider and rule on the legal

1 issues without requiring exhaustion of administrative remedies.

2 36. The Court also finds that Senator Hardy is not requesting judicial review to deprive the  
3 Commission of its opportunity to consider the affirmative defense of separation of powers and  
4 legislative immunity. See Malecon Tobacco, 118 Nev. at 841-42 & n.15 (explaining that judicial review  
5 must not be used to usurp or bypass the agency's role in the administrative process). To the contrary,  
6 before he requested judicial review Senator Hardy filed his motion to dismiss with the Commission and  
7 gave the Commission a full opportunity to consider and rule on the affirmative defense of separation of  
8 powers and legislative immunity. Given that the Commission has, in fact, considered, ruled on and  
9 rejected the affirmative defense and intends to proceed with a hearing on the merits of the remaining  
10 allegations, the Court finds that Senator Hardy has taken the steps necessary to exhaust his available  
11 administrative remedies with regard to the issues of separation of powers and legislative immunity, and  
12 that he has satisfied the jurisdictional prerequisites to qualify for interlocutory judicial review under  
13 NRS 233B.130(1).

14 37. Finally, the APA establishes time limits for requesting judicial review that are "mandatory  
15 and jurisdictional." Civil Serv. Comm'n v. Dist. Ct., 118 Nev. 186, 189-90 (2002). In most contested  
16 cases under the APA, an aggrieved party must file a petition for judicial review within 30 days after  
17 service of the *final* decision of the agency. NRS 233B.130(2)(c); Mikohn Gaming v. Espinosa, 122  
18 Nev. 593, 598 (2006). The APA, however, does not specify a period in which an aggrieved party must  
19 file a petition for judicial review of "[a]ny preliminary, procedural or intermediate act or ruling by an  
20 agency in a contested case." NRS 233B.130(1). In the absence of an express filing period in the APA  
21 for such interlocutory judicial review, it must be presumed that an aggrieved party has at least 30 days to  
22 file a petition for judicial review after service of a written order denying a motion to dismiss. See  
23 Stenstrom v. Mont. Child Support Enforcement Div., 930 P.2d 650, 653-54 (Mont. 1996) (holding that  
24 an aggrieved party seeking interlocutory judicial review in a contested case must, to the extent

1 practicable, file a petition for judicial review within 30 days).

2 38. In this case, Senator Hardy was served by mail on October 10, 2008, with the Commission's  
3 written order denying his motion to dismiss. (Pet. Ex. A.) Senator Hardy filed his Petition for Judicial  
4 Review on November 3, 2008, which was within the 30-day period following service of the  
5 Commission's order. Therefore, the Court finds that Senator Hardy timely filed his Petition for Judicial  
6 Review and that he has satisfied the mandatory and jurisdictional time requirements to invoke the  
7 Court's jurisdiction under the APA.

8 39. Accordingly, after fully considering the preliminary issues of jurisdiction, justiciability and  
9 ripeness, the Court concludes that it has jurisdiction to grant injunctive relief and to consider Senator  
10 Hardy's timely-filed Petition for Judicial Review and that the substantive legal issues raised in this case  
11 are justiciable and ripe for review.

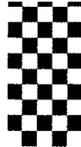
12 **Standard of review.**

13 40. Under the APA, Senator Hardy has the burden to prove that the Commission's decision  
14 denying his motion to dismiss is invalid. NRS 233B.135(2); Weaver v. State, Dep't of Motor Vehicles,  
15 121 Nev. 494, 498 (2005). To meet his burden of proof, Senator Hardy must show that the  
16 Commission's decision prejudices substantial rights because it is:

- 17 (a) In violation of constitutional or statutory provisions;  
18 (b) In excess of the statutory authority of the agency;  
19 (c) Made upon unlawful procedure;  
20 (d) Affected by other error of law;  
21 (e) Clearly erroneous in view of the reliable, probative and substantial evidence on the  
22 whole record; or  
23 (f) Arbitrary or capricious or characterized by abuse of discretion.

24 NRS 233B.135(3).

41. As a general rule, the Court must give deference to an agency's conclusions of law when  
they are closely tied to the agency's view of the facts. City Plan Dev., Inc. v. Labor Comm'r, 121 Nev.  
419, 426 (2005). However, on pure issues of law, such as the agency's interpretation of its enabling



1 statute, the Court is empowered to undertake an independent de novo review, and the Court is not  
2 required to defer to the agency's legal conclusions. Bacher v. State Eng'r, 122 Nev. 1110, 1117 (2006);  
3 Nev. Tax Comm'n v. Nev. Cement Co., 117 Nev. 960, 964 (2001). The Court likewise reviews  
4 constitutional challenges de novo. Rico v. Rodriguez, 121 Nev. 695, 702 (2005). Accordingly, because  
5 this case involves constitutional challenges and pure issues of law which do not require the resolution of  
6 any contested factual matters, the Court's standard of review is de novo without deference to the  
7 Commission's legal conclusions.

