



**In the Matter of the Request for Opinion
Concerning the Conduct of Jim Shirley,
Pershing County District Attorney,
State of Nevada,**

Request for Opinion No. 10-93C

Subject.

EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION

The following report and recommendation is based on the Commission staff's consideration and investigation of the Ethics Request for Opinion ("RFO") filed regarding the conduct of Jim Shirley, Pershing County District Attorney, ("Subject"), a public officer, and on the Subject's written response to the RFO, both attached as exhibits to this report and recommendation, and the other exhibits attached hereto. This Executive Director's Report and Recommendation and its exhibits are provided for the consideration of the two-commissioner investigatory panel, as required by NRS 281A.240(1)(c) and NRS 281A.440(4).

Facts:

In October 2010, Jim Shirley, the Pershing County District Attorney, disseminated a newsletter to the residents of Pershing County in response to a 2009 Community Assessment that identified a need for enhanced communication between the public and the county. Shirley utilized discretionary funds gathered from the Traffic Diversion Program to pay for the printing and mailing of the newsletter. In the newsletter, Shirley provided information about his office and its programs, and also editorialized regarding issues his office found with the conduct of the incumbent Sheriff. Shirley had made no secret about his opinions on the Sheriff's handling of the jail's "trusty" program and the Sheriff's administration of warrants in Pershing County, and, in addition to writing about them in the newsletter, he had written letters making the Board of County Commissioners and the Sheriff himself aware of his opinions and concerns related to public safety. Issues related to public safety seem to fall within the scope of the District Attorney's functions.

One additional fact must be considered in this analysis. The newsletter was published and distributed on or about October 11, 2010, which was less than one month before the election in which the incumbent Sheriff was a candidate for retention. The newsletter was marked "Volume 1, Issue 1" on the first page, and allegedly was to be published regularly.

Although none of the newsletter text included names of candidates, encouraged voters to support or oust an incumbent, or had any other direct link to the election, the timing of its distribution is curious.

Allegations:

The main allegation is that Shirley caused a government to expend resources to support or oppose a candidate for office in violation of NRS 281A.530. Additionally, the RFO alleges that Shirley used his position in government to gain an unwarranted personal benefit in violation of NRS 281A.400(2) and used government resources to further his own personal interest in violation of NRS 281A.400(7).

Nevada Revised Statutes (NRS) and case law:

NRS 281A.520:

1. Except as otherwise provided in subsections 4 and 5, a public officer or employee shall not request or otherwise cause a governmental entity to incur an expense or make an expenditure to support or oppose:
 - (a) A ballot question.
 - (b) A candidate.
2. For the purposes of paragraph (b) of subsection 1, an expense incurred or an expenditure made by a governmental entity shall be considered an expense incurred or an expenditure made in support of a candidate if:
 - (a) The expense is incurred or the expenditure is made for the creation or dissemination of a pamphlet, brochure, publication, advertisement or television programming that prominently features the activities of a current public officer of the governmental entity who is a candidate for a state, local or federal elective office; and
 - (b) The pamphlet, brochure, publication, advertisement or television programming described in paragraph (a) is created or disseminated during the period specified in subsection 3.
3. The period during which the provisions of subsection 2 apply to a particular governmental entity begins when a current public officer of that governmental entity files a declaration of candidacy or acceptance of candidacy and ends on the date of the general election, general city election or special election for the office for which the current public officer of the governmental entity is a candidate.
4. The provisions of this section do not prohibit the creation or dissemination of, or the appearance of a candidate in or on, as applicable, a pamphlet, brochure, publication, advertisement or television programming that:
 - (a) Is made available to the public on a regular basis and merely describes the functions of:
 - (1) The public office held by the public officer who is the candidate; or
 - (2) The governmental entity by which the public officer who is the candidate is employed; or
 - (b) Is created or disseminated in the course of carrying out a duty of:
 - (1) The public officer who is the candidate; or
 - (2) The governmental entity by which the public officer who is the candidate is employed.

NRS 281A.400(2)

2. A public officer or employee shall not use the public officer's or employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public officer or employee, any business entity in which the public officer or employee has a significant pecuniary interest, or any person to whom the public officer or employee has a commitment in a private capacity to the interests of that person. As used in this subsection:
 - (a) "Commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281A.420.
 - (b) "Unwarranted" means without justification or adequate reason.

