

UCCSN Board of Regents' Meeting Minutes July 20-21, 1994

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Pages 96-131

BOARD OF REGENTS

UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF NEVADA

July 20, 1994

A special meeting of the Board of Regents was held via video teleconference on July 20, 1994 at 11:00 A.M. The locations were: Computing Center, University of Nevada, Reno Campus; Computing Center, University of Nevada, Las Vegas Campus; Room 138, Western Nevada Community College; Room 128, Greenhaw Technical Arts, Northern Nevada Community College; and Shadow Lane office, Community College of Southern California.

Members present: Dr. James Eardley, Chairman Reno

Mrs. Shelley Berkley, Las Vegas

Dr. Jill Derby, Washington, D. C. (telephone)

Mr. Joseph M. Foley, Las Vegas

Mrs. Dorothy S. Gallagher, Las Vegas

Mr. Madison Graves, II, Reno

Dr. Lonnie Hammargren, Reno

Mr. Daniel J. Klaich, Reno

Mrs. Nancy Price, Reno

Mrs. Carolyn M. Sparks, Las Vegas

Mrs. June F. Whitley, Las Vegas (telephone)

Others present: Interim Chancellor John A. Richardson

President Anthony Calabro, WNCC

President Joseph Crowley, UNR

President Ron Remington, NNCC

Mr. Donald Klasic, General Counsel

Ms. Mary Lou Moser, Secretary

Chairman Eardley called the special meeting of the Board of Regents to order at 11:10 A.M. on July 20, 1994 with all Regents present except Regents Berkley, Foley and Sparks. Mrs. Berkley, Mr. Foley and Mrs. Sparks entered the meeting during General Counsel's remarks.

1. Discussion and Action Regarding Attorney General's Open Meeting Law Memorandum

Chairman Eardley explained that on July 12, 1994, the At-

torney General released in internal memorandum opinion stating that the Chancellor is a public officer for the purposes of the Nevada Open Meeting Law. Chairman Eardley asked General Counsel Klasic to report on this matter.

General Counsel Klasic stated that the Board should discuss whether it would like to conduct open or closed meetings for the purpose of holding interviews of candidates for the position of Chancellor, and for the purpose of discussing the candidate's qualification. Mr. Klasic stated that he would be explaining the above issues in three parts: 1) Counsel's opinion of whether the UCCSN Chancellor is a public officer; 2) discussion of factors to take into consideration on whether to conduct an open or closed meeting on interviews or discussion of qualifications; and 3) discussion of the remedies or sanctions that are available for violations of the Open Meeting Laws.

1) Opinion of whether the UCCSN Chancellor is a public officer - Mr. Klasic stated that the Attorney General has issued an internal memorandum taking the position that the UCCSN Chancellor is in fact a public officer. Therefore, under the Open Meeting Law, all discussions relative to the appointment of a Chancellor must be

conducted in open session. Although there is an exception to the Open Meeting Law, which states that a closed meeting can be conducted to discuss the competence, character, misconduct or mental or physical health of a person, there is a limitation whereby a closed meeting cannot be conducted for those purposes to discuss the appointment of a person to a public office.

Mr. Klasic stated that it was his opinion that the Chancellor is not a public officer, and that the Board of Regents would not be obligated to hold a closed meeting to discuss interviews or qualifications of candidates. The Attorney General indicated that there is a definition of a public officer in the Nevada Revised Statutes. The Nevada Supreme Court has held that referenced statute, in fact, is consistent with its prior holdings on what is a public officer. There are two tests that have to be met in order for a person to be considered a public officer:

- 1) A public officer is a person elected or appointed to a position, which is established by the constitution or a statute of this State or by a charter

or ordinance of a political subdivision of this

State, AND

- 2) Involves the continuous exercise as part of the regular and permanent administration of the government of the public power trust or duty.

The Attorney General took her position based on NRS 396.210, which purportedly creates the position of Chancellor and said the first part of the test has been met. The statute provides that "after consultation with the faculty the Board of Regents shall appoint a Chancellor of the System. The Chancellor shall have a degree from a College or University recognized as equal in rank to those having membership in the Association of American Universities." Mr. Klasic stated that his concern with the opinion is that the Attorney General tended to treat the System as just another State Agency. In point of fact, the University and Community College System of Nevada and its Board of Regents is a constitutionally organized and established entity. As such, it has constitutional autonomy. The case law indicates that a constitutionally autonomous State University is a part of the Executive

Branch of State government, but it is not like any other State Agency. Within the internal affairs of the UCCSN it is equal to the other branches of State government. Mr. Klasic explained that insofar as the Board of Regents has authority to run its own internal affairs, the Legislature lacks the authority to tell the Board of Regents what it may do.

Mr. Klasic explained that there was a case in 1981, "Board of Regents v. Oakley", involving the University of Nevada System, in which Nevada's Supreme Court indicated that whenever the Legislature enacted a law of general application, which applied to all State Agencies and did not involve the internal affairs of the University, that law could be applied to the University. This is why UCCSN is subject to the Open Meeting Law; it is a law that is applied to all State Agencies and is a matter of Statewide interest.

In considering NRS 396.210, which indicates that the Board of Regents shall appoint a Chancellor, Mr. Klasic said it only applies to one agency, the University of Nevada. It clearly applies to a matter of the internal affairs of the University only. The Nevada Supreme

Court held in the case of "King v. Board of Regents" in 1948, that the Board of Regents have the exclusive, executive and administrative authority over the affairs of the University. Mr. Klasic explained, therefore, that the Board of Regents does not need NRS 396.210 to create the position of Chancellor. If the Legislature had never enacted NRS 396.210 the Board of Regents would have had the authority to create the Chancellor. If the Legislature were to repeal NRS 396.210, the Board of Regents could still keep the position of Chancellor. The Board of Regents has the authority to change that office by abolishing or creating another position, etc. The statute did not create the office of Chancellor; the Board of Regents created this position. The Legislature simply recognized the authority which the Board of Regents already had in its possession.

Mr. Klasic stated his research showed that the Board of Regents established the Chancellors Office by Board of Regents' action on February 10, 1968. On April 24, 1968 the Board of Regents appointed Neil Humphrey as the 1st Chancellor of the System. The statute on which Senior Deputy General Robert Auer of the Attorney General's

office relies to say that the Legislature created the Chancellor's Office was not enacted and approved by the Legislature and the Governor until April 29, 1969, and it become effective July 1, 1969. So for a period of one year and a half, prior to the statute even coming into effect, the Board of Regents had already created a Chancellor's Office and had already appointed a Chancellor. Mr. Klasic said this should be proof positive that it is unnecessary to have the statute to create the position of Chancellor.

In addition, Mr. Klasic explained, NRS 396.210 proports to direct the Board of Regents to appoint a Chancellor, to tell the Board of Regents the means by which a Chancellor shall be appointed, and to set the qualifications of a Chancellor. Mr. Klasic stated that this is an impermissible legislative interference in an essential function of the UCCSN. Under "King v. Board of Regents", and "Board of Regents v. Oakley", that statute is void, unconstitutional, and has no effect whatsoever.

Mr. Klasic explained that the first portion of the test has not been met. The position of Chancellor is not a position that has been created by a statute of the

State; it was created exclusively by the Board of Regents.

With regard to the second part of the test of the term "public officer", which requires a person to be involved in the "... continuous exercise as part of the regular and permanent administration of the government of the public power trust or duty", Mr. Klasic stated that there is a very important case that the Nevada Supreme Court relies on in determining this particular issue. In "Mathews v. Murray", the Nevada Supreme Court quoted from another case that to constitute a public office it is essential that certain independent public duties as part of the sovereignty of the State should be appointed to it by law, to be exercised by the incumbent by virtue of his election or appointment to the office thus created and defined, and not as a mere employee subject to the direction and control of someone else. The fact that public employment is held at the will or pleasure of another or holds the position at the will of his principal is held to distinguish a mere employment from a public office. Mr. Klasic stated that the Attorney General did not give much discussion to this particular issue. First, Mr. Klasic

said the Chancellor is a person who holds his or her office at the pleasure of the Board of Regents; secondly, the Chancellor does not have independent authority from the Board of Regents. Only the Board of Regents establishes the duties of the Chancellor, and the Legislature recognizes this, stating that the Board shall provide the duties of the Chancellor.