8 **Because of separation of powers and legislative immunity, the Commission is barred as a**  
9 **matter of law from conducting further administrative proceedings against Senator Hardy on**  
10 **the remaining ethics allegations.**

11 42. This case is about the proper separation of powers between the Legislative Department and  
12 Executive Department of State Government. In Nevada, "[t]he doctrine of separation of powers is  
13 fundamental to our system of government." Dunphy v. Sheehan, 92 Nev. 259, 265 (1976). The  
14 constitutional source of this doctrine is Article 3, Section 1 which establishes a tripartite system of state  
15 government and which firmly fixes the principle of separation of powers in the organic law of this state.  
16 Galloway v. Truesdell, 83 Nev. 13, 19 (1967). The separation-of-powers provision of the Nevada  
17 Constitution provides:

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

23 Nev. Const. art. 3, § 1.

24 43. The Nevada Supreme Court has determined that "[u]nder the separation of powers doctrine,  
individual legislators cannot, nor should they, be subject to fines or other penalties for voting in a  
particular way." Guinn II, 119 Nev. at 472 & n.28 (following federal law and citing Gravel v. United  
States, 408 U.S. 606, 616-18 (1972)). To preserve the proper separation of powers, this legislative

1 immunity shields a legislator from any “executive and judicial oversight that realistically threatens to  
2 control his conduct as a legislator.” Gravel, 408 U.S. at 618. It also ensures that “legislators are free to  
3 represent the interests of their constituents without fear that they will be later called to task in the courts  
4 for that representation.” Powell v. McCormack, 395 U.S. 486, 503 (1969). In short, legislative  
5 immunity is intended to “protect the integrity of the legislative process by insuring the independence of  
6 individual legislators.” United States v. Brewster, 408 U.S. 501, 507 (1972).

7 44. Even though legislative immunity is a personal right that belongs to each individual  
8 legislator, the doctrine works to “preserve the constitutional structure of separate, coequal, and  
9 independent branches of government . . . [by] preventing intrusion by Executive and Judiciary into the  
10 legislative sphere.” United States v. Helstoski, 442 U.S. 477, 491 (1979). Thus, in addition to  
11 protecting the independence of individual legislators, legislative immunity “serves the additional  
12 function of reinforcing the separation of powers so deliberately established by the Founders.” United  
13 States v. Johnson, 383 U.S. 169, 178 (1966).

14 45. In Dunphy v. Sheehan, the Nevada Supreme Court held that application of the Ethics Law to  
15 judges would violate separation of powers under Article 3, Section 1 of the Nevada Constitution because  
16 “[t]he promulgation of a Code of Judicial Ethics is a measure essential to the due administration of  
17 justice and within the inherent power of the judicial department of this State.” 92 Nev. at 266. The  
18 holding in Dunphy v. Sheehan is supported by the judicial discipline provisions of Article 6, Section 21  
19 of the Nevada Constitution. Under those provisions, the Nevada Supreme Court is given the power to  
20 adopt a Code of Judicial Conduct, and the Commission on Judicial Discipline is given the power to  
21 discipline judges for ethical violations. Consequently, the regulation of judicial ethics and the discipline  
22 of judges for ethical violations related to the judicial process are functions constitutionally committed to  
23 the Judicial Department of State Government under Article 3, Section 1 and Article 6, Section 21 of the  
24 Nevada Constitution. See Mosley v. Comm’n on Jud. Discipline, 117 Nev. 371, 378-79 (2001);

1 Halverson v. Hardcastle, 123 Nev. ---, 163 P.3d 428, 441-42 (2007).

2 46. Similarly, the regulation of legislative ethics and the discipline of state legislators for ethical  
3 violations related to the legislative process are functions constitutionally committed to the Legislative  
4 Department of State Government under Article 3, Section 1 and Article 4, Section 6 of the Nevada  
5 Constitution. Under those constitutional provisions, each state legislator is entitled to constitutional  
6 legislative immunity which protects the legislator from being punished by a governmental entity other  
7 than the legislator's own House for performing legislative actions, like voting, that fall within the sphere  
8 of legitimate legislative activity and are an essential part of the legislative function.

9 47. Legislative immunity is not a new, novel or unique concept in the law. The doctrine of  
10 legislative immunity has its origins in the Parliamentary struggles of the 16th and 17th centuries when  
11 the English monarchs used civil and criminal proceedings to harass, intimidate and suppress legislators  
12 who were critical of the Crown. Tenney, 341 U.S. at 372. As explained by the United States Supreme  
13 Court, legislative immunity was expressly included in the English Bill of Rights of 1689, and it was  
14 extended to legislators in the American colonies where "[f]reedom of speech and action in the  
15 legislature was taken as a matter of course by those who severed the Colonies from the Crown and  
16 founded our Nation." Id.