NRS 281A.400(7)

7. Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit the public officer's or employee's personal or financial interest.

In re Stix, RFO 06-71C, presented a similar fact scenario in which an incumbent Mayor, with the approval of the city council, began publishing a city-wide newsletter, inserted and mailed with the City's utility bills, which prominently featured an article promoting his activities as Mayor, and provided other city news. The Commission found that, in that circumstance, the Mayor's inception of the newsletter did not violate NRS 281A, despite its creation and monthly distribution during the 6-month period immediately preceding an election in which the Mayor was a candidate.

Analysis:

The Pershing County District Attorney's newsletter containing Jim Shirley's opinions about the conduct of the Sheriff as an incumbent or as a candidate appear to be a step removed from the typical application of NRS 281A.400 or 281A.520. The newsletter, rather than discussing Shirley's own accomplishments to boost his own candidacy, refers to another public officer and candidate, the Pershing County Sheriff. The newsletter did not mention the incumbent Sheriff by name or refer to his candidacy. Instead, it focused on Shirley's observations and concerns regarding safety issues in the county and his opinions on the county officers involved in those issues.

Presumably, attention to the safety and welfare of Pershing County is within the duties of the District Attorney's office.¹ Therefore, Shirley publishing his thoughts about the safety practices of the "trusty" program and the failures in the administration of warrants in the county appears related to the functions and concerns of the office of the district attorney in the county, as the D.A.'s office would be charged with defending the County against any claim of liability created by the Sheriff's acts.

Shirley contends that, although the October 2010 issue was the inaugural issue, he intended to publish the newsletter on a regular basis, and not just before county elections. NRS 281A.520 specifically permits governments to expend resources to disseminate materials that describe the functions of county offices and provide information to the public about those functions.

Mr. Shirley's personal interests may coincide with his professional duties, but no evidence was adduced to indicate that a personal interest rather than his concerns in his professional capacity spurred him to put this information before the public. As a result, Shirley's opinions seem to be justified (the opposite of the definition of

¹NRS 252.080 Public prosecutor. The district attorney in each county shall be public prosecutor therein.

NRS 252.110 Duties. The district attorney shall:

1. Draw all indictments, when required by the grand jury.
2. Defend all suits brought against his or her county.

5. Bring all actions on behalf of the county for abatement of nuisances pursuant to order of the board of county commissioners or, in the discretion of the district attorney, pursuant to an ordinance of the county as provided by NRS 244.360, subsection 6, including actions for injunction, as well as for recovery of compensatory and exemplary damages and costs of suit.

6. Perform such other duties as may be required of him or her by law.

"unwarranted" in the statute) and therefore could not have violated NRS 281A.400(2) - use of his position in government to gain an unwarranted advantage, or NRS 281A.400 (7) use of government resources to further a personal interest - by expending county Traffic Diversion funds², which were completely within Shirley's discretion, to publish the newsletter.

NAC 281A.435 Basis for finding by panel; unanimous finding required for determination that no just and sufficient cause exists. (NRS 281A.290)

1. A finding by a panel as to whether just and sufficient cause exists for the Commission to render an opinion on an ethics complaint must be based on credible evidence.

2. A finding by a panel that no just and sufficient cause exists for the Commission to render an opinion on an ethics complaint must be unanimous.

3. As used in this section, "credible evidence" means the minimal level of any reliable and competent form of proof provided by witnesses, records, documents, exhibits, concrete objects, and other such similar means, that supports a reasonable belief by a panel that the Commission should hear the matter and render an opinion. The term does not include a newspaper article or other media report if the article or report is offered by itself.

Conclusion and Recommendation:

I recommend that the Panel find just and sufficient cause **DOES NOT EXIST** for the Commission render an opinion on all of the above allegations against Pershing County District Attorney Jim Shirley, including the alleged violations of NRS 281A.400 (2) and (7) and NRS 281A.520, and that the Investigatory Panel dismiss the RFO in its entirety, as no credible evidence was presented to support the allegations in the request for opinion.

I hereby provide this recommendation to this honorable panel.


Caren Jenkins, Esq.
Executive Director

Date: _____

4/1/11

² Traffic diversion funds are accumulated from fees collected from the presentation of driving school programs designed to allow drivers to reduce the number of "points" on their driving records in an effort to minimize the impact on their insurance. The expenditure of these funds is completely with the District Attorney's discretion.