



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct
of **PUBLIC OFFICER**, Member,
Nevada State Commission,
State of Nevada,

Request for Opinion No. 11-57A

Public Officer. /

OPINION

I. STATEMENT OF THE CASE

PUBLIC OFFICER requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of his anticipated future conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in chapter 281A of the Nevada Revised Statutes ("NRS"). A quorum¹ of the Commission heard this matter on August 11, 2011. PUBLIC OFFICER appeared in

person and provided sworn testimony.

At the conclusion of the hearing, and after full consideration of the facts, circumstances and testimony presented, the Commission deliberated and orally advised PUBLIC OFFICER of its decision interpreting the guidelines of Advisory Opinion No. 08-08A as they apply to his particular circumstances as a part-time public officer with a private law practice. The Commission now renders this formal written Opinion stating its findings of fact and conclusions of law.

The facts in this matter were obtained from documentary and testimonial evidence provided by PUBLIC OFFICER. The Commission's findings of fact set

¹ The following Commissioners participated in this opinion: Chairman Erik Beyer, and Commissioners Gregory J. Gale, CPA, Magdalena M. Groover, George M. Keele, Esq., James M. Shaw and Keith A. Weaver, Esq. Commissioner Gale disclosed his prior relationship with PUBLIC OFFICER, determined that abstention was not warranted, and participated in the decision of this matter.

forth below accept as true those facts presented by PUBLIC OFFICER for the purposes of the advice offered in this Opinion. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this Opinion.

II. QUESTION PRESENTED

PUBLIC OFFICER seeks clarification and guidance on whether the Opinion issued in RFO No. 08-08A applies and extends to certain situations not addressed in the Opinion.

III. FINDINGS OF FACT

1. In his private capacity, PUBLIC OFFICER is a lawyer licensed in Nevada. PUBLIC OFFICER practices as part of a law firm. He has no ownership interest in the firm, but the firm provides him a salary and benefits.
2. In his public capacity, PUBLIC OFFICER is a member of a State commission. His public officer position is part-time.
3. The State commission issues licenses.
4. Any State commission licensee may come before the State commission multiple times.

IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

PUBLIC OFFICER is an attorney licensed to practice law in Nevada who serves as a part-time member of a State regulatory commission. He requests that the Commission review its decision in Opinion No. 08-08A and clarify whether it applies and extends to his particular situation.

Opinion No. 08-08A sets forth guidelines for the conduct of a public officer who serves on a State regulatory commission and is also a lawyer in private practice in Nevada. The Opinion addresses three questions: (1) whether a public officer may provide legal representation to individuals and entities licensed by the commission on which he serves, (2) whether a public officer may provide legal representation to those adverse to such licensees, and (3) whether it would be proper for members of the public officer's law firm to undertake such representation.

In answer to questions (1) and (2), the Commission held that a public officer may not represent his commission's licensees, or those adverse to such licensees, in any matter related or unrelated to licenses issued by the State commission. As for question (3), the Commission determined that these strictures are inapplicable to members of the public officer's law firm, but that the public officer must

adhere to the disclosure and abstention requirements of NRS 281A.420 with respect to the law firm's representation.

PUBLIC OFFICER now asks the Commission to consider Opinion No. 08-08A in light of four scenarios not addressed in that opinion, as follows:

- 1) Can such a public officer represent non-licensee clients in cases unrelated to the public officer's public duties, where a licensee is or may be a witness, thereby involved in pre-trial discovery such as document production, property inspection, and depositions, as well as potential testimony at trial?
- 2) Where an opposing party brings a third-party complaint against a licensee so that the licensee then becomes a party to the litigation, in addition to being a witness, does the public officer have to cease participation in such a case?
- 3) Where licensees and non-licensees with common interests are parties to litigation, can the public officer be actively involved in representing the interests of both the licensees and non-licensees?
- 4) Where members of a public officer's law firm represent licensee clients in matters unrelated to the jurisdiction of the commission, and do not represent those clients before the commission, does NRS Chapter 281A and Opinion No.