Mr. Klasic noted that the Regents' Handbook, Title 4, Chapter 1, Section 4, states "It shall be the function of the Board of Regents to approve or reject policies proposed by the Administration. Only in the most unusual circumstances should the Board of Regents concern itself with the details of administration. Upon the basis of recommendations and data presented by the Administration, the Board of Regents shall determine the general method in which various problems and administrative duties are to be solved or handled and shall permit the Administration to apply the policies decided upon to single individual jobs or problems. Whenever a situation arises where no policy has been established in the past, the Chancellor shall analyze the situation and determine the issue upon which the Board needs to act. Thereupon the Board shall settle

policy in reference to the particular case. After the Board has acted, the Chancellor shall apply the new policy to the particular cases. Where appropriate, the Council of Presidents shall be involved."

Mr. Klasic summarized that the Chancellor does not have independent policy setting authority; the Board of Regents performs this function. The Chancellor identifies issues and brings them to the Board for action, and then carries out the new policy.

Mr. Klasic explained that Mr. Auer has indicated that there are a number of statutes on the books, which in his view, indicated that the Chancellor has duties established by the Legislature, independent of the Board of Regents. Mr. Klasic disagreed and explained that the Board has constitutional autonomy, whereas the Legislature does not have the authority to set the duties of the Chancellor. Mr. Klasic reviewed the statutes from which Mr. Auer formulates his opinion.

1) In NRS 396.620 the Legislature has set forth that the Chancellor shall cause to be analyzed by an appropriate employee of the System any ores, min-

erals, soil or water taken within Nevada and sent to the Bureau of Mines and Geology. Until 1993, that statute used to provide that the President of UNR was to perform that duty. The Chancellor has never performed that function and probably would not perform it in the future. Mr. Klastic stated that he was unsure of why that statute was passed, but felt that it might have something to do with the name change of the System.

2) In NRS 396.853 the Chancellor signs and countersigns bonds and securities issued under the University Securities Act. Mr. Klastic stated that this is only a ministerial duty, whereby the actual signing is by the Chairman of the Board, and the countersigning by the Chancellor is nothing more than attesting the signature. More importantly, the Legislature has gone out of its way to provide that the University Securities Act will not constitute a liability of the State of Nevada. Mr. Klastic found it difficult to see how the Chancellor is performing a function of the sovereignty of the State of Nevada with respect to the University Securities Act, whereby the Legislature indicates

that the University Securities Act is not a part of the State's liability.

3) In NRS 396.323 the Chancellor has the authority to issue subpoenas in order to enforce disciplinary matters with the University System. Mr. Klasic stated that once again there is the question of whether the Legislature can enact that statute, given the fact that this involves purely an internal matter, namely disciplinary matters. More importantly, the Chancellor has no authority to enforce that subpoena power. In order to enforce the subpoena power, he/she would have to go to court. In Mr. Klasic's opinion this shows that this is not a part of the sovereign function of government.

Mr. Klasic stated that Mr. Auer has indicated that the Attorney General's office has previously litigated and the First Judicial District Court held that a superintendent of a local school district is a public officer. The implication is that if a superintendent of a local school district is a public officer, how can it be said that the person who heads up the University

System, a \$400 million operation, is not a public officer? Mr. Klasic noted that the case of "Menglekamp v. List" decides this particular issue by noting that when the Legislature draws a line, there is frequently little demonstrable difference between cases on opposite sides of the line and closest to it. Still, if it is demonstrated that there is clearly a rational or legitimate reason for the distinction drawn, the law must be upheld. Mr. Klasic explained that the Legislature has drawn the line in terms of defining what is a public officer. That definition includes the superintendent of the school districts. A local school district is not a constitutionally autonomous body; it cannot exist but for the Legislature; its employees cannot exist but for the Legislature; its employees cannot carry out the school district's functions, except for the Legislature. Therefore, the line has been drawn and the superintendent of public schools is on one side of the line while the Chancellor is on the other side of the line because the Chancellor's position has not been created by statute, and he does not carry out the functions of the sovereign.

Mr. Klasic reiterated that the Chancellor is not a

public officer and consequently there is no obligation under the Nevada Open Meeting Law for this Board or its committees to conduct an interview or discussions of the qualifications of candidates in closed session.

2) Discussion of the factors to take into consideration whether to conduct an open or closed meeting on interviews or discussion of qualifications of candidates - Mr. Klasic stated that the Board of Regents is not obligated to conduct closed meetings; the Board can hold open meetings if it so desires. The Board must make the determination as to what will best serve the interests of this System and the people of the State of Nevada, in either open or closed meetings to discuss these particular issues.

Mr. Klasic noted that there is an opinion that meetings should be conducted in the open because that is in the spirit of open government and will help prevent the possibility of nepotism or political decisions being made in secrecy. Mr. Klasic said that the 5 candidates that the Board was presented with are most likely not related to anybody in the System, and they are all far enough away from Nevada that politics would not enter

into this process.

However, on the issue whether the Open Meeting Law fosters open government or not, Mr. Klasic stated that he is not taking a position one way or another. He did want the Regents to know that a book has recently been published by Riesman and Mc Laughlin, and he referred to an excerpt from the book which was distributed by Dr. Ira Krinsky during the meeting in which professional search firms were interviewed by the ad hoc Chancellor's Search Committee. He noted that the State of Florida provides for open searches and it has been said that this process works. However, Reisman and Mc Laughlin have conducted further research on this and they indicate as follows, "In the public arena there is virtually no discourse about which professional experiences and personal attributes were deemed essential for a new President. There is also no serious evaluation of the perceived strengths and weaknesses of the candidates of themselves." They also reported that "In the presence of the Press and the public, the Search Committee and the Regents did not debate the hard choices facing them. Indeed they did not debate much of anything at all." In addition, they said,

"The same reluctance to speak candidly at open meetings was present in the 1988 University of Minnesota search. On November 30, 1988, when the Minnesota Regents met in public session to choose the new President of the University from among 3 finalists there was a minimum of discussion. This was not because there was a minimum of disagreement, for the final verdict was far from unanimous. One of the Regents explained afterwards, 'The problem is that anyone with serious reservations about a candidate, something detrimental, isn't going to air them in public. In the public you are concerned about demeaning someone's character, concerned about libel.'" Riesman and Mc Laughlin concluded, "Sunshine laws are often defended as a means of educating and informing the public. However, a sunshine search process can hardly be considered educational when important issues related to the search are not discussed frankly or perhaps not discussed at all. The presence of the media benefits the simplifiers and puts at a disadvantage those whose judgments are propagated and take longer to state and to comprehend. Ironically, the more open a search is in terms of public disclosure, the less openness in terms of candor and argument is practiced by all parties. Despite their

promise of openness, sunshine searches reduce open access to talent and impede open deliberations about candidates. Unfortunately, then, the effect of the sunshine laws have been the promotion of the value of access to information, to the neglect of the allowed purposes for which these laws were enacted -- good government and good decisions."

Mr. Klasic said the Board of Regents will have to determine whether an open or closed meeting would foster the hiring of a Chancellor for the System.

3) Discussion of the remedies or sanctions that are available for violations of the Open Meeting Laws -

Mr. Klasic stated that there are two ways in which litigation against the Board of Regents can proceed:

- a. civil enforcement, or
- b. criminal enforcement.

Mr. Klasic explained that "civil enforcement" entails the possibility of getting an injunction. It is possible that if the Board prepares a notice of a meeting and indicates the possibility of a closed meeting in

the notice, that the Attorney General may go into court and seek a temporary restraining order to prevent that from happening.

Mr. Klasic stated that he has discussed this with officials in the Attorney General's office and they have informed him that this is not likely to happen, because it is always up to the Board to change its mind at the last minute, and the Attorney General's office is uncomfortable about going into court on a speculative matter. They would rather have the violation occur and then seek an injunction.

In addition, any action which the Board takes could be voided. Mr. Klasic stated that he, as General Counsel, does not permit the Board of Regents to take action in closed meetings, and the Board has been very good about this in the past. So there is no action to void, and it would be stretching it if the Attorney General's office would void a Chancellor's selection if a discussion was held in closed meeting. The remedy to be taken if that occurs is to simply hold another meeting in the open and take action again to select a Chancellor.

Mr. Klasic explained "criminal enforcement" by stating that the Nevada Open Meeting Law provides "Every member of a public body who attends a meeting of that public body where action is taken in violation of any provision of this chapter with knowledge of the fact that the meeting is in violation thereof, is guilty of misdemeanor.