17 48. Thus, for centuries, courts have stridently adhered to the fundamental principle that under the  
18 constitutional doctrines of separation of powers and legislative immunity, the only governmental entity  
19 that may question or penalize a state legislator for any actions taken by him within the sphere of  
20 legitimate legislative activity is the legislator's own House. This principle is enshrined in Article 4,  
21 Section 6 of the Nevada Constitution, which invests each House with the exclusive power to determine  
22 the rules of its legislative proceedings and to punish its members for improper conduct related to those  
23 legislative proceedings. Article 4, Section 6 provides:

24

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

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

5 49. In interpreting provisions similar to Article 4, Section 6, courts from other jurisdictions have  
6 found that the power of each House to punish or expel its own members is plenary and exclusive.  
7 French v. Senate, 80 P. 1031, 1032-33 (Cal. 1905); Gerald v. La. State Senate, 408 So. 2d 426, 428-29  
8 (La. Ct. App. 1981); Hiss v. Bartlett, 69 Mass. (3 Gray) 468, 473 (1855). As explained by one court,  
9 “[t]he overwhelming weight of opinion as expressed by not only the courts of this State, but the opinion  
10 of the courts of our sister states is that the discipline and removal of a legislator is within the sole  
11 province of the body in which he serves as a member.” Gerald, 408 So. 2d at 429. Furthermore,  
12 because Article 4, Section 6 creates an exclusive power in each House, neither the Legislature nor one of  
13 the Houses may delegate that exclusive power to another branch of government. See Heller v.  
14 Legislature, 120 Nev. 456, 472 n.65 (2004); In re McGee, 226 P.2d 1, 5 (Cal. 1951). Thus, each House  
15 has the exclusive constitutional power to punish its members for any actions taken by those members  
16 within the sphere of legitimate legislative activity, and no other governmental entity may exercise or  
17 interfere with that power, including the other House.

18 50. When the Nevada Constitution expressly grants the Legislative Department an exclusive  
19 power, the other Departments of State Government may not usurp, exercise or infringe upon that  
20 exclusive power out of respect for an equal and coordinate branch of government. Heller, 120 Nev. at  
21 466-69. As explained by the Nevada Supreme Court, “[s]eparation of powers is particularly applicable  
22 when a constitution expressly grants authority to one branch of government, as the Nevada Constitution  
23 does in Article 4, Section 6.” Id. at 466.

24 51. Accordingly, out of respect for the separation of powers and the constitutional authority of

1 an equal and coordinate branch of government, the Court must apply legislative immunity to those  
2 legislative actions, like voting, that fall within the sphere of legitimate legislative activity and are an  
3 essential part of the legislative function.

4 52. The Court emphasizes, however, that the protection afforded by legislative immunity is not  
5 limitless, and such protection "does not extend beyond what is necessary to preserve the integrity of the  
6 legislative process." Brewster, 408 U.S. at 517. It is the nature of the legislative action, and not the fact  
7 that the actor is a legislator, which determines whether legislative immunity will apply to a given  
8 situation. Woods v. Gamel, 132 F.3d 1417, 1419 (11th Cir. 1998). Thus, not everything done by a state  
9 legislator in his official capacity is protected by legislative immunity. Gravel, 408 U.S. at 625. To be  
10 protected, the action must be "an integral part of the deliberative and communicative processes by which  
11 Members participate in committee and House proceedings with respect to the consideration and passage  
12 or rejection of proposed legislation or with respect to other matters which the Constitution places within  
13 the jurisdiction of either House." Id. Stated succinctly, the action must be "an essential part of the  
14 legislative function." Yeldell v. Cooper Green Hosp., Inc., 956 F.2d 1056, 1062 (11th Cir. 1992).

15 53. It is well established that voting on legislative matters is an essential part of the legislative  
16 function. Kilbourn v. Thompson, 103 U.S. (13 Otto) 168, 204 (1881); Bogan v. Scott-Harris, 523 U.S.  
17 44, 55 (1998). In addition to voting, legislative immunity protects "activities by legislators that directly  
18 affect drafting, introducing, debating, passing or rejecting legislation." Baraka v. McGreevey, 481 F.3d  
19 187, 196 (3d Cir. 2007); Chappell v. Robbins, 73 F.3d 918, 921 (9th Cir. 1996). Thus, "legislative  
20 immunity is not limited to the casting of a vote on a resolution or bill; it covers all aspects of the  
21 legislative process, including the discussions held and alliances struck regarding a legislative matter in  
22 anticipation of a formal vote." Almonte v. City of Long Beach, 478 F.3d 100, 107 (2d Cir. 2007). All  
23 these activities are protected because they are "integral steps in the legislative process." Bogan, 523  
24 U.S. at 55.

1 54. As discussed previously, the remaining ethics allegations against Senator Hardy involve the  
2 legislative action of voting and other actions taken by Senator Hardy during the course of processing  
3 legislation, which is the quintessential legislative function. The Commission "does not refute that the  
4 ethics allegations at issue against Hardy involve actions taken by him within the sphere of legitimate  
5 legislative activity, namely, disclosure, voting and participation on a legislative matter." (Opp'n at 4-5.)  
6 Therefore, because this case involves actions taken by Senator Hardy within the sphere of legitimate  
7 legislative activity, the Court concludes that those legislative actions are protected by the constitutional  
8 doctrines of separation of powers and legislative immunity and, as a result, the Nevada Senate is the  
9 only governmental entity that may question or penalize Senator Hardy concerning those legislative  
10 actions based on Article 3, Section 1 and Article 4, Section 6 of the Nevada Constitution.

