

**BEFORE THE NEVADA COMMISSION ON ETHICS**

**In the Matter of the Request for Opinion concerning the conduct of  
LONNIE HAMMARGREN, Nevada Lieutenant Governor**

This opinion is in response to the opinion request by Mr. John N. "Jack" Schroeder filed on May 31, 1995, with the Nevada Commission on Ethics ("Commission") concerning Lieutenant Governor Lonnie Hammargren. The issue presented is whether Mr. Hammargren's use of state property and resources in lobbying for the passage of AB 520 in the 1995 Legislature was prohibited by the Nevada Ethics in Government Law.

A hearing was held in Las Vegas, Nevada, on August 3, 1995. The notice of hearing specified the relevant provisions in the Code of Ethical Standards as NRS 281.481(2), (7), and (8). The hearing was attended by and testimony was elicited from Mr. Jack Schroeder and Lt. Governor Hammargren, and Lt. Governor Hammargren's counsel, Mr. R. Allan Jones, also attended. At the conclusion of the hearing the Commission requested the participants to provide it with briefs addressing the legal issues of whether Mr. Hammargren was a "member of the legislature" within the meaning of NRS 281.481(7). The hearing was confidential pursuant to the provisions of NRS 281.511 (4) and (9) and was, therefore, not open to the public. Based upon the foregoing, the Commission makes the Findings of Fact and issues the Opinion that follows.

**FINDING OF FACTS**

1. Lonnie L. Hammargren, M.D. is a Nevada licensed neurosurgeon.
2. In 1986, a patient of Dr. Hammargren brought a malpractice against him. A summary judgment in favor of Dr. Hammargren was made by the district court, but the Nevada Supreme Court reversed the district court. (See *Hoopes v. Hammargren*, 102 Nev. 425, 725 p.2d 238 (1986)).
3. In November 1994, Dr. Hammargren was elected Lieutenant Governor, and in January 1995 he took office. The Lt. Governor serves as President of the Nevada Senate and may cast a vote only as a tie-breaker where a vote of the Senate is tied (Nev. Art. 5 § 17).
4. Dr. Hammargren continues to conduct his private medical practice as a neurosurgeon. He testified that his current malpractice premium of \$55,000.00 per year would increase by 56% in the near future.
5. Except for doctors who practice internal medicine or other specialized areas of medicine, such as an OB-GYN medical practice (whose yearly malpractice premium is \$40,000), the average malpractice premium for Nevada doctors is approximately \$16,000 per year. The average premium among California doctors is \$12,000.
6. On April 25, 1995, Assembly Bill 520 was referred to the Assembly Committee on Judiciary. As introduced, the bill provided for specific attorney disclosures concerning contingency fees and specified caps on the amount of fees an attorney may receive. The bill also revised the immunity from liability for civil damages provided for certain persons who provide emergency obstetrical care and to certain persons who provide medical care to indigent persons. It also provided that any punitive damages awarded to a plaintiff in a medical malpractice cause of action would be paid to the state treasurer for use by the Welfare Division of the Department of Human Resources in the administration of a state plan for assistance to the medically indigent. The bill capped the amount of damages that may be awarded for non-economic losses at \$250,000, regardless of the number of parties in the action or the number of causes of action brought in relation to the injury upon which the action was based, reduced the amount of damages awarded

for non-economic damages paid by collateral sources, mandated that a jury not be instructed or advised on the limitation on the amount of an award of damages for noneconomic losses, and provided the court authority to reduce an award should the jury may have awarded damages that exceeded that amount.

7. Advocates of the bill proposed that its passage would limit medical provider's liability and benefit malpractice insurance carriers by setting limits on their liability, thereby providing for decreased malpractice insurance premiums.

8. On May 11, 1995, Dr. Hammargren wrote and mailed a letter to all of Nevada's licensed physicians. The letter was written upon the official state letterhead of the Lieutenant Governor's office with Dr. Hammargren's public offices as lieutenant governor of the state and president of the senate, as well as his address at both the Capitol Building in Carson City and the Grant Sawyer Building in Las Vegas. The letter was produced by Dr. Hammargren's state-employed staff. Dr. Hammargren signed the letter using his official title as Lieutenant Governor. The letter is reproduced here as follows:

### DOCTORS, ACT NOW!!!

May 11, 1995

#### A Letter to All Nevada Doctors

Dear Doctors:

Tort reform will be voted on by the Nevada State Legislature within weeks. Legislators do respond to constituents. I urge you to act now--or don't complain later.