The Attorney General shall investigate and prosecute any violation of this chapter." Mr. Klasic stated that the key language is: "the knowledge of the fact that the meeting is in violation thereof." The Attorney General states there would be a violation of the law with knowledge of that fact since Mr. Auer's memorandum states, "Whether or not a Chancellor should be considered as a public officer for open meeting purposes is an issue that has not been directly addressed in Nevada's case law." So this is an open issue, Mr. Klasic said, and there is one attorney whose opinion is not binding saying that it is a violation of the Open Meeting Law to do this, and there is yet another attorney whose opinion is not binding who says it is not a violation of the Open Meeting Law.

If the Board should choose to follow the advice of its own Counsel, and hold a closed meeting, the Board may

be faced with the claim that the meeting was in violation of the law. Mr. Klastic noted that each Regent should have received a letter from the attorney representing the Nevada State Press Association on this claim and Mr. Klastic's response to that letter. Mr. Klastic felt it was an improper act for the Press Association's attorney to directly send to each of the Board members a letter without the permission of the Board's attorney or copying the Board's attorney.

Mr. Klastic noted that Mr. Evan Wallach, attorney for the Nevada State Press Association, cited in his letter to the Board of Regents dated July 14, 1994, the case of "State ex rel Murray v. Palmgren" in which the Kansas Supreme Court held that a public body violated the State's Open Meeting Law. However, Mr. Klastic noted that Nevada's Open Meeting Law is somewhat different from the Kansas Open Meeting Law, in that Kansas provides that anyone who knowingly violates the Open Meeting Law is guilty of misdemeanor, but Nevada's law states that anyone who attends a meeting where action is taken in violation with knowledge of the fact that the meeting is in violation is guilty of a misdemeanor.

There is a very important difference between these two laws, and Mr. Klasic explained that the Kansas Supreme Court indicated that proof of criminal intent does not require proof of knowledge of the scope or meaning of the terms used in the statute. All that is required is proof that the person acted intentionally in the sense that he/she was aware of what he/she was doing. In the Kansas case, the question that is asked is, "Are you aware of doing an act?" It makes no difference whether you know or don't know that the act is a violation of the law or not. If the act is performed and the act is illegal, the law has been violated. On the other hand, Nevada asks a more specific question, "Are you aware of the legality of the act? Do you know the act that you are about to do is illegal?"

Another case cited by Mr. Wallach, "Powers v. Goodwin", did not involve the Open Meeting Law. However, Mr. Klasic said it did involve a situation where a group of county commissioners paid some money to a person illegally. The question was whether the commissioners would be liable for the money to the taxpayers. The commissioners stated that they relied on their attor-

ney's advice in voting the way that they did. This case is also distinguishable from Nevada law as stated in the case "Cannon v. Taylor", in which the Nevada Supreme Court held that the Clark County Commissioners were not liable for illegally paying money when they acted on the advice of the Attorney General. However, the Power case still recognizes a defense when a client acts in good faith upon his/her attorney's advice. The following four tests must be met in order for the client not to be held liable:

- 1) the client must make a complete disclosure of the facts to the attorney;
- 2) the client must request the attorney's advice as to the legality of the action;
- 3) the client should have received advice that it was legal; and
- 4) the client should have relied upon the advice in good faith.

Mr. Klasic said that Mr. Wallach also cited "Bear Creek

Valley Sanitary Authority v. Hopkins", which is a very similar case concerning the illegal payment of money. The Oregon Appeals Court cited the "Cannon v. Taylor" case with approval, although it was not the Attorney General who gave the advice, but a private attorney. The Oregon Court of Appeals stated that the policy expressed therein militates in favor of allowing a defense of good faith reliance on the advice of counsel to public officers. "We do not believe that local officials should be required to make complex decisions regarding expenditures of public funds without the advice of counsel and at their own risk. Such a requirement would discourage competent individuals from seeking or accepting such positions and would be a detriment to local government. We hold that the defense is available to these defendants, even in the case of private counsel."

Finally, Mr. Klasic said, Mr. Wallach cites "City Council of Reno v. Reno Newspapers" to the effect that a "criminal contempt violation of the Nevada Open Meeting Law may require conscious awareness of a wrongful act." Mr. Klasic stated that Mr. Wallach has taken that citation quite drastically out of context. This

was a case where the City Council had entered into a voluntary injunction with Reno Newspapers where Council agreed it would not violate the Open Meeting Law. The Nevada Supreme Court stated, "The evidence in this case does not support a finding of criminal contempt of court. The injunction was somewhat ambiguous as to what conduct was prescribed and whether the injunction was effected indefinitely. The Council members considered two apparently conflicting sections of the Nevada Open Meeting Law and asked their City Attorney for his opinion. The City Attorney had indicated that the Council could meet in closed session to discuss the applications for the position of City Clerk based upon his reading of Nevada law and the then recently issued "Mc Kay" decision. Acting on his advice the Council voted to meet in closed session and then conducted the meeting. This conduct does not show any conscious awareness of a wrongful act for the existence of a guilty mind. It is therefore concluded that there was no willful violation of the District Attorney's preliminary injunction.

Chairman Eardley requested each Regent, if he/she so desires, to make a statement pertaining to this discussion.

Mrs. Whitley stated that she has served on a number of search committees and is aware of the issues that are discussed during the interview process with the candidates.

In her opinion, Mrs. Whitley stated that it would be both detrimental not only to the candidates, but also to the Board's ability to select the best qualified individual for the position. Therefore, she stated that she was in agreement with General Counsel Klasic's advice.

Mrs. Sparks stated that she did not think the Attorney General's office has provided the Board of Regents with legally sound advice as to why the Board should not continue to conduct its search as it has been performed in the past. General Counsel Klasic has certainly demonstrated a much stronger argument. The Board's discussions that would be held with the candidates should be in a closed session. However, once the Board conducts its interview with the candidates, the public will then have an opportunity to meet and interview the candidates and have an opportunity to provide input to the Committee. The information from the Attorney General's office is similar to that cited in the letter from the Nevada State Press Association's attorney, Evan Wallach, which was not impressive.

Mrs. Sparks stated that she could not see the Board conducting a wrongful act and she would not have a guilty mind in attending a closed session. She stated that General Counsel Klasic has provided the Board with solid advice and has provided the Board with a defense to respond to the Attorney General's office. Mrs. Sparks agreed with the advice and will take the advice in good faith.

Mrs. Price indicated that when she became a member of the Board of Regents, she had discussions with General Counsel Klasic regarding what a public officer was, what a political subdivision was, and the constitutional role of the Board of Regents. She stated that she has the utmost confidence in the Board's Counsel and his ability. However, she stated that she did have a different conclusion in this very important situation for the entire System.

Mrs. Price stated that the problems of the Board has in understanding its role, the Chancellor's role, and the President's role is tied in this whole area of definition. Regarding the political subdivision issue, it has been stated that the Board of Regents belongs to the Executive Branch. Mrs. Price stated that she has accepted the arguments with regard to the autonomy under the constitution, autonomy

from the Legislature, and the fact that the Legislature passes unconstitutional laws with regard to the University System. She stated that these laws are unchallenged by the Board, and now the Board is faced with this outcome of that history. With regard to the Chancellor and the Presidents, they are referred to as "public officers" in the Association of Governing Board's handbook materials, and the Board requests these persons to act as public officers when the Board insists that they manage the System and the Board of Regents does not micro-manage. There are organizational charts and the UCCSN Code that clearly place these persons in control. The difference between Mr. Klasic's remarks and Mrs. Price's view of the System, is that the Board of Regents has an enormous authority because the Legislature is not involved in the University System and the System is not an agency of the Administration. The Board of Regents has a higher authority over the System that equates to a legislative type of authority. The people that are appointed to the Chancellor and Presidents' positions by the Board are appointed in the manner as in a political subdivision and the Board wants its employees to take the responsibility of authority.

With regard to the Open Meeting Law, Mrs. Price stated that

no matter what the decision, it is clear to her that the direction of government is toward more open meetings and more participation. The fact that a person may be inhibited from applying for a position that has much authority and ability to make changes as a public and political administrator means to her that these persons are not appropriate to hold these positions.