08-08A require the public officer to disclose and abstain whenever the licensee clients come before the commission?

The intent of the Ethics Law is to preserve and enhance the public's faith in the integrity of government. In furtherance of this objective, public officers must abide by the Nevada legislature's public policy declarations and conduct themselves so as to avoid conflicts between their public duties and their private interests. NRS 281A.020(1)(b). When a public officer serves on a State regulatory commission, the public officer must take great care to avoid situations that will require abstention on licensure matters because licensees may appear before the commission multiple times. As noted in Opinion No. 08-08A, constant abstention due to conflicts with licensees would cumulatively adversely affect the public officer's discharge of the public duties for which he was appointed. On the other hand, the Ethics Law is not designed to dissuade people from accepting appointments to State regulatory commissions by making it difficult or impossible for those appointed to part-time public positions to make a living. Rather, the ethical guidelines and standards set forth in NRS Chapter 281A and this Commission's Opinions should be viewed as a means for fostering openness and dedication to the duties which are part of public service. It is with these precepts in mind that we revisit the holdings of Opinion No. 08-08A in light of

PUBLIC OFFICER's particular situation.²

B. RELEVANT STATUTES

1) Licensee as witness in litigation unrelated to license

Opinion No. 08-08A declared that a public officer's representation on behalf of or against a licensee in any matter violates NRS 281A.020 and implicates the prohibitions expressed in NRS 281A.400(1), (2), (5) and (10) and NRS 281A.410(1). We now consider whether these prohibitions would also preclude the public officer's participation in litigation where a licensee is involved not as a party, but as a witness.

This issue arises from a quiet title action in which PUBLIC OFFICER, in his private capacity on behalf of his private client, LLC X, filed a complaint for declaratory relief against non-licensee parties. A licensee of the State commission ("LICENSEE"), its predecessor-in-interest, and their representatives are likely to be witnesses in the case. As such, they will likely be requested to produce documents, permit inspections of their adjacent property, submit to depositions, and be subpoenaed to testify if the case goes to trial.

² The Commission notes that the provisions of NRS 281A.420 were amended in 2009, after its Opinion was issued for RFO No. 08-08A, and therefore considers the new amendments concerning abstention in applying and/or distinguishing its holdings in RFO No. 08-08A to the facts and circumstances presented in this RFO.

The Commission's rationale for its decision in Opinion No. 08-08A recognizes that licensees might hire a public officer on matters unrelated to the public officer's public duties "to curry favor for the next time that the licensee comes before the state commission on a matter." The Opinion also recognizes that litigating adverse to a licensee would place the public officer in an untenable situation, with public matters being materially affected by the public officer's commitment in his private capacity to the interests of his client. Here, however, the considerations appear to be different.

As a witness, LICENSEE does not have a stake in the outcome of the litigation involving non-licensees, and it presumably would provide documents and testimony accurately and truthfully, whether beneficial or detrimental to the legal position of LLC X. Therefore, LICENSEE could not "curry favor" with PUBLIC OFFICER in his public capacity, since its obligations as a witness would preclude changing facts or documents to be more favorable to LLC X.

Given that regulated Nevada businesses frequently are witnesses in business disputes, a rule that precludes a Nevada attorney from representing non-regulated entities in such matters would severely limit an attorney's private practice, and thus make it less likely that private attorneys would be willing to serve the State as part-time appointees to regulatory commissions. It also appears that a public officer's representation of a party to litigation

involving a licensee as a witness would not erode the public's trust in violation of NRS 281A.020, and that the public interest is adequately protected through the disclosure and abstention provisions of NRS 281A.420. We therefore decline to extend Opinion No. 08-08A's restrictions on an attorney's law practice and clarify that a public officer may provide legal representation to a non-licensee party even though a licensee is or may be a witness.