11 55. There are at least three cases from other states which support this conclusion. State v.  
12 Dankworth, 672 P.2d 148 (Alaska Ct. App. 1983); In re Arnold, 991 So. 2d 531 (La. Ct. App. 2008),  
13 review denied, 992 So. 2d 990 (La. 2008); Irons v. R.I. Ethics Comm'n, C.A. No. PC 07-6666, 2008 R.I.  
14 Super. LEXIS 137 (R.I. Super. Ct. Oct. 29, 2008). Each case holds that legislative immunity protects a  
15 state legislator from being prosecuted or punished under a state ethics law for legislative actions, like  
16 voting, that fall within the sphere of legitimate legislative activity and are an essential part of the  
17 legislative function.

18 56. The Arnold and Irons cases are particularly persuasive because they are so factually similar.  
19 In both cases, a state ethics commission commenced administrative proceedings against a state legislator  
20 for failing to abstain from voting on legislation when the legislator allegedly had a conflict of interest  
21 under the state ethics law. Because of the protection provided by legislative immunity, the courts held  
22 that the state ethics commission was barred as a matter of law from conducting such administrative  
23 proceedings against the state legislator. In reaching its holding in Arnold, the Louisiana Court of Appeal  
24 explained that:

1 [W]e reject the Board's argument that our holding will exempt all legislators from the Code  
2 of Governmental Ethics when their actions may be within the legislative sphere. On the  
3 contrary, our holding herein does not exempt legislators from the duties imposed upon them  
4 in the Code; rather, it merely provides that any alleged violation of those duties occurring  
5 within the "legitimate legislative sphere" may not be questioned "elsewhere," other than in  
6 the legislature. Thus, pursuant to [the Louisiana Constitution], where a legislator's actions  
7 within the legitimate legislative sphere, such as speech, debate, and voting on matters before  
8 the legislature, constitute an alleged violation of the Code of Governmental Ethics, the  
9 Board of Ethics is without jurisdiction to question or punish such action. Nonetheless, the  
10 legislator is not exempt from questioning and punishment for those actions. Instead, the  
11 power to question the legislator in such an instance is within the sole province of the  
12 legislature.

13 Arnold, 991 So. 2d at 545.

14 57. The Court agrees with the reasoning in Arnold. Therefore, because the protection of  
15 legislative immunity is vital to the separation of powers under Article 3, Section 1 of the Nevada  
16 Constitution and because each House of the Legislature has the exclusive power to determine the rules  
17 of its legislative proceedings and to punish its members for improper conduct related to those legislative  
18 proceedings under Article 4, Section 6 of the Nevada Constitution, the Court concludes that the  
19 Commission is barred as a matter of law from conducting further administrative proceedings against  
20 Senator Hardy on the remaining ethics allegations.

21 58. In its Opposition, the Commission makes several arguments as to why it should not be  
22 barred by separation of powers and legislative immunity from proceeding against Senator Hardy in this  
23 case. First, the Commission contends that Senator Hardy is not entitled to legislative immunity as a  
24 state constitutional right because the Nevada Constitution does not contain a speech or debate clause like  
the United States Constitution and other state constitutions. (Opp'n at 5-7.) Based on this contention,  
the Commission argues that Senator Hardy can claim legislative immunity only through the common  
law. Id. Second, the Commission contends that it is an independent legislative-executive commission  
of State Government that was created by the Legislature to aid in the execution of its duty to regulate the  
conduct of its members. (Opp'n at 8.) Third, the Commission contends that the Legislature, as an

1 institution, has the authority to waive the legislative immunity of its individual members if, in the  
2 exercise of its legislative power to regulate the conduct of its members, it passes a narrowly drawn  
3 statute like NRS 281A.420 which amounts to an explicit and unequivocal expression of its intent to  
4 waive such immunity. (Opp'n at 5-7, 10-11.) Having reviewed each of the Commission's arguments,  
5 the Court does not agree with those arguments.

6 **Under the separation-of-powers provision of the Nevada Constitution, members of the**  
7 **Legislature are protected by legislative immunity as a state constitutional right even though**  
8 **there is no speech or debate clause in the Nevada Constitution.**

9 59. As noted previously, the Nevada Supreme Court has determined that "[u]nder the separation  
10 of powers doctrine, individual legislators cannot, nor should they, be subject to fines or other penalties  
11 for voting in a particular way." Guinn II, 119 Nev. at 472 & n.28. To support its determination, the  
12 Nevada Supreme Court relied on Gravel v. United States, a case in which the United States Supreme  
13 Court reaffirmed the importance of *constitutional* legislative immunity under the doctrine of separation  
14 of powers. 408 U.S. at 616-18. If the Nevada Supreme Court believed that state legislators enjoyed  
15 legislative immunity only through the common law, it is unlikely the court would have relied on a  
16 decision which was based wholly on constitutional legislative immunity.