Mrs. Price reminded the Board that it has conducted several public meetings with students, faculty, and general public whereas it has been stated that the Board of Regents is not going to abide by the law, because the end justifies the means. If this is the case where the Board of Regents is going to defy the law, which has been perceived by Mrs. Price, then the Board needs to go to court and get a decision and then continue with its business. For the Board of Regents to say that it does not agree with the Attorney General's opinion and then proceed with its business, Mrs. Price stated that she felt the Board was blatantly defying the law.

Mrs. Price indicated that she has a personal problem with the part of knowingly violating the law. The intent connects with the legality of the situation, in that in many

cases it is an individual's intent that determines whether he/she violated the law or not. Now if there are two different opinions and Mrs. Price stated that if she should believe that it is wrong to hold closed meetings, then she would knowingly be in violation of the law if she were to attend the meeting. On the other hand, Mrs. Price stated that she is an elected representative. If she does not attend the meeting, then she felt that she was not performing her job as a Regent. Furthermore, Mrs. Price indicated that she would be placed in the position of not being able to represent her constituents because she could not attend meetings that she considers in violation of the law.

Mrs. Price stated that she was hopeful that attitudes would change between now and the next legislative session and that the Board would follow the Attorney General's opinion and appear as good citizens. Then, during the legislative session, the Board can seek clarification of the Open Meeting Law based on the legislative process and the process of government. There needs to be a clarification on the fact that the Legislature does not have a part in the University's organization and that the Board recognizes that this would give greater authority to the Board and the Board should act on this authority. The Board of Regents is a

body which makes policy and the persons that implement the policy are public officers and subject to the laws of public officers.

Mr. Klaich stated that he appreciated General Counsel Klasic's analysis. It was very thorough, and as an elected Regent, Mr. Klaich will take General Counsel's advice into account when making a decision. Mr. Klaich stated that he has taken a broader view of the question and that is the issue of how the Board of Regents tends to conduct its business while being perceived by the public and the resulting health of the System as viewed in that context. This question has been before this Board for over a year and it has to do with how the Board conducts its executive searches. At this time, the Board has a narrow focus on this issue.

Mr. Klaich continued that through the good fortune of stable leadership over the last decade, the Board has not conducted many executive searches. In that time, attitudes have changed and directions of government have changed, but the Board of Regents has not changed. The Board wishes to conduct business in the same way it did 10 years ago. There are some members on this Board who feel that if they are not allowed to guard the applicant's privacy throughout the

search process, then somehow the search committee will lose some very highly qualified applicants. If this is true, it is a price worth paying. There is no question that the trend in government is for more openness at all levels, including executive searches.

Mr. Klaich stated that if at the beginning of an executive search, the candidates are notified of the Board's attitude toward public government and the execution of public trust, then, it is his opinion that it would be more likely that the search would attract candidates that would bring the same commitment to open government to the position and in the long run will better serve the Board. To the contrary, Mr. Klaich stated that closed searches cater to clannishness and the entrenched bureaucracy in higher education which is largely white and male. If the Board of Regents is to appeal to a class of candidates by choosing a search process, Mr. Klaich stated that he would favor an open search process which would appeal to a new and more diverse generation of leaders in higher education committed to public trust and the public's right-to-know in the exercise of their office.

Regarding another point, Mr. Klaich stated that the Board

has suffered greatly in the past two years for those activities not undertaken in public. While not directly related to the issue being discussed, Mr. Klaich stated that it is related in the sense that the credibility of this Board is not at its highest level. He stated that he was not criticizing anyone in making these comments but himself, because he has participated in all of the actions. He stated that if he has been in error, so be it, but it is time to put the issue of open/close behind, to stop talking about lawsuits, closed meetings and admendments to the Open Meeting Law, which will never occur. The Board should start talking about the important things in higher education, such as student/faculty ratios, long deferred pay raises, old decaying buildings that need renovations, capital projects that need to be started, and equipment that has not been appropriated by the Legislature. He questioned whether the Board wants to spend time in the next legislative session discussing the Open Meeting Law, or should the Board spend time talking about the woeful underfunding of the System that will affect students into the next millennium.

Mr. Klaich stated that he did not care about the last two opinions given by the Attorney General, or whether they are

right or wrong. This Board needs to take a position at this time in favor of the clear trend in public government -- conduct the searches openly and go forward. Mr. Klaich stated that whether this is pursuant to the Open Meeting Law or policies that this Board adopts that are consistent with the Open Meeting Law is irrelevant. In the long term, the Board of Regents will be a more respected, healthier, and more diverse System.

Dr. Hammargren stated that he was in favor of an open search for the next Chancellor. The "health" of the System should be the Board's priority, in what the Board must look for in the next Chancellor. The Board has been too litigious, too quick to sue, to battle in court. The Board has been far more concerned with lawsuits than with education. The emphasis has been on procedure, rather than educational results. The Attorney General's office interpreted the legislative laws as unequivocal and that the Board should choose a new Chancellor in public. If in the future there are unconstitutional laws, then it is imperative for the Board to keep track, and go back to the Legislature. If there should be a "turf" contest between the Legislature, Attorney General, or court system then Dr. Hammargren said that's fine, but he did not want the future of higher

education dependent on the "turf contest". Instead, the Board should look to itself for the future of higher education. Dr. Hammargren mentioned that the library district in Las Vegas conducted open meetings to choose its leader and it has worked. He suggested that the Board of Regents try the trend for open meetings. In the process of choosing a Chancellor, Dr. Hammargren agreed with Mr. Klaich in that the Board should select a person who is willing to go through this process and that should be the kind of person UCCSN should want to lead its System.

Mrs. Gallagher stated that the issue before the Board is the law. There is a problem with the fact that the Board has been told that the Chancellor is a public officer. She questioned that if the Chancellor is a public officer, then why aren't the Presidents considered public officers also?

Mrs. Gallagher did not feel that the Chancellor nor the Presidents are public officers, but that the members of the Board of Regents are public officers.

On the advice of the Board's General Counsel, Mrs. Gallagher stated that she did not have a problem with attending a closed session to discuss the characters, etc., of an individual, but if in that process the Board made a decision

on whom they were going to appoint, then there is a problem.

However, when the Board can go into a closed session to discuss the character traits, why should these candidates be exposed to the public with that type of discussion?

Although Dr. Hammargren reported that the Las Vegas library district's search went well, Mrs. Gallagher has heard that it was a disaster. Mrs. Gallagher stated that the Board should allow the candidates some privacy in discussing with the Board issues that probably should not be discussed or answered in public. She added that she did not have a problem with having candidates interviewed by the general public or the media, in fact, it has already been established that there will be an opportunity for this to occur. To ask an individual to sit before the media and discuss some of the character traits and questions that search committee members would want to ask in private, is not fair to the candidate or the members of the committee.

Mrs. Gallagher stated that she would like the Board to challenge the fact that the Chancellor is not a public officer. When this is taken up by the courts is not an issue, but it should be addressed in the future. Then the Board will have to develop a policy for future executive searches. There are other searches being conducted at this time

that have all different processes. She stated that the Board should face up to this issue and make a decision on how to proceed. The issue of the Chancellor serving as a public officer must be defined, and if the court should rule that the Chancellor is a public officer, then that is the law and the Board should then abide by the law. Mrs. Gallagher stated that in her opinion, the Attorney General's opinion is not law. The determination will become the foundation for the other future executive searches that will come before the Board.

Mr. Foley stated that he was in agreement with Regents Price and Klaich and was in opposition with Regent Gallagher on this issue. Mr. Foley commended General Counsel Klasic for the excellent study of this issue. However, he questioned Mr. Klasic's advice to the Board, because now that the Search Committee has released the names of the finalists, there should not be a problem with confidentiality. How can the Board interview the candidates in closed session? Mr. Foley was under the impression that what Mr. Klasic stated is that under the exception of the Open Meeting Law, in which this Board practices consistently, any officer that the Board appoints can be subjected to a closed session to discuss their qualifications, etc. Mr. Foley

questioned whether the candidates who are non-employees can be examined in closed session.

General Counsel Klasic responded that there has been litigation over this same issue between the Nevada State Press Association and the Board of Regents, in which the Nevada State Press Association took the position that a closed session can be conducted only when it involved System employees. The position in which the Board of Regents took, which was upheld by the District Court in Clark County, is that the language of the statute actually applies to any person, whether they are in the System or not.

Mr. Foley continued and requested a change to his letter to the Board of Regents and Donald Klasic, dated July 18, 1994 which is filed in the Regents' Office, in that "... participating in the selection of a Chancellor would be (unlawful) DUMB in my opinion." He stated that he cannot agree 100% with Regent Klaich, because of his own experience of serving on various search committees. He explained that the Board probably should not expand its horizons of the search process by conducting a full disclosure of the identity of all the candidates who originally apply for the position.

