INTERIM JOINT COMMITTEE ON STATE GOVERNMENT

Minutes of the 5th Meeting of the 2021 Interim

September 21, 2021

Call to Order and Roll Call

The fifth meeting of the Interim Joint Committee on State Government was held on Tuesday, September 21, 2021, at 1:00 PM, in Room 149 of the Capitol Annex. Senator Robby Mills, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Robby Mills, Co-Chair; Representatives Jerry T. Miller, Co-Chair, and Kevin D. Bratcher, Co-Chair; Senators Ralph Alvarado, Denise Harper Angel, Christian McDaniel, Michael J. Nemes, Wil Schroder, Adrienne Southworth, Brandon J. Storm, Damon Thayer, and Phillip Wheeler; Representatives John Blanton, Adam Bowling, McKenzie Cantrell, Jennifer Decker, Jim DuPlessis, Joseph M. Fischer, Kelly Flood, Jim Gooch Jr., Derrick Graham, Richard Heath, Samara Heavrin, Mary Beth Imes, DJ Johnson, Matthew Koch, Derek Lewis, Scott Lewis, Savannah Maddox, Patti Minter, Kimberly Poore Moser, Jason Nemes, Attica Scott, Tom Smith, Pamela Stevenson, Nancy Tate, Ken Upchurch, Russell Webber, and Buddy Wheatley.

Guests: James F. "Ted" Booth, Mississippi Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER); Mary Elizabeth Bailey, Personnel Cabinet.

LRC Staff: Alisha Miller, Daniel Carter, Michael Callan, and Peggy Sciantarelli.

Approval of Minutes

The minutes of the August 26 and September 1 meetings were approved without objection by voice vote, upon motion by Senator Wheeler.

Overview of Legislative Immunity/Legislative Privilege

The guest speaker was James F. "Ted" Booth, General Counsel, Mississippi Joint Legislative Committee on Performance Evaluation and Expenditure Review (PEER), the Mississippi legislature's audit evaluation and investigative committee. He is also staff counsel for Mississippi's joint reapportionment committee. In conjunction with his testimony, he provided a written document entitled "Legislative Privilege-An Overview."

Mr. Booth stated that legislative privilege is an evidentiary rule that protects legislators from being required to testify in a civil action or to render documents when

sought through discovery or subpoena. Legislative immunity shields legislators from being parties to litigation. They are related doctrines and often trace their sources to the same constitutional provisions or common law. In Mississippi, as in many other states, privileges are not preferred by courts. Privileges often shield otherwise relevant and material evidence from disclosure and run contrary to current notions of openness in government. Privileges can be either absolute or qualified.

The source of legislative privilege varies from state to state. In Kentucky the source is the state constitution Speech or Debate clause (Section 43), which is modeled on the US Constitution. Seven states, including Mississippi, California, and Florida, have no such clause. For those states, the privilege will be based on a constitutional structural argument, the common law, or a rule of evidence. In federal courts, the source of legislative privilege is what is sometimes called "federal common law."

A confidentiality statute shields the release of a document from a public records request, while privilege makes the records or testimony of a person not subject to discovery. Generally, a confidentiality statute does not in and of itself create an evidentiary privilege. Privilege is a much stronger concept.

While privilege protects persons or information from being discovered, immunity protects legislators from being parties to litigation and being potentially liable. Immunity tends to be absolute and not qualified. It may be derived from a state's constitution, the common law, or a statute. Immunity applies to suits brought against legislators in their personal and official capacities; it protects them from liability arising from acts occurring within the course and cope of carrying out legislative duties. Immunity is recognized in federal courts. The US Supreme Court recognizes the need for immunities and privileges for state legislators. A 1951 US Supreme Court case, *Tenney v. Brandhove,* 341 US 367 (1951), is the source for state legislative immunity in federal proceedings. Justice Frankfurter cited "federal common law" as the source. Thirteen years earlier, in a famous case, *Erie Railroad v. Tompkins*, the Supreme Court categorically stated there is no such thing as federal common law. Justice Frankfurter rediscovered federal common law.

Mr. Booth discussed general principles gained from his research of all jurisdictions regarding the scope and application of legislative privilege. The privilege must be invoked by the legislator—not by someone else on behalf of the legislator. Staff may also be able to claim privilege in litigation arising from a legislative act, but legislators should consult with their house counsel on that subject. In some states, a balancing test will be applied in determining legislative privilege. Generally, testimony and records that relate to the drafting, consideration, and passage of legislation is protected. However, the privilege may be waived through inconsistent behavior, delay, or by policy.

Most federal courts take the position that legislative privilege is qualified, but there are exceptions. Courts must determine whether the public good of allowing the privilege

outweighs the value of receiving relevant evidence. A few federal courts have held that the privilege is absolute, but privileges in federal court may be subject to balancing. In a redistricting case in Virginia, judges argued that when the subject matter deals with private rights, the chances are greater that the legislative privilege would be treated as absolute. When it deals with things that address important public policy issues, such as redistricting, expect the privilege to be balanced. The privilege can be balanced because it is a product of common law rather than statute or constitutional law. The common law must yield to the important public policy. This is often seen in redistricting cases.

The Deliberative Process Privilege is a qualified privilege that has been discussed in various treatises on the federal rules of evidence, and it can apply to the legislative process. It is available to deal with issues that grow directly from deliberation, such as conducting hearings, drafting legislation, committee action, and floor action. Also, under the federal rules of civil procedure, the Work Product Rule (FRCP Rule 26) may provide considerable protection for legal materials developed by a committee.