DO THIS: Phone, write and FAX your Assemblyman and your Senator, asking them to vote "yes" on AB 520, which will reform Nevada law to limit extravagance and eliminate frivolous lawsuits from your business, medical and personal life.

Remember, a 10-word letter sent by many people will be more effective than a long letter sent by a just a few. Grassroots politics are effective.

DO THIS: Please send a copy of your letter to (but do not call) Senator Mark James. He is Chairman of the Senate Judiciary Committee, an attorney with a broad view, who will consider this issue fairly. He has the qualities to be a future governor.

Your medical society and I can only represent you. But only you can generate a flood of mail to your own state representative and any other legislators you personally know. We have a good chance to enact tort reform if Nevada doctors, individually, act now!

Sincerely,

LT. GOVERNOR LONNIE HAMMARGREN

P.S. - Please send me a copy of your letter.

9. In response to his request as lieutenant governor, the Assembly Committee on Judiciary granted Dr. Hammargren 10 minutes to testify on AB 520 at its hearing of the bill on May 29, 1995. Dr. Hammargren brought with him an

actual pie for demonstrative purposes and wore a Tasmanian Devil necktie because he was "as mad as Hell and was not going to take it anymore." Dr. Hammargren declared that he was emotionally involved with the issues addressed in AB 520 and that he was in favor of both health care reform and tort reform nationally.

10. Dr. Hammargren stated that Nevada was twenty years behind the tort reform enacted in California, because California, unlike Nevada, has statutory provisions for arbitration, limitation on attorney fees, and caps on noneconomic damage awards. He testified that the rising costs of health care constituted an existing crisis in this state. He testified that while Nevada is the fifth most litigious state and rates fifth in malpractice costs in the nation, it has the second highest number of trial attorneys, but the lowest number of doctors.

11. Dr. Hammargren expressed his anger at testimony received the previous week by the Assembly Committee on Judiciary in which medical malpractice insurance company profits were quoted at 28%. Disagreeing with such testimony, Dr. Hammargren stated that no dividends had been paid to investors of the Nevada Medical Liability Insurance Company (NMLIC) since 1992, and in fact that company suffered a loss of \$1,000,000.00 in 1994. During the last 18 months, the NMLIC has increased its rates three times. Dr. Hammargren testified that the only profession making a profit were the attorneys, and this was the reason why the Nevada Trial Lawyers Association was against Assembly Bill 520. He opined that perhaps it was the best attorneys who won malpractice cases rather than those lawsuits which were most meritorious. Demonstrating his arguments with a pie he had brought with him to the hearing, Dr. Hammargren stated that out of every dollar he spent in malpractice premiums, one-fourth went to the insurance company, one-half went to attorneys for the parties, and the remaining one-fourth went to the plaintiff. It was Dr. Hammargren's opinion that an injured patient should receive three-quarters of the pie.

12. Dr. Hammargren testified that his current malpractice premium rate of \$55,000 per year was increasing by 56% and that the doctor treating his patients while covering for him was paying \$90,000 per year in insurance premiums. Another doctor who treated Dr. Hammargren's patients had decided to cease his medical practice and engage only in consultation services because his insurance fees would drop markedly as a result.

13. At the time of his testimony before the Assembly Committee on Judiciary, Dr. Hammargren was the defendant in a pending lawsuit for malpractice. Mr. Schroeder asserted the outcome of the suit would be affected by the successful passage of AB 520.<sup>[1]</sup>

## OPINION

The Commission has jurisdiction over this matter pursuant to NRS 281.511(2). Dr. Hammargren was a public officer in his position as lieutenant governor as such employment is defined in NRS 281.4365(1).

The issue presented in this matter is whether Dr. Hammargren violated the Nevada Ethics in Government Law by using state resources -- including the use of state stationary, state-paid employees, and the title of Lieutenant Governor -- in preparing and sending the May 11, 1995, letter to all physicians in Nevada. We conclude for the following reasons that Dr. Hammargren violated NRS 281.481(7).