Accordingly, we advise PUBLIC OFFICER that he must disclose his relationship to LICENSEE in accordance with NRS 281A.420(1) when LICENSEE comes before him in his public capacity. Further, although a witness is presumed to provide truthful information, this situation nonetheless creates a perception that LICENSEE has the opportunity to curry favor with PUBLIC OFFICER if it provides evidence favorable to his client LLC X and thus has the appearance of impropriety. Therefore, we determine that under NRS 281A.420(4) this is a clear case where the independence of judgment of a reasonable person in PUBLIC OFFICER's situation would be materially affected and therefore advise him that NRS 281A.420(3) requires his abstention as well.

2) Licensee as third-party defendant in litigation unrelated to license

As noted above, Opinion 08-08A directs that a public officer may not represent individuals or entities adverse to State commission

licensees. Here, we are asked to consider the situation where the public officer heeds this restriction, but the actions of a third-party later cause his client's position to become adverse to a licensee.

In the declaratory relief action described above, two defendants filed their answers, each asserting an affirmative defense that a third party is or may be liable for the relief sought by LLC X. Such defenses appear to refer to LICENSEE, which is clearly a witness in the case. If the other parties bring LICENSEE into the case as a third-party defendant, then PUBLIC OFFICER's client LLC X may become adverse to LICENSEE.

We do not construe Opinion No. 08-08A as mandating PUBLIC OFFICER to withdraw from representation of his client in this situation. Compulsory withdrawal as counsel based on an opposing party's actions could lead to abuse. Although in this particular case, there is no question that counsel for the non-licensee defendants have asserted their claims in complete good faith, it is possible that a party could seek to remove a public officer as counsel for an adversary by bringing in a licensee as a third-party defendant. Where, as here, the underlying dispute does not involve the regulated industry and affects real estate, rather than the public duties of PUBLIC OFFICER, the public interest can be protected by appropriate disclosures and abstention under NRS 281A.420. As in the witness situation discussed above, if the opposing party files a third-party complaint against

LICENSEE in the declaratory relief action, then PUBLIC OFFICER must disclose and abstain in accordance with NRS 281A.420 whenever LICENSEE comes before him in his public capacity.

3) Licensee as party to class action in litigation unrelated to license

Next we consider Opinion No. 08-08A's proscriptions on public officers in a common interest or class action setting where various businesses, including licensees, have claims against common defendants.

In this particular situation, various businesses were required to contribute funds to a government entity, to be held and used by that government entity for a particular purpose. That purpose was eventually determined to be unfeasible, and now one or more government entities are attempting to use those funds for an unrelated purpose, rather than returning them to the contributors. The various businesses are suing to obtain those funds and prevent government entities from using them for other purposes. Each contributing business may be named as a plaintiff, or the claims may be asserted as a class action, with all contributors being members of the class. Some of the businesses are commission licensees, and others are not. PUBLIC OFFICER questions whether in this situation Opinion 08-08A precludes him from representing the interests of both the licensees and non-licensees.

Under NRS 281A.420(4), an exception exists from the abstention requirements where a benefit or detriment to one person "is not greater than that accruing to any other member of the general business, profession, occupation or group that is affected by the matter." The Commission concludes that a similar exception can be carved out from the absolute prohibition of Opinion No. 08-08A barring a public officer from representing a licensee, that would allow such representation when the licensee is a member of a group receiving the same benefit or detriment that all other group members receive.

The public interest remains protected in this situation since the disclosure requirements of NRS 281A.420 would still apply. However, the absolute prohibition against representing a licensee would not apply where the licensee is a member of a specific group with no independent claim or recovery. Accordingly, we advise PUBLIC OFFICER that the Ethics Law would not prohibit him from representing both licensees and non-licensees in the common interest or class action as described above. We note, however, that PUBLIC OFFICER's appearance in a class action suit on behalf of multiple licensees may, depending on the circumstances, require his frequent abstention when these same licensees appear before the regulatory commission. We therefore remind him that constant abstention due to these types of conflicts could cumulatively adversely affect PUBLIC OFFICER's discharge of his public duties and thereby implicate NRS 281A.020.