As it has been witnessed with the previous Chancellor's search earlier this year, the Committee arrived at the point where it became fearful of having to disclose the applicants' names. Chairman of the Search Committee, Mr. Graves, notified the candidates of the possibility that their names would be disclosed and a substantial number of excellent candidates withdrew from the search. This indicates additional evidence, at this point in time, that the revealing of the confidence that was assured these applicants would be held in confidence by starting off with not affording these applicants that confidence will definitely limit the Committee's ability to select a qualified person for this position. It is hopeful that those who apply are already employed at an education system.

At this point, the ad hoc Chancellor's Search Committee has named 5 semi-finalists and it seems that there is no confidence left in this search process. Mr. Foley stated that if there was any confidence left it has been violated by the media when they published the names of the semi-finalists. It could be possible that the Board was in violation by releasing the names to the media. In any event, Mr. Foley stated that Chairman Eardley has remarked that to be a finalist provides a good advertisement for

that particular individual in his hometown.

Mr. Foley urged the Board of Regents to go public with the interview process of the last 5 candidates for the Chancellor position and then conduct a subsequent open meeting to deliberate the most qualified and desirable finalist(s).

Dr. Derby stated that one must look at the broader issues involved, as well as the present issue that the Board is facing at this time. She stated that she had prepared a statement, which is filed in the Regents' Office. As a Chair of one of the 3 search committees that is underway at this time, she stated that she was frustrated with the uncertainty that surrounds the options of conducting a Board search. She stated that she would welcome certainty for certainty sake, whatever that certainty is. Dr. Derby stated that her dilemma is that General Counsel Klasic disputes the opinion of the Attorney General and it must be decided who is right. She confessed that she does not know who is right in this case. Intuitively, she stated that the Attorney General's position that the head of public higher education system made by statute is a public officer makes sense; but General Counsel Klasic has made a very good case to the contrary.

She continued that there are some broad issues that need to be discussed. There are valid arguments for both sides of this issue. However, the two values pitted against each other in this discussion are, on one hand, the ability of the Board to secure leadership, and the other hand, the importance of operating openly and thereby complying with the spirit and possibly the letter of the Open Meeting and Open Record Laws, and thereby restoring public confidence in the governance of public higher education.

Dr. Derby stated that one of the most important public trusts is that of securing good leadership for the System. She has been told by those with experience in higher education that searches operating in the open diminishes the opportunity to secure the best leadership from the widest possible pool of candidates. Although the Board is discussing the confidentiality of the interview process, the broader issues of conducting searches is also being discussed. There is validity and merit to the argument. She stated that this argument has been made, and that there are many potential candidates who would not take the kind of risks by participating as candidates in an open search process. Dr. Derby stated that by taking this argument

one step further, she stated that in a thoroughly open search process it has been said that the Board would be unable to secure good leadership because there really is no factual ground for making such an extreme claim. Dr. Derby stated that there is evidence on both sides of that question, such as in the previous search process the Committee did lose many good candidates, at least on paper, under the condition of anticipated openness, but there were good candidates that remained. It is important to point out that it is really unknown until the candidate proceeds to the interview process whether there are good candidates or not.

Dr. Derby stated that there are more questions that the Board could expect on the requirement of openness in searches to change the function of the pool of candidates from one with less sitting CEOs to the more "up-and-coming" candidates. She questioned whether that would mean that there is a less qualified pool of candidates -- possibly it might -- and is it a pool containing no good candidates -- no one could rightfully agree with that. After all, every top executive in higher education was at some time or another an "up-and-comer". This is an important consideration in this larger issue of how this Board conducts its

searches. In a more specific case of open interviews, Dr. Derby stated that she suspected that there would be a loss of candor. For those who argue that that would be the case, they are correct and there is merit to the argument. However, there is also something to be gained in an open process, because in agreeing with Mr. Klaich, it is more likely to select an individual who is comfortable with doing business in the open. Dr. Derby considered this a plus to this argument.

She stated that Nevada has strong Open Meeting and Open Records Laws that are a fact of life in this State. If the Board wishes to do it differently, it could lobby the Legislature to change the law in the direction of less openness, but it is known how unlikely that would happen. She suggested that if a member does not like the law, he/she could move to another State and run for its Board of Regents where there are less stringent sunshine laws. Sooner or later the Board must come to terms with that. The Board's public image has suffered because it has not come to terms with that issue. Dr. Derby stated that changing the law is unlikely and she did not think it was desirable. What the System needs is funding, not fighting, when it comes to the Board's relationship with the Legis-

lature.

Another side of this issue is that the Board loses more than it gains by refusing to comply with the Attorney General's opinion. The argument that has been made by those close to the public polls which have indicated that our System has a serious credibility problem with the people in Nevada and a reputation for preferring a closed process than an open process. Dr. Derby suggested that the first order of business is for the Board to rebuild public confidence and the way it performs its business.

Dr. Derby stated that her dilemma is with merit given to both sides of this argument, and the question before the Board is whether it should prioritize confidentiality in the search process at the risk of further eroding the public's confidence, or does the Board prioritize the restoration of public confidence by the Board's willingness to operate in an open process, while risking the loss of candor that an open interview is likely to produce, or the broader case that has been suggested with regard to the candidates' pool.

Dr. Derby stated that this issue is a hard one to face, because the Board will lose and gain something either way it

chooses. It is a matter of establishing priorities for the Board. She stated that she is for the value of openness and working to restore the public confidence. In the long run, the Board will have paid a greater price by conducting closed searches than if there is openness with a loss of confidentiality within the search process. Dr. Derby suggested that the Board comply with the Attorney General's opinion and express its willingness to conduct this part of the search in the open. Although Dr. Derby welcomes the education that this matter has brought forth for seeking a final and conclusive ruling, and to put away the question and uncertainty that surround the searches, she stated that she cannot choose to get there by choosing to defy the law that has been interpreted by the Attorney General. She is aware that the opinion of the Attorney General is just an opinion, but it is not an opinion by just any legal person, it is by the person that has been elected by the people of Nevada to make such opinions.

If the Board can make a better case to the public and their representatives in the Legislature that the Board needs to have confidentiality to conduct the searches and then it is therefore worth the sacrifice of openness, the opinions might be more encouraging. However, the Board needs to re-

member that those in the media consider themselves as guardians of openness in government. The case that could be made to the public that the Board requires secrecy to conduct its business will never be made to the public. Dr. Derby stated that she agreed with those who say that the clear trend across the country is towards openness and not away from it. The Board needs to realize that they are elected public officials in Nevada and realize that the reality of having a system of elected Regents who have sworn to uphold the laws of the State. This is the reality and Dr. Derby stated that she was tired of fighting. By so doing, the Board will be able to restore its confidence with the public in the way the Board governs its Colleges and Universities.

In closing, Dr. Derby stated that if the Board should choose to challenge the interpretation of the law as rendered by the Attorney General, she would welcome that clarification and the adjudication in which it would bring to this Board. She stated that she respects the views of others in this discussion who believe that the greater good is done by choosing confidentiality over openness and would disagree with that opinion. She realizes that this Board does want the best for UCCSN.

Mrs. Berkley stated that she was impressed with the discussion and that each point of view that has been expressed has validity. She stated that she, too, was plagued with what position to take on this very important matter. Mrs. Berkley felt that there was no one in this State that cherishes more and supports open government than herself. Behind the Open Meeting Law is the larger idea that government exists to serve the people. From this simple but profound idea the democratic system has been derived. The leaders are the public servants whose public duties must be performed in the public interest. Public servants may not withhold critical information from the public, open government and government free of conflict of interests are two sides of the same democratic coin. Mrs. Berkley stated that she believes, and the record will show, that she is a strong proponent of open government and the Open Meeting Law ever since she began holding public office in 1983. She stated that she prides herself for being very responsive to her constituents and the public need. She supports candidates who agree in this philosophy.

Mrs. Berkley stated that there is nothing wrong with the Open Meeting Law, however, she disagrees with the Attorney

General's interpretation of the Open Meeting Law in this case. She did not believe that anybody would accuse her of being an arrogant public official or believe that she has an agenda of secrecy and closed government. She stated that she has great concern that her remarks will be misinterpreted. Mrs. Berkley stated that she was hopeful that the last 14 years of public service would hold her in good stead while giving her opinion on this issue. Mrs. Berkley reflected that she has been very critical of the actions of this Board over the last few years and has not been considered one of the "good ol' boys" who have felt that the issues should be discussed behind closed doors.