Concluding his presentation, Mr. Booth stated that the forum court matters. In federal court, when dealing with a significant public policy issue, it is likely that privilege will be qualified. In redistricting cases the federal courts usually find a way to pierce the privilege. In state courts the source of the privilege is the critical question. In places like Kentucky, which has a Speech or Debate clause, there would be a strong argument regarding the absolute character of the privilege. However, the way an open records law is crafted can defeat a claim of privilege. Generally speaking, privilege arguments work best when trying to protect legislators who are having to testify or surrender documents regarding the stages of drafting, conducting hearings, committee processes, and floor action on legislation.

Responding to Representative Graham, Mr. Booth said that an open records law could be drafted in terms broad enough to actually defeat a claim of privilege. For example, if an open records law says that all material associated with the preparation, drafting and consideration of legislation must be made available to the public and released upon request, it would be difficult to invoke legislative privilege. Mississippi's open records law says nothing therein shall be construed as limiting the legislature's power to determine access to its own records. All joint committees—like his two committees—have adopted policies that make work files confidential. With the PEER Committee, certain things have to be public. Final reports that are voted out by the committee are released and made available to anyone on demand. Other files—work papers and interview notes, for example—are protected from public requests.

In response to Representative Wheatley, Mr. Booth said that past NCSL panel discussions have counseled people to exercise "good email hygiene," which would extend to text messaging. He advised caution when using e-mail or text messaging to transmit potentially discoverable information. Answering another question from Representative

Wheatley, he said that a staff person's claim of legislative privilege is based on the privilege extended to a legislator. If a legislator is required to release his records, there would not be a separate protection for staff.

There were no other questions, and Senator Mills thanked Mr. Booth for his testimony.

The Future of Remote Working in State Government

Senator Mills stated that he and other members of the General Assembly have concerns, from a customer service standpoint, whether remote working in state government has a positive or a negative impact on their constituents. He introduced the guest speaker, Mary Elizabeth Bailey, Commissioner of the Department of Human Resources Administration, Personnel Cabinet. Her testimony included a PowerPoint presentation.

Ms. Bailey discussed the current staffing model for employees of executive branch KRS Chapter 18A agencies. As of July 6, 2021, employees will continue to work according to the following options: working 100 percent in an executive branch building/office; hybrid telecommuting, with the employee working both in a building/office and a remote work station; or telecommuting 100 percent, with the employee working entirely from a remote work station. State government agencies review their telecommuting policy and staffing plans quarterly. The entire staffing model will be reevaluated in October 2021.

Fifty percent of executive branch employees are currently working at their state government building/office location. This category includes employees in positions that are public facing and therefore not eligible to telecommute; employees whose job duties cannot be performed remotely; employees with flexible work schedules; and employees who request not to telecommute. Employees who scored in the lowest two categories on their previous performance evaluation, or who are currently on a performance improvement plan, are not eligible to telecommute. Under the hybrid telecommuting plan, an employee may work remotely 1-4 days each week. This plan is in use for 37 percent of executive branch employees. Telecommuting 100 percent currently includes 13 percent of the executive branch. This option requires approval of the Personnel Cabinet.

Ms. Bailey said that telecommuting is not new in Kentucky state government. It was created more than 23 years ago and is authorized in administrative regulation by 101 KAR 2:095 and 101 KAR 3:050. The pandemic prompted a closer look at telecommuting, and an executive branch telecommuting policy was implemented. The policy addresses supervisor and employee training, terms and conditions agreements, and safety. Flexible work schedules are permitted, and an agency is authorized to visit an employee's remote work site at any time.

Representative Nemes said it would be beneficial to know whether remote working can provide opportunities for cost control. He requested that the following information be

furnished by the executive branch, based on the budget area affected: a list of all employees who are telecommuting; why they do not need to report to the workplace; and whether the number of telecommuting jobs can be reduced. He suggested that the information be transmitted to the LRC budget subcommittees for possible use in forthcoming budget proposals. He said he would also like to know if there can be a reduction in state office building rent when employees are not occupying the workplace.

Senator Thayer said people have complained to him that they have been unable to reach employees in customer service areas because they are working from home. Ms. Bailey said that forward-facing agencies are working in state buildings and are providing services to the Commonwealth. She is not aware of any issues but would be happy to look into any complaints that have been received.

Responding to Representative Bowling, Ms. Bailey reviewed the telecommuting policy relating to out-of-state residents who work in Kentucky.

Senator Alvarado said it is a major concern that information transmitted by employees on their personal devices is potentially discoverable. He questioned whether the executive branch has taken that into consideration, and he suggested that employees be made aware of this. Ms. Bailey agreed that it would be important to remind employees.

Responding to questions from Senator Wheeler, Ms. Bailey said she would need to defer to individual agencies regarding metrics for judging the efficiency of working remotely versus in-person in an office. If an employee utilizing the work-from-home privilege is not meeting standards, the agency can cancel the telecommuting agreement at any time. The timeline for reviewing performance standards differs by agency, and this issue will be raised during the October review. The extent to which telecommuting privileges are being utilized in urban areas compared to rural areas also differs by agency.

Responding to Representative Miller, Ms. Bailey said that occupational tax rates for employees who work remotely is based on actual work location. Employees with questions about occupational tax should consult the Human Resources office in their agency.

Representative Graham said that in order to be efficient and proficient in providing services, it would be better for state employees to work within the confines of their office building. Frankfort is the seat of state government. Franklin County is in his district, and he is also concerned about the local government's loss of occupational tax income as a result of remote working.

Senator Thayer stated that with the available COVID protocols, there is no reason why in-person work in state offices cannot be managed appropriately. He stated for the record that he and Representative Graham are in full agreement that state employees—with

the exception of consultants—need to return to work in their offices, and he respects Representative Graham for taking that position.

Business concluded, and Senator Mills thanked Ms. Bailey for her testimony. Discussion concluded and the meeting was adjourned at 2:06 p.m.