4) Disclosure and abstention obligations when law firm member represents licensee in matter unrelated to license

Opinion No. 08-08A holds that members of a public officer's law firm may appear in a representative capacity before the State commission on which the public officer serves, provided, however, that the public officer makes appropriate disclosures under NRS 281A.420 and abstains from acting on the matter. Here, we consider a public officer's obligation to disclose and/or abstain when his law firm's licensee clients appear before the State commission represented by other counsel.

Here, PUBLIC OFFICER's law firm represents clients on real estate and land use matters. If a licensee engages the law firm for real estate or land use work, PUBLIC OFFICER asks whether he must disclose this relationship whenever the licensee appears before his commission, even when represented by non-firm counsel on the licensure matter. He also asks whether abstention is always required in this situation.

Our pronouncement in Opinion No. 08-08A addresses a public officer's obligation to disclose and abstain when a member of his own law firm appears before his commission as counsel for a licensee. Consistent with the broad purposes of NRS Chapter 281A to require disclosure of relationships that might reasonably affect a public officer's public duties, a public officer should

also make adequate disclosures whenever his law firm's licensee clients appear before him in his public capacity with other counsel. We hereby expressly broaden the rule announced in Opinion No. 08-08A to require disclosure both when a public officer's law firm appears before the commission and when the law firm represents licensees in other business and legal matters.

Although the Ethics Law mandates disclosure of the licensee's relationship with the public officer's law firm, abstention is not automatic and should be made only after analyzing the law firm's relationship and its effect on the particular matter before the State commission. For example, where PUBLIC OFFICER's law firm represents a licensee in a land use matter, and where the licensee appears for a routine licensing approval with other counsel, then abstention may not be required. In this situation, PUBLIC OFFICER is advised to conduct an abstention analysis in accordance with *In re Woodbury*, RFO No. 99-56, and return to the Ethics Commission for specific advice regarding a specific circumstance. The analysis of the relationship would include, consistent with the *Woodbury* guidelines, such non-exclusive factors as the responsibilities of the public officer in the law firm, the basis of the compensation of the public officer by the law firm, the involvement of the public officer with the particular client in his attorney capacity, the significance of the licensee as a client to the law firm, and the significance of both the non-regulatory matter that the law firm is

handling and the licensing matter presented to the public officer.

V. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, PUBLIC OFFICER was a "public officer," as defined by NRS 281A.160.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has jurisdiction to render an advisory opinion in this matter.
3. In matters unrelated to PUBLIC OFFICER's public duties, PUBLIC OFFICER may represent a non-licensed entity in litigation where an individual or entity licensed by the State commission is or may be a witness, provided that PUBLIC OFFICER discloses and then abstains from acting on future matters involving the licensee that come before the State commission.
4. In cases unrelated to PUBLIC OFFICER's public duties, PUBLIC OFFICER may continue to represent a non-licensee client in litigation where an opposing party files a third-party complaint against a licensee by means of which the non-licensee client becomes adverse to a licensee, provided that PUBLIC OFFICER discloses and then abstains from acting on future matters involving the licensee that come before the State commission.

5. In cases unrelated to PUBLIC OFFICER's public duties, PUBLIC OFFICER may represent both licensees and non-licensees where claims are shared, the claims are not regulated by his public body, and the benefits and detriments are the same for all such parties, provided that PUBLIC OFFICER discloses and abstains from acting on future matters involving the licensees that come before the State Commission.
6. If PUBLIC OFFICER's law firm represents a licensee, NRS 281A.420 requires PUBLIC OFFICER to disclose this relationship whenever the licensee appears before the commission on which he serves, regardless of whether his law firm represents the licensee on the matter before the commission. Abstention is mandatory when his law firm represents a licensee in a matter before the commission; however, abstention may not be required in all circumstances in which the licensee is represented by counsel outside his law firm on matters before the commission.

Dated this 18th day of July, 2012.

NEVADA COMMISSION ON ETHICS

By: Erik Beyer
Erik Beyer
Chairman