Mrs. Berkley stated that she has voted consistently in the minority on this Board, and she does not accept responsibility for the lack of credibility by the public of this Board that is being experienced at this time. If the Board is to restore public confidence, the Board needs to do its job and do it well. The job before the Board at this time is to find the best possible person to lead the UCCSN over the next decade. It is the most significant and important responsibility that a member of the Board has. Although she was not a member of the Board 10 years ago, she cannot believe that the reason why there hasn't been an executive

search for all those years is because there has been a great deal of stability. In her opinion, Mrs. Berkley stated that the Board has been gutless and the Board has retained people in executive positions that should not have been there.

Mrs. Berkley stated that she has thoroughly reviewed this matter and commended General Counsel Klasic on an outstanding job in presenting the issues before the Board in a legal context. She believes that the Board of Regents are public officials. The Attorney General's opinion has been very detrimental to the Board by elevating one of its employees, no matter how important that employee is to the System, to a level of public official, which this employee should not hold. This is a fundamental issue that needs to be resolved by the courts. The Board has been in a quagmire of indecision since last December when the Board received the first Attorney General's opinion. It is absolutely essential that this Board take that opinion and the opinion of the Board's General Counsel and get this matter litigated and a decision made by a court of law. There is no shame in asking for help. No matter how the Board votes on this issue it will be a split vote and will continue to remain split on a very fundamental issue. The courts are there

for this very reason, for this public body to avail itself of the decision-making abilities of a court of law. The Board should take advantage of this situation and take this very right issue before a court of law to make a definitive judgement.

Mrs. Berkley stated that in December she had requested the Board to seek judicial guidance on this matter by way of a declaratory judgement. She stated that her opinion has not changed. By requesting a judgement it should not be considered an insult to the public, it is a service, and the Board should seek this without controversy, without being pitted to the "good guys" against the "bad guys". The Board needs to get this matter resolved, because if not, Mrs. Berkley assured the Board that this issue will continue to plague the Board of Regents. There are many searches to be conducted in the future, and the Board needs to have a decision on this matter.

Mrs. Berkley stated that she feels very uncomfortable when she has heard that she has been sitting in public meetings where Board members have suggested to others that the Board is not going to follow the law and that the "ends justify the means". Mrs. Berkley stated that she had never heard

this from a fellow Board member and she, herself, would certainly not say anything to the contrary. Again, the Board is in a quagmire of indecision and Mrs. Berkley stated that she does not have a problem with the Open Meeting Law, although she felt that this interpretation by the Attorney General is incorrect.

Mrs. Berkley questioned General Counsel Klasic whether a declaratory judgement is the action to be taken, and could the Board receive a decision prior to August 12, 1994. She does not want to go another day longer than necessary without a permanent Chancellor in place.

General Counsel Klasic responded that the Board of Regents are now in a situation that would lend itself to filing a declaratory judgement action. There are potential adverse parties involved: the Board of Regents which assumes to proceed with the matter, and the Attorney General taking the position that the Open Records Law requires open meetings for interviews and discussion of candidates. In addition, there is the very visible threat contained in Mr. Auer's letter which indicates that if there is going to be a closed meeting on this matter, then he would recommend the enforcement of the Open Meeting Law.

With regard to receiving a decision by August 12, 1994, Mr. Klasic responded that he has spoken with the Attorney General's office and they have indicated a willingness to cooperate with the Board in putting together an expedited briefing schedule to get this matter before a judge. There are approximately 3 weeks to prepare the briefings. However, the issue lies with the court itself. Just because the parties may agree to submit this matter before August 12, does not necessarily mean that the court is going to reach a decision by August 12. Mr. Klasic stated that he is hopeful that as part of the action, a meeting would be held with the court to see if the court would be willing to decide by that time.

In summary, Mr. Klasic stated that "yes" there is a basis for a declaratory judgement action; "yes" the Attorney General is willing to cooperate with the Board in putting together an expedited briefing schedule; but he is uncertain as to whether a court would be willing to give the Board a decision by August 12.

Mrs. Graves stated that he agrees with all the statements that have been made thus far by his fellow Regents. Un-

fortunately, Mr. Graves stated that perception is sometimes reality. He informed the Board that he ran for the position of Regent to perform the best job that he could to make a difference in higher education. One of the most important jobs that Regents have is to appoint the Chancellor and the 7 Presidents. He believed that over the course of his term as Regent that he would be replacing the Chancellor and all 7 Presidents, who will lead the System into the next century. He stated that if he is handicapped in his ability to perform this task, he believed it would mean filling these positions with lesser qualified candidates, which will reflect lesser quality and poorer management throughout the System. Members of this Board have spoken with executive search firms and others across the country in higher education on whether there would be a loss in the best qualified candidates if an open search is to be conducted, whereby all the names for all candidates are released. The response is that the search process will not attract the better qualified candidates. Yet, perception is sometimes reality.

Mr. Graves stated that this Board has been beaten up and he has personally been taken to task, particularly, because the Chairman of the Board had appointed him as Chairman of the

ad hoc Chancellor Search Committee. Mr. Graves adamantly stated that he wanted to get a Chancellor in place because a permanent Chancellor will be the best thing that the Board can do in order to get better government in UCCSN.

This search has been abandoned once. A meeting of the ad hoc Chancellor Search Committee has been set for August 12, 1994. Mr. Graves informed the Board that there is one member, out of 5 members, who is opposed to a closed session. As Chairman, Mr. Graves stated that he would feel reluctant to request this member to attend the meeting, if it should be decided that the meeting will be in closed session. Mr. Graves stated that conducting an open session goes against what he believes, because in an open session the candor, frankness and truthfulness will be lost and the Committee will then open itself up to a libel lawsuit. Yet, under the circumstances, there is no alternative but to conduct an open session. Mr. Graves suggested that the Board review this matter in two parts:

- 1) Hold the August 12 meeting in an open session to select the best final candidates; and
- 2) Direct General Counsel Klasic to immediately

litigate this matter.

Mr. Graves stated that he agrees with General Counsel Klasic that the Attorney General's opinion is poorly written and it is only an opinion. In addition, the Nevada State Press Association's attorney also did a poor job with all the cases cited and does not hold up according to General Counsel Klasic. Although Mr. Graves agrees with Mr. Klasic, he felt the Board should go forward.

Mr. Graves stated that he is willing to hold the August 12 meeting in the open, including the discussion of qualifications of the candidates, and urged the members of the Board to vote for this. In addition, the Board should direct General Counsel Klasic to adjudicate this matter, so that the Board of Regents will have direction. Mr. Graves noted that each search committee in progress at this time is deciding what action it will pursue, either conducting an open search, closed search, or hiring an executive search firm. The Board of Regents should be directing the search committees, however, is unable to do this, because it is split on this decision.

President Crowley stated that he did not want to get in-

volved in the questions of law, however this has been a wonderful and instructive discussion. The Board is grappling with a tremendously difficult problem and there are not any easy answers to the dilemmas that confront the Board. President Crowley stated that General Counsel Klasic's presentation was marvelous on this matter, however, there are other opinions and the issue needs to be clarified.

On the subject of openness, President Crowley stated that the Board has allowed itself to be cornered on that question and the public's perception is that the Board does not conduct its business openly. President Crowley did not believe that this is an accurate perception, especially with respect to the searches that the Board has conducted over the year for the chief executive officer positions. He felt that phrases have been tossed around with abandon as if they were easily defined -- open, open government, public participation, the public's right to know, public interest.

President Crowley informed the Board that he had attended a graduate seminar that dealt with the subject of public interest and the 20 participants were charged with defining

"public interest". The participants were unable to define "public interest". He did not feel that this was an "either/or" question, whether it is open government or not. The Board performs most of its business in the open and the processes that involve the selection of Presidents and Chancellors has not yielded the kind of skullduggery that the media has charged that such processes can yield, and he did not think that Board should surrender its territory on this matter. The searches have had a substantial measure of openness, which they should have.