17 60. Furthermore, like the Nevada Constitution, the California Constitution does not contain a  
18 speech or debate clause. Nevertheless, the California appellate courts have held that "[t]he California  
19 separation of powers provision, however, provides a sufficient ground to protect legislators from  
20 punitive action that unduly impinges on their function." Steiner v. Super. Ct., 58 Cal. Rptr. 2d 668, 678  
21 n.20 (Cal. Ct. App. 1996); Hancock v. Burns, 323 P.2d 456, 461-62 (Cal. Dist. Ct. App. 1958); Allen v.  
22 Super. Ct., 340 P.2d 1030, 1033-35 (Cal. Dist. Ct. App. 1959).

23 61. Finally, as a matter of separation of powers, members of the executive and judicial branches  
24 enjoy constitutionally-based immunity when performing core functions even though there are no  
constitutional provisions creating such immunity. For example, the Federal Constitution does not

1 expressly grant executive immunity to the President and Vice President or judicial immunity to federal  
2 judges. Nonetheless, the United States Supreme Court has held that these public officers enjoy  
3 constitutionally-based immunity based on separation of powers. Nixon v. Fitzgerald, 457 U.S. 731, 749-  
4 50 (1982); Cheney v. United States Dist. Ct., 542 U.S. 367, 382-92 (2004).

5 62. In Nixon, the respondent argued that the President was not entitled to executive immunity  
6 because the Constitution did not contain a provision similar to the Speech or Debate Clause for the  
7 President. 457 U.S. at 749-50. The Supreme Court flatly rejected the respondent's argument on the  
8 basis of separation of powers:

9 Noting that the Speech and Debate Clause provides a textual basis for congressional  
10 immunity, respondent argues that the Framers must be assumed to have rejected any similar  
11 grant of executive immunity. This argument is unpersuasive. First, a specific textual basis  
12 has not been considered a prerequisite to the recognition of immunity. No provision  
13 expressly confers judicial immunity. Yet the immunity of judges is well settled. . . . Justice  
14 Story, writing in 1833, held it implicit in the separation of powers that the President must be  
15 permitted to discharge his duties undistracted by private lawsuits. 3 J. Story, Commentaries  
16 on the Constitution of the United States § 1563, pp. 418-419 (1st ed. 1833).

17 Id. at 750 n.31. In concluding that the President was entitled to constitutional executive immunity, the  
18 Court found "the most compelling arguments arise from the Constitution's separation of powers and the  
19 Judiciary's historic understanding of that doctrine." Id.

20 63. In light of this case law, the Court concludes that under the separation-of-powers provision  
21 of the Nevada Constitution, members of the Legislature are protected by legislative immunity as a state  
22 constitutional right even though there is no speech or debate clause in the Nevada Constitution.

23 **The Commission is an agency of the Executive Department and under the doctrine of  
24 separation of powers, it cannot usurp, exercise or infringe upon functions constitutionally  
committed to the exclusive power of the Legislative Department.**

25 64. Under the separation-of-powers provision of the Nevada Constitution, there are only three  
26 Departments of State Government, and each state officer and agency must fall into one, and only one, of  
27 those Departments. Galloway, 83 Nev. at 19-22. Consequently, the Commission is either an agency of

1 the Executive Department or an agency of the Legislative Department. It cannot be an independent  
2 legislative-executive commission of State Government because no such entity exists under the  
3 separation-of-powers provision of the Nevada Constitution.

4 65. The constitutional function of the Executive Department is to execute the laws enacted by  
5 the Legislature. Galloway, 83 Nev. at 20. Thus, when a state agency is authorized by statute to execute  
6 the laws enacted by the Legislature, the state agency is properly categorized under the Nevada  
7 Constitution as an administrative agency of the Executive Department. Id.

8 66. Under NRS Chapter 281A, the Commission is expressly authorized by statute to carry out  
9 and enforce the Ethics Law, and the Commission has the power to impose civil penalties. NRS  
10 281A.440 & 281A.480. When carrying out and enforcing the Ethics Law, the Commission must comply  
11 with the APA, which establishes the "minimum procedural requirements for the regulation-making and  
12 adjudication procedure of all agencies of the Executive Department of the State Government." NRS  
13 233B.020(1); see also NRS 233B.031 (defining "agency"). In addition, the Commission's budget is part  
14 of the Governor's budget for the Executive Department, and the Commission must comply with the  
15 State Budget Act, which applies to all departments, institutions and agencies of the Executive  
16 Department. NRS 353.150-353.246. Lastly, the Executive Director, General Counsel and employees of  
17 the Commission are in the unclassified service and are governed by the State Personnel System, which  
18 applies to the Executive Department. NRS 281A.230-281A.250, 284.010 & 284.013. Thus, given the  
19 Commission's executive powers, duties and responsibilities, the Commission is properly categorized  
20 under the Nevada Constitution as an administrative agency of the Executive Department.