NRS 281.481(7) provides that "[a] public officer or employee, other than a member of the legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest." The evidence presented at hearing showed that Dr. Hammargren used his staff, state-paid employees, to prepare and mail the May 11, 1995, letter on state letterhead on which Dr. Hammargren's title of Lieutenant Governor was plainly displayed and over which he signed his name. The evidence also showed that Dr. Hammargren had a pecuniary interest in the passage of AB 520 that was personal, based upon his practice as a neurosurgeon and the effect passage of AB 520 would have on his malpractice insurance rates. Dr. Hammargren made clear his personal financial interest in his presentation to the Assembly Committee on Judiciary by discussing the personal effect the bill's passage would have upon his practice and his malpractice insurance rates. It was clear that Dr. Hammargren

believed that the passage of AB 520 would have a beneficial effect upon his personal malpractice insurance rates as well as the rates of other physicians. Thus, Dr. Hammargren's conduct in producing and mailing the May 11, 1995, letter was squarely within the prohibition of NRS 281.481(7).

Dr. Hammargren argued that his conduct was exempted under NRS 281.481(7) because he was a "member of the legislature" for the reason that as Lieutenant Governor he also served as President of the Senate. We find that for the purposes of NRS 281.481(7) the office of President of the Senate does not make the Lieutenant Governor a "member of the legislature" who would be entitled to the narrow exemption provided in the statute.

Article 5, § 17 of the Nevada Constitution provides in pertinent part that the Lieutenant Governor "shall be President of the Senate, but shall only have a casting vote therein." Article 5 of the Nevada Constitution, in which the office of lieutenant governor is created, is the article delineating the **executive** department of Nevada government. Article 4 of the Nevada Constitution is the article delineating the legislative department of Nevada government. The lieutenant governor is **not** listed as a senator or as a member of the Senate in art. 4, § 4 of the Nevada Constitution. See also, *State v. Highway Patrol Bd.*, 372 p.2d 930, 941 (Mt. 1962), quoting *Rouse v. Johnson*, 28 S. W. 2d 745 (Ky. 1930) ("that the Lieutenant Governor, **though an executive officer...**"); *State v. Cason*, 507 S. W. 2d 405, 414 (Mo. 1973) (discussion of lieutenant governor as "a member of the executive branch of government" as not violating the separation of powers doctrine by sitting as president of the senate).

We have determined that the better reasoned authority from other jurisdictions is that which found that the service by a lieutenant governor in the office of the **president** of the senate does not make the lieutenant governor a **member** of the senate. For example, in *Opinion of the Justices of the Supreme Court*, 225 A.2d 481, 483 (Del. 1966), the Delaware Supreme Court determined that the lieutenant governor was not a member of the Senate. In that case, the issue was whether the lieutenant governor was a "member" of the Senate so that he could be counted for purposes of constituting a quorum. Reviewing constitutional language that was essentially identical to Nevada Constitution art. 5, § 17, the Court concluded that the lieutenant governor, while being the presiding officer of the Senate and being allowed to cast tie-breaking votes, was not a member of the Senate. See also, *State v. Perpich*, 182 N. W. 2d 182, 185 ("He [the lieutenant governor] is not a member of the senate. He occupies his office as ex officio president of the senate only by virtue of the Constitution.").<sup>[2]</sup>

Similarly, in *State v. Highway Patrol Bd.*, *supra*, the Montana Supreme Court made a point of discussing the lieutenant governor's interrelationship with the senate as an exercise of **powers**. *Id.*, at 938-9. In other words, while it is true that in very limited circumstances the lieutenant governor can exercise legislative **powers**, this does not make him a **member** of the legislature. In the circumstances of the present opinion request, Lt. Governor Hammargren did not exercise any legislative power in casting a deciding vote regarding AB 520 because no such vote, in fact, was necessary or taken.