President Crowley stated that he has spoken with several people in higher education in the state of Florida and it is possible to attract good candidates under the Florida sunshine approach for the selection of chief executive officers of institutions and systems. There is no doubt about that, but there is also no doubt that the process loses qualified candidates who will not subject themselves to the open process. In Florida, it is a full blown media exposure, including television cameras. The public's right to know in Florida, according to those President Crowley has spoken with, extends to the President's mail. In fact, President Crowley stated that one of his colleagues must save his mail to allow for reporters to review the mail

once a week. If this President should throw a piece of mail away, including an anonymous note, then he is guilty of a criminal act. The media compile juicy stories from this that do not advance the cause of higher education. Nevada's Board of Regents have not been charged with that extreme case of openness, it has been charged with conducting interviews in the open and discussing the candidate's qualifications in the open. President Crowley offered his personal opinion, in that neither of those issues are positive in the sense of allowing openness about everything and advancing the public's interest and good government.

President Crowley stated that in his opinion that much damage is likely in Nevada by having interviews conducted in the open and that process can be utilized in many ways, such as having the candidates make presentations at open sessions and request several persons and groups to participate. He stated that conducting interviews and discussing the qualifications of the candidates would also be acceptable to conduct in the open. However, by conducting an open interview, the Committee will not be able to seriously discuss the qualifications of the candidates. Ironically, this lends itself to closed government, because questions have to be asked and shared with the Committee members and this is

then conducted in private sessions. President Crowley strongly felt that this would be the case if the Committee should conduct interviews in the open, and informed the Board that this process happens throughout the country.

Finally, President Crowley stated that this is a question of tremendous public importance; how this body selects its chief executive officers now and in the future. It is in the Board's interest to learn as quickly as possible what the law will compel the Board to do in this matter, and to get the Board out in front of this question whether or not to conduct open or closed sessions.

Interim Chancellor Richardson informed the Board that the President of the Humphrey Institute at the University of Minnesota, Harland, Cleveland, wrote a book which exams the issue of selection of College and University Presidents through open search process as opposed to one that had some measure of confidentiality associated with the process. He made a very important point in this book that while the media tries to portray this as open versus closed, or open versus secret process, it is not really the issue that is confronted. The issue is one of tension between a public Board's responsibility to hire the best chief executive

officers they can and the process that leads to that, versus the public's right to know about that process. Obviously, the media comes down on the side of the public's right to know about the process. However, Dr. Cleveland argues that is not necessarily in the public's best interest. In the long run the public's best interest is probably best served by securing the best executive leadership that can be secured. Dr. Richardson agreed and did not see this issue in terms of openness versus secretiveness. He stated that it is in terms of securing the best qualified person for the position.

Dr. Richardson stated that from a perspective of having gone through both types of searches in his professional career, he would never go through a completely open search process again, because the personal risk is just too great. There are several people in this profession across the country that feel the same way.

Dr. Richardson stated that this is a sufficiently important issue that it ought to be adjudicated by the courts. He stated that he had great difficulty as the Interim Chancellor to believe that the Chancellor is a public officer.

There are those who argue because of the responsibilities

which the position carries forth, it is obvious that the position is a public officer. However, the Board should be reminded that the Board is a constitutional board, which is a distinction not shared by many boards across the country. Constitutional boards have much stronger powers than statutorily created boards. In addition, Nevada's Board of Regents is an elected constitutional board which also carries responsibilities. Dr. Richardson stated that he felt that the Board and its members are the public officers, not the Chancellor. This issue needs to be clarified.

Finally, Dr. Richardson stated that it is one thing to conduct the interviews in public, which can be done without much damage. However, it is quite another issue to try to conduct meaningful deliberations about the strengths and weaknesses of candidates in a public meeting. This will not happen and it should be obvious to all concerned that it will not happen in the open. It is not in the best interest of the public to drive it underground, because it will happen this way, and he has seen it happen across the country. Dr. Richardson stated that he believes that it is in the best interest of this Board to pursue this matter legally and to get it resolved in the courts. If the Board chooses to conduct the interviews in the open,

it is certainly the Board's choice; however, he encouraged the Board to seek a determination of A) is the Chancellor a public officer; and B) how the Board can proceed in this search and other searches in the future?

Chairman Eardley stated the common sense of applicants is that once the 5 applicants allowed their names to become public, it was because they were now being considered as semi-finalists. This is much different than being 100th in a pool of applicants for a position. This process may create a search process for the future in how the Board conducts searches. The Search Committee conducting the interviews will allow for an open session once semi-finalists are selected.

Chairman Eardley stated that he did not appreciate being threatened by a letter from an attorney, who has sent the same letter to each member of the Board. Dr. Eardley stated that he has served on the Board of Regents for the past 8 years and has never participated in any secret meeting. The meetings have always been conducted in the open and the media has implied that this Board has conducted past meetings in the closed. Editorials have been written, especially by a local newspaper, and Dr. Eardley did not even think

that that individual has ever attended a Board meeting.

He continued that at least 90% of the Board's time has been spent on many issues to assist higher education in Nevada.

The members of the Board of Regents have worked hard and without pay and are very dedicated to the mission of higher education. The Board does not need reporters "slapping" the Board every time they think they have an opportunity.

Dr. Eardley stated that he had received a letter from General Counsel Klasic advising the members of the Board that the attorney who had sent the threatening letter to each member of the Board has been reported, due to Supreme Court Ruling 182, which states, "In representing a client, a lawyer shall not communicate about the subject of representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has consent of the other lawyer and has authorization to do so."

General Counsel Klasic had not even received a copy of the attorney's letter which makes threats to the Board members.

Dr. Eardley stated that the 5 applicants could be screened down in an open interview by the Search Committee which would eventually narrow the applicant pool to 3 finalists

which would then be forwarded onto the Board of Regents.

The Board would then deliberate in open meeting with the Chairman of the Search Committee who would give a presentation on the candidates, and then the full Board of Regents would then make the final appointment. The Board's General Counsel should seek resolution to these other problems outside this current search for a new Chancellor.

Chancellor Eardley stated that the Board of Regents and its ad hoc Chancellor's Search Committee has been at this process for too long and he encouraged the members of the Board to vote for an open process and direct the General Counsel to seek clarification from the court system.

Mr. Graves moved that the ad hoc Chancellor's Search Committee be directed to hold its August 12, 1994 meeting in the open. In addition, the General Counsel be directed to pursue declaratory action and relief in this matter as well as the issue that was addressed almost a year ago as to the Open Records Law dealing with all applicant names being released. Mrs. Gallagher seconded.

Upon questioning, Mr. Graves explained that all Chancellor candidates have been notified that by Nevada Revised Statute

the Board of Regents may elect to have a closed session, thereby saying that if the Board does not elect to have a closed session, then it will be opened.

General Counsel Klasic stated that he was troubled with a portion of the above motion that insinuates that no matter what happens the August 12 meeting will be held in open session.

Mr. Graves moved to amend the motion to stated that unless otherwise adjudicated to hold the August 12 meeting in the open session. Dr. Hammargren seconded the amendment.

Dr. Hammargren questioned whether the Attorney General has rendered an opinion or not, because the discussion has addressed Mr. Wallach's letter who indicates that the Attorney General has issued an informal opinion. He questioned whose authority is being disputed by the Board and which court will adjudicate this issue. General Counsel Klasic responded that one of the local State District Courts would hear this case. In reference to the Attorney General's opinion, Mr. Klasic responded that after an issue has been received by the Attorney General's office, input is given on the issue from throughout the office and an opinion is issued

over the name of the Attorney General. Either the Attorney General personally signs the opinion, or it is signed "X Attorney General, by X Deputy Attorney General". An opinion that is issued by a Deputy Attorney General can either be a published or an unpublished opinion. In either event, it is a formal opinion. A published opinion receives a number and it appears in a published booklet, whereas an unpublished opinion is given in a letter format. In this case, Mr. Klasic stated that Deputy Attorney General Auer put together an internal memorandum which reflects his opinion to the Attorney General. The Attorney General has not formally accepted or adopted this opinion. Mr. Klasic stated that he would presume that by the mere fact that the Attorney General released that internal memorandum to the public sector, that she has, in fact, adopted Mr. Auer's opinion.

Mr. Foley indicated that he had a problem with the motion, although he did agree that the Board must seek litigation on this matter. In order to litigate on declaratory judgment, there must be a case in controversy. If the Board is to proceed with conducting an open meeting on August 12, as stated in the motion, then the Press will have to challenge that issue, otherwise there is no controversy and

there is not a case.