21 67. Like other administrative agencies of the Executive Department, the Commission is  
22 authorized by statute to exercise quasi-legislative functions, such as adopting regulations, and quasi-  
23 judicial functions, such as adjudicating contested cases. However, the mere exercise of quasi-legislative  
24 or quasi-judicial functions by an administrative agency of the Executive Department does not transmute

1 the agency into an instrumentality or agency of the Legislative or Judicial Department. Galloway, 83  
2 Nev. at 21-22; Nev. Indus. Comm'n v. Reese, 93 Nev. 115, 119-22 (1977) (plurality op.); State ex rel.  
3 Richardson v. Board of Regents, 70 Nev. 144, 147-48 (1953). Thus, even though the Commission is  
4 authorized to perform quasi-legislative and quasi-judicial functions, the Commission's status as an  
5 administrative agency of the Executive Department remains unchanged.

6 68. This result is not altered because the Commission is composed of four members appointed  
7 by the Governor and four members appointed by the Legislative Commission. NRS 281A.200. The fact  
8 that a legislative officer or agency appoints one or more members of an executive branch agency does  
9 not change its status as an agency of the Executive Department. This is confirmed by several cases  
10 which conclude that state ethics commissions are part of the executive branch even though one or more  
11 of their members are selected by the legislative branch. State Bd. of Ethics v. Green, 566 So. 2d 623,  
12 624-26 (La. 1990); In re Advisory Opinion (Ethics Comm'n), 732 A.2d 55, 57-58 (R.I. 1999); Caldwell  
13 v. Bateman, 312 S.E.2d 320, 325 (Ga. 1984); Parcell v. State Gov'tl Ethics Comm'n, 620 P.2d 834, 834-  
14 37 (Kan. 1980); Parcell v. Kansas, 468 F. Supp. 1274, 1276-80 (D. Kan. 1979), *aff'd*, 639 F.2d 628  
15 (10th Cir. 1980). As explained by the Rhode Island Supreme Court, the fact that an ethics commission  
16 has members selected by the executive and legislative branches "most assuredly [does] not create or  
17 establish any 'fourth branch' of state government." In re Advisory Opinion, 732 A.2d at 60.

18 69. Accordingly, the Court is unable to find a legal basis to conclude that the Commission is an  
19 independent legislative-executive commission of State Government. Therefore, the Court concludes  
20 that the Commission is an agency of the Executive Department and that under the doctrine of separation  
21 of powers, it cannot usurp, exercise or infringe upon functions constitutionally committed to the  
22 exclusive power of the Legislative Department.

23 **There has not been an institutional waiver of legislative immunity through the enactment of**  
24 **NRS 281A.420.**

1 70. Although the United States Supreme Court has acknowledged the legal theory behind an  
2 institutional waiver of constitutional legislative immunity, neither the Supreme Court nor any other  
3 federal or state court has ever held that Congress or a state legislature has the power to enact by statute  
4 an institutional waiver of constitutional legislative immunity. See Johnson, 383 U.S. at 185; Helstoski,  
5 442 U.S. at 492-93.

6 71. It is well established that fundamental and personal constitutional rights belong to the  
7 individual, and those individual rights cannot be taken away through the enactment of a statute.  
8 Dickerson v. United States, 530 U.S. 428, 444 (2000). Legislative immunity is a fundamental and  
9 personal constitutional right that is afforded to each individual legislator. Helstoski, 442 U.S. at 490-92.  
10 Therefore, a state legislator's individual right to legislative immunity may not be taken away by the  
11 Legislature through the enactment of a statute. Coffin v. Coffin, 4 Mass. (1 Tyng) 1, 27 (1808). As  
12 explained by the court in Coffin:

13 [A state legislator] does not hold this privilege at the pleasure of the house, but derives it  
14 from the will of the people, expressed in the constitution, which is paramount to the will of  
15 either or both branches of the legislature. In this respect, the privilege here secured  
16 resembles other privileges attached to each member by another part of the  
constitution . . . Of these privileges, thus secured to each member, he cannot be deprived, by  
a resolve of the house or by an act of the legislature.

17 Id.; accord Holmes v. Farmer, 475 A.2d 976, 985 (R.I. 1984) (holding that legislative immunity  
18 "protects the individual legislator personally from attack either by another branch of government or from  
19 a majority within the Legislature itself"); Wiggins v. Stuart, 671 S.W.2d 262, 264 (Ky. Ct. App. 1984)  
20 (holding that no statute or court rule will override the legislative immunity provided in the state  
21 constitution).

22 72. Unquestionably, each individual legislator, by his own knowing and intentional conduct,  
23 may waive his own fundamental and personal constitutional rights, either by deliberate election or by  
24 actions or omissions inconsistent with the assertion of the right. See Yakus v. United States, 321 U.S.

1 414, 444 (1944); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 142-43 (1967). However, there is simply no  
2 precedent to support the proposition that the Legislature may take away a state legislator's individual  
3 constitutional rights through the enactment of a statute.