Finally, we must look to the intent of the exception created in NRS 281.481 (7). It seems to us that the exception in NRS 281.481(7) is an acknowledgement of Nevada's institution of citizen legislators. In its wisdom, the Legislature recognized that citizen legislators may have occasion to use state property and time for personal purposes on a rare and limited basis because their service as legislators requires them to simultaneously serve the state and address private matters in their absence. The exception is narrowly limited to "members of the legislature," and we feel it should not be expanded to the executive branch merely to excuse otherwise inexcusable conduct. Dr. Hammargren argued that he was a "member" of the legislature merely to avoid responsibility for using his position, his office, his staff, and his resources to lobby for a bill that would directly affect his private medical practice and malpractice insurance rates. We hold that any ambiguity that may exist in Nevada Constitution art. 5, § 17 and NRS 281.481(7) should be resolved in favor of public accountability for the lieutenant governor's acts rather than to condone or excuse those acts. Therefore, we conclude that Dr. Hammargren was not a "member of the legislature" under NRS 281.481 (7) and was, thus, not entitled to the narrow exemption provided therein.

An additional argument was raised that Dr. Hammargren's lobbying for the passage of AB 520 violated NRS 281.481(2)<sup>[3]</sup>. Although a portion of Dr. Hammargren's testimony before the Assembly Committee for Judiciary on May 29, 1995, evidenced a personal interest to have his personal malpractice rates and personal medical practice benefited by AB 520, we cannot conclude that Dr. Hammargren's testimony argued for an "unwarranted" privilege, preference, exemption, or advantage solely for himself. Clearly, Dr. Hammargren's testimony also showed concern for larger issues affecting the general practice of medicine and physicians statewide. AB 520 would not solely have benefited Dr. Hammargren, but would have changed the law statewide for all physicians and patients. Dr. Hammargren's testimony was merely another voice in a controversial issue of public policy debated through the deliberation of AB 520. Thus, while it can be said that Dr. Hammargren's testimony was in part motivated by personal reasons, we cannot hold that Dr. Hammargren's testimony violated NRS 281.481(2).

As a final issue, NRS 281.511(4)(f), as it was in effect when this opinion request was brought before the Commission, provided that the Commission could waive the confidentiality and make public any opinion request "relating to the propriety of past conduct that the commission determines should be made public." Because this request has raised and resolved important issues of public policy that are being addressed on first impression, we will waive the confidentiality of this opinion and make it public.

## CONCLUSION

The Commission concludes that Dr. Hammargren violated NRS 281.481(7) by using state employees, state property, state resources, and his state title in preparing and mailing the letter of May 11, 1995, to all Nevada physicians. The Commission concludes that the Lieutenant Governor of Nevada is not a "member of the legislature" for purposes of exemption from NRS 281.481 (7). The Commission concludes that Dr. Hammargren did not violate NRS 281.481 (2) by lobbying for passage of AB 520 by appearing before the Assembly Committee on Judiciary on May 29, 1995. Finally, the Commission concludes to make this opinion public because it addresses an important public issue of first impression, namely whether the lieutenant governor is a "member of the legislature" for the purposes of NRS 281.481 (7).

## COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances. The statutory provisions quoted and discussed above must be applied on a case-by-case basis with results which may vary depending on the specific facts and circumstances involved.

DATED: May 6, 1996.

NEVADA COMMISSION ON ETHICS

By: /s/ THOMAS R. C. WILSON, Chairman

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<sup>[1]</sup> Mr. Schroeder additionally requests the Commission to admit Addendum I as part of the record in these proceedings. We decline to do so because Addendum I could have been made a part of the hearing but was not, and we do not deem it necessary to supplement the already extensive record made at the hearing.

<sup>[2]</sup> *Cf. Dye v. State ex. rel. Hale*, 507 So.2d 332 (Miss. 1987) and *Kirksey v. Dye*, 564 So.2d 1333 (Miss. 1990), wherein the Supreme Court of Mississippi found that the lieutenant governor was "constitutionally an officer of both legislative and executive departments and, as President of the Senate, is 'enough of a member of the Senate' to be eligible to receive the legislative powers conferred upon him by that body." *Dye v. State ex. rel. Hale*, at 347,

*Kirksey*, at 1335.

[3] NRS 281.481(2) provides:

A public officer or employee shall not use his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest, or any other person.