Mr. Klastic agreed. If a decision is made to allow the Board of Regents to conduct a meeting in the open, then there is not a case in controversy because the Board would then be agreeing with the Attorney General's opinion. The wording in the motion reads, "... hold the meeting in the open unless otherwise adjudicated". Mr. Klastic stated that he will not be able to appear before District Court and request that it adjudicate that the Attorney General is wrong, because the Board has agreed with the Attorney General.

Mr. Klastic suggested that 1) a decision be made to conduct the meeting in closed session, unless otherwise adjudicated, and that General Counsel be directed to pursue a declaratory action or relief, or 2) a decision not be made on whether the Board will conduct either an open or closed session, but just indicate that General Counsel is directed to seek declaratory relief. This will still cause an adverse situation, because there is one attorney saying one thing and the Board's General Counsel saying another, and the issue is rather open on August 12 as to how the meeting will be conducted. The case of controversy will still exist if the Board opts for the second suggestion.

Upon questioning, Mr. Klaich interpreted Mr. Klasic's suggestions as stating that the Board must decide which way to go, and not to ride the fence on this matter.

Mrs. Price requested clarification on the motion. As she understood the motion it seemed to be there are two different issues being discussed. One being that the August 12 meeting should be conducted in the open; however, that does not solve any of the issues at hand. The second issue regards the Open Records Law with regard to the candidates and the applications that have been received. The Board has 3 different search processes, and as far as she was aware, no members of the Press or any other group had ever asked for those applications and unless that should happen there is no controversy. Now, if the Board wishes to create a controversy in order to get the issue into court to ask a question, and the Press does not ask for any of the applications, Mr. Price stated that she would be happy to do whatever she can to create a controversy.

Mr. Graves withdrew the motion.

Mrs. Berkley stated that this is exactly what happened last

January when the Board should have gone to court at that time, but voted instead to terminate the search. When it was time to go to court, the Board was told that it couldn't because there was no case in controversy. Mrs. Berkley felt that it was absolutely critical that this issue be adjudicated and a decision rendered by a court of confident jurisdiction. This motion should be worded in a way that the Board can be heard before a court. She suggested that the motion be worded, and allow the Board of Regents to conduct its meeting in closed session, unless otherwise advised in a court of law. This should give the Board a case in controversy, which will permit General Counsel to appear before a court to get this matter adjudicated.

Mrs. Berkley stated that it was her understanding that private organizations could not request opinions from the Attorney General, nor she did not think that individual members of the Board of Regents could request the Attorney General's office for opinions. It was her understanding that the full Board of Regents were able to request such opinions.

Mrs. Price questioned Mrs. Berkley on two different issues; that of 1) whether the Chancellor, further the Presidents,

is a public officer or not, and 2) whether the candidates' applications are public records.

These are two entirely different controversies that need to be clarified and taken to court, and then, separately there was the question of what the Board wished to do for the meeting on August 12.

Mrs. Price moved approval to conduct the ad hoc Chancellor Search Committee meeting on the open on August 12, 1994 for the purpose of interviews.

Mrs. Berkley stated in accordance with what General Counsel Klasic has reported that if the meeting is conducted in the open, then the Board no longer has a case in controversy.

Mrs. Whitley questioned whether the interviews were of the semi-finalists and the finalists, which should be public interviews. Chairman Eardley agreed, although Interim Chancellor Richardson disagreed. Mrs. Whitley stated that the confusion lies with that the Board is arguing the wrong point.

Dr. Hammargren seconded.

Dr. Hammargren suggested the motion should be amended to include pursuing with one of the other Presidential searches the litigation as to whether or not this is an acceptable process to conduct interviews.

Mrs. Sparks clarified that these are not finalists for the position of Chancellor, but semi-finalists. After the interviews are conducted, then finalists will be selected by the ad hoc Committee.

Mrs. Berkley made a point of clarification that General Counsel Klastic stated that if the Board decides to conduct an open meeting, then there is no longer a case of controversy to adjudicate.

Mrs. Price amended the motion to include discussion of candidates. Dr. Hammargren seconded.

Discussion ensued on whether this motion would allow for adjudication by the courts, with Mr. Klastic saying it would not.

Mrs. Sparks stated that once again the Board has been

challenged and it has not been responsive. If the Board does not respond to this challenge in a responsible way, then Mrs. Sparks felt that the Board would be failing in its responsibilities as elected officers. The Board is relinquishing its constitutional autonomy and diminishing the credibility of the Board. She questioned that if the Board decides to conduct an open meeting, would the ad hoc CCSN Presidential Search Committee be required to conduct its business in the open, along with the UNLV Presidential Search Committee. The Board must make a decision because it is spending thousands of dollars and man hours, and now it seems that the motion is addressing something that will not even challenge the questions before the Board.

Chairman Eardley questioned General Counsel Klastic on whether there is any law or legislative mandate that addresses Presidents. Mr. Klastic stated that the President's issue has not yet progressed to the point of a case in controversy, because the issue has never been raised. Mr. Klastic stated that it would be very difficult for the Attorney General to reach a conclusion that the Presidents should be considered as a public officer, since there is not a statute, which Mr. Klastic is aware of, that actually creates the position of President as a branch of the Uni-

versity. Therefore, the very first test of what constitutes a public office has not been met.

Dr. Derby stated that in response to Mrs. Sparks' comments, that she would welcome the clarification, because it is very tough Chairing a search committee when there is a cloud of confusion that hangs over the process without knowing and being clear on what is permissible and what is not. However, on the other hand, Dr. Derby stated that when it is tied to this issue, it is her understanding that the narrower issue before the Board at this time is how to proceed in terms of the August 12 meeting. She stated that she was very comfortable in supporting an open meeting. The candidates have been announced and the Committee should go forward with an open process. Some candor will be lost, but it will not be that serious and will be manageable. The value of conducting an open session is worthwhile.

Mr. Klaich stated that the motion on the floor is a poor motion, not because of the substance of the motion, but because it potentially deprives the Board, after a full discussion, of the opportunity to resolve the issue that is squarely before the Board. He stated that he agreed with Mrs. Berkley in that there was an opportunity in

December to seek some clarification of a statute, but the Board did not avail itself to that opportunity. The Board has another opportunity before it, and it has been fully discussed. The Board should avail itself to the opportunity one way or another. Mr. Klaich respectively stated to Mrs. Price, that the motion on the floor deprives the Board of really the reason that we are all in attendance at this meeting. He stated that he would be voting against the motion, because the Board must face up to the responsibility of whether the Board is going to proceed in litigation or not.

Mr. Foley stated that each of the members of the Board are guilty of wishful thinking by expecting a decision from the court by the August 12 meeting. There is nothing in the world to stop the Board from having a decision appealed to the Supreme Court. In the meantime, the decision stands. He explained that a judgement in low court is a final judgement until reversed. If the District Court decides that the Chancellor is not a public officer, and it is appealed, then what will happen to the progress that has been made thus far. Will the Board have to abort this search in order to go before the court? That would be nonsense. Mr. Foley stated that the best way to proceed

is to assert the Board's autonomy as a constitutional body,
and it seems that each member of the Board is in agreement
with General Counsel Klasic's opinion. In order to bring
this about is to wait to see what the Nevada State Press
Association does in this regard. He encouraged the members
of the Board to vote in favor of the motion in order to
proceed and conclude this search.

Roll Call Vote:

Aye: Regents Derby, Foley, Hammargren, Price

Nay: Regents Berkley, Gallagher, Graves, Klaich,
Sparks, Whitley

Motion failed.

Mrs. Berkley suggested an alternative motion for the sole
purpose of adjudicating this issue and not to make the
determination of whether or not searches in the future will
be conducted in either closed or open sessions.

Mrs. Berkley moved approval that the August 12 interviews
be done in private, to give the attorney the opportunity

to litigate this matter by continuing a case a controversy.

Dr. Derby made a point of clarification on the motion,
that if the Board just defeated the idea of having an open
meeting, clearly it is a closed meeting.

Mrs. Berkley restated the motion to read that the Board
instruct General Counsel to pursue a declaratory judge-
ment with the most deliberate speed. Mrs. Price seconded.

Roll Call Vote:

Aye: Regents Berkley, Derby, Gallagher, Graves,
Price, Sparks, Whitley

Nay: Regents Foley, Hammargren, Klaich

The motion carried.

The meeting adjourned at 1:40 P.M.

Mary Lou Moser

Secretary of the Board

07-20-1994