4 73. Furthermore, because many current state legislators were not in office when NRS 281A.420  
5 was enacted, an institutional waiver of legislative immunity could not be based on their actual consent to  
6 the waiver. Instead, an institutional waiver could be premised only on the doctrine of constructive  
7 consent, in which the consent of current legislators is imputed to them through the conduct of past  
8 legislators, not through their own personal and present conduct. As explained by the United States  
9 Supreme Court, however, "[c]onstructive consent is not a doctrine commonly associated with the  
10 surrender of constitutional rights." Edelman v. Jordan, 415 U.S. 651, 673 (1974). Thus, an institutional  
11 waiver of legislative immunity would be an anomaly in constitutional law because it would be based on  
12 constructive consent rather than actual consent.

13 74. The United States Supreme Court has also emphasized that neither the Legislative nor the  
14 Executive Department can agree to waive the structural protections of separation of powers. Freytag v.  
15 Comm'r of Internal Revenue, 501 U.S. 868, 879-80 (1991). Thus, although individuals can waive  
16 personal constitutional rights, the separation-of-powers principles inherent in the Constitution are not  
17 subject to waiver or consent. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848-51  
18 (1986). Consequently, regardless of the degree of assent or acquiescence by the Legislative or  
19 Executive Department, legislation which infringes on the structural protections of separation of powers  
20 is unconstitutional. Clinton v. City of New York, 524 U.S. 417, 445-46 (1998) (striking down the Line  
21 Item Veto Act even though Congress assented to the President vetoing parts of enacted legislation,  
22 instead of vetoing the legislation as a whole); INS v. Chadha, 462 U.S. 919, 942 n.13 (1983) (striking  
23 down a statute which allowed the House of Representatives, by simple resolution, to veto certain  
24 immigration enforcement decisions made by the executive branch, even though the President assented to

1 the statute). In explaining why Congress could not assent to the President exercising the line item veto,  
2 Justice Kennedy stated:

3 It is no answer, of course, to say that Congress surrendered its authority by its own hand;  
4 nor does it suffice to point out that a new statute, signed by the President or enacted over his  
5 veto, could restore to Congress the power it now seeks to relinquish. That a congressional  
6 cession of power is voluntary does not make it innocuous. The Constitution is a compact  
enduring for more than our time, and one Congress cannot yield up its own powers, much  
less those of other Congresses to follow. Abdication of responsibility is not part of the  
constitutional design.

7 Clinton v. City of New York, 524 U.S. at 451-52 (Kennedy, J., concurring) (citations omitted).

8 75. Legislative immunity is intended to “preserve the constitutional structure of separate,  
9 coequal, and independent branches of government.” Helstoski, 442 U.S. at 491. Because legislative  
10 immunity is part of the structural protections of separation of powers, the Legislature cannot, by  
11 institutional waiver, consent or acquiescence, deprive individual legislators of the protection of  
12 legislative immunity and thereby alter the constitutional division of powers among the three branches of  
13 State Government.

14 76. An interpretation of NRS 281A.420 as an institutional waiver of legislative immunity would  
15 also raise the specter of an unconstitutional delegation to the Commission of the exclusive power of each  
16 House to determine the rules of its legislative proceedings and to punish its members for improper  
17 conduct related to those legislative proceedings under Article 4, Section 6 of the Nevada Constitution.  
18 See Heller, 120 Nev. at 472 n.65; McGee, 226 P.2d at 5. It is well established that “statutes must be  
19 construed consistent with the constitution and, where necessary, in a manner supportive of their  
20 constitutionality.” Foley v. Kennedy, 110 Nev. 1295, 1300 (1994). Thus, “[w]here a statute may be  
21 given conflicting interpretations, one rendering it constitutional, and the other unconstitutional, the  
22 constitutional interpretation is favored.” Sheriff v. Wu, 101 Nev. 687, 689-90 (1985); INS v. St. Cyr,  
23 533 U.S. 289, 299-300 (2001). Because an interpretation of NRS 281A.420 as an institutional waiver of  
24 legislative immunity would raise serious constitutional problems under Article 4, Section 6, the Court

1 will not favor such an interpretation.

2 77. Accordingly, because the Legislature cannot, through the enactment of a statute, take away  
3 individual constitutional rights, alter the structural protections of separation of powers or delegate  
4 exclusive constitutional powers to another branch of government, the Court concludes that there has not  
5 been an institutional waiver of legislative immunity through the enactment of NRS 281A.420.

6 **The Standing Rules of each House concerning disclosure of conflicts, voting and abstention**  
7 **take precedence over NRS 281A.420, and the determination of whether Senator Hardy**  
8 **violated the Standing Rules is a matter reserved exclusively to the Nevada Senate.**

8 78. During the 2007 Legislative Session, the Nevada Senate and Assembly exercised their  
9 constitutional power under Article 4, Section 6 and adopted Standing Rules concerning disclosure of  
10 conflicts, voting and abstention. See Senate Standing Rules 32 & 44, 2007 Nev. Stat. 3470, 3472;  
11 Assembly Standing Rule 23, 2007 Nev. Stat. 3455-56. Because each House is given the exclusive  
12 constitutional power to determine the rules of its legislative proceedings under Article 4, Section 6, the  
13 Court concludes that those Standing Rules concerning disclosure of conflicts, voting and abstention take  
14 precedence over NRS 281A.420.

15 79. In matters of internal legislative procedure like voting, the rules adopted by each House take  
16 precedence over any conflicting statutory provisions that are intended to govern legislative procedure.  
17 See Abood v. League of Women Voters, 743 P.2d 333, 338-40 (Alaska 1987); People's Advocate, Inc.  
18 v. Super. Ct., 226 Cal. Rptr. 640, 644-46 (Cal. Ct. App. 1986); Coggin v. Davey, 211 S.E.2d 708, 710-  
19 11 (Ga. 1975); Mason's Manual of Legislative Procedure §§ 2-4 (2000) (Mason).<sup>1</sup> This is because the  
20 exclusive constitutional power of each House to determine the rules of its legislative proceedings is  
21 paramount to statutory provisions governing legislative procedure. See id.; Mason, at § 2 ("The  
22 constitutional right of a state legislature to control its own procedure cannot be withdrawn or restricted  
23

24 <sup>1</sup> Senate Standing Rule 90 provides that "[t]he rules of parliamentary practice contained in Mason's Manual of Legislative Procedure shall govern the Senate in all cases in which they are applicable and in which they are not inconsistent with the standing rules and orders of the Senate, and the joint rules of the Senate and Assembly." 2007 Nev. Stat. 3476.

1 by statute.”). Thus, any statutes governing legislative procedure that were enacted by the Legislature in  
2 a prior session are preempted and superseded by the procedural rules adopted by the Houses in a  
3 subsequent session under Article 4, Section 6. See Manigault v. Springs, 199 U.S. 473, 486-87 (1905);  
4 Abood, 743 P.2d at 338-40; People’s Advocate, 226 Cal. Rptr. at 644-46; Coggin v. Davey, 211 S.E.2d  
5 at 710-11; Mason, at §§ 2-4.

6 80. Because each House adopted Standing Rules concerning disclosure of conflicts, voting and  
7 abstention for the 2007 Legislative Session, the Court must respect the constitutional power of each  
8 House under Article 4, Section 6, and the Court must conclude that those Standing Rules concerning  
9 disclosure of conflicts, voting and abstention take precedence over NRS 281A.420. Therefore, the  
10 determination of whether Senator Hardy violated the Standing Rules is a matter reserved exclusively to  
11 the Nevada Senate under Article 4, Section 6.

#### 12 ORDER AND JUDGMENT

13 81. Based on the foregoing findings of fact and conclusions of law, the Court enters the  
14 following order and judgment pursuant to N.R.C.P. 58, N.R.C.P. 65(d) and NRS 33.010, 233B.130(1)  
15 and 233B.135(3).

16 82. The Court holds that it has jurisdiction to grant injunctive relief in this case and to grant  
17 Senator Hardy’s Petition for Judicial Review of the Commission’s decision denying his motion to  
18 dismiss based on the affirmative defense of separation of powers and legislative immunity. The Court  
19 also holds that the substantive legal issues raised in this case are justiciable and ripe for review.

20 83. The Court holds that because the protection of legislative immunity is vital to the separation  
21 of powers under Article 3, Section 1 of the Nevada Constitution and because each House of the  
22 Legislature has the exclusive power to determine the rules of its legislative proceedings and to punish its  
23 members for improper conduct related to those legislative proceedings under Article 4, Section 6 of the  
24 Nevada Constitution, the Commission is barred as a matter of law from conducting further

1 administrative proceedings against Senator Hardy on the remaining ethics allegations involving S.B. 509  
2 of the 2007 Legislative Session and alleged violations of NRS 281A.420.

3 84. The Court grants Senator Hardy's Petition for Judicial Review pursuant to NRS 233B.130(1)  
4 and 233B.135(3), and the Court holds that Senator Hardy's substantial rights have been prejudiced by  
5 the Commission's decision denying his motion to dismiss based on the affirmative defense of separation  
6 of powers and legislative immunity.

7 85. The Court reverses and sets aside the Commission's decision denying Senator Hardy's  
8 motion to dismiss based on the affirmative defense of separation of powers and legislative immunity,  
9 and the Court orders the Commission to dismiss the remaining ethics allegations against Senator Hardy  
10 involving S.B. 509 of the 2007 Legislative Session and alleged violations of NRS 281A.420 based on  
11 the affirmative defense of separation of powers and legislative immunity.

12 86. The Court enters and issues a permanent injunction pursuant to NRS 33.010 and N.R.C.P. 65  
13 enjoining the Commission from conducting further administrative proceedings against Senator Hardy in  
14 Request For Opinion No. 08-04C.

15 87. The Court orders that all parties shall bear their own costs and attorney's fees with regard to  
16 the matters addressed in the Court's order and judgment.

17 88. Pursuant to N.R.C.P. 58, the Court designates the Petitioner as the party required to:  
18 (1) serve written notice of entry of the Court's order and judgment, together with a copy of the order and  
19 judgment, upon each party who has appeared in this case; and (2) file such notice of entry with the Clerk  
20 of Court.

21 DATED: This 22<sup>nd</sup> day of December, 2008.

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23   
24 WILLIAM A. MADDOX  
DISTRICT JUDGE