



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Public Employee**, Public Entity,
State of Nevada,

Advisory Opinion No.19-098A

Public Employee. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Employee ("Public Employee"), Public Entity ("Public Entity"), requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.675, regarding the propriety of Public Employee's 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"). Pursuant to NAC 281A.352, a quorum of the Commission considered this matter by submission, without holding an advisory-opinion hearing.¹ The Commission considered the request for an advisory opinion, information provided by Public Employee that Public Employee affirmed as true, and publicly available information.

Public Employee sought an opinion from the Commission regarding the applicability of the requirements of the Ethics Law to Public Employee's circumstances wherein Public Employee's relative desires to establish a business entity that will provide similar services to the public as provided by Public Entity, which employs Public Employee. Public Employee requests guidance on whether Public Employee may make any referrals to Public Employee's relative's business entity. After fully considering Public Employee's request and analyzing the facts and circumstances presented, the Commission advises Public Employee how Public Employee's circumstances implicate the Ethics Law.

The Commission now renders this Abstract Opinion stating its formal findings of fact and conclusions of law. The facts in this matter were obtained from documentary and other evidence provided by Public Employee. For the purposes of the conclusions offered in this opinion, the Commission's findings of fact set forth below are either based upon or accept as true the facts Public Employee presented.

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 Abstract Opinion.² Although the full written opinion was served on Public Employee, for confidentiality reasons, this Abstract Opinion redacts certain Findings of Fact, provides a summary of issues and removes other identifying information to protect the confidentiality of Public Employee.

¹ The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Weaver and Commissioners Duffrin, Gruenewald, Lowry, O'Neill, Wallin and Yen.

² The Commission reserves its statutory authority should an ethics complaint be filed presenting contrary circumstances. See *In re Howard*, Comm'n Op. No. 01-36 (2002) (notwithstanding first-party opinion, public is not precluded from bringing ethics complaint) and *In re Rock*, Comm'n Op. No. 94-53 (1995) (reservation of right to review until time issue is raised).

II. QUESTION PRESENTED

Public Employee questions whether any provision of the Ethics Law applies to Public Employee's referral of members of the public, as part of Public Employee's public duties, to a business entity anticipated to be established by a relative of Public Employee.

III. FINDINGS OF FACT

1. Public Employee is employed by Public Entity in a regulatory capacity, which public duties entail interaction with the public and outreach events and presentations.
2. Public Employee's relative is contemplating establishing a business entity to assist members of the public and provide services that are similar in nature to Public Employee's public duties.
3. The business entity's operations would be funded by customers and other sources.
4. Public Employee believes the business entity could serve a niche that would not conflict with, but would support Public Entity's policies and programs, and Public Employee seeks guidance on whether Public Employee could refer members of the public to the relative's business entity under the Ethics Law.

IV. STATEMENT OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

Public Employee's public duties include similar services to the public as Public Employee's relative anticipates providing pursuant to an established business entity. The Commission confirms that Public Employee has a commitment in a private capacity to the interests of Public Employee's relative under NRS 281A.065. As a result of this private commitment, Public Employee is guided to comply with the provisions of NRS 281A.400 and NRS 281A.420, as discussed herein.

The Commission's jurisdiction is limited to guidance on the application of the Ethics Law to public officers and employees. Therefore, this opinion guides Public Employee in the compliance of the Ethics Law in the performance of Public Employee's public duties. The Commission has no authority to render an opinion to or otherwise control whether Public Employee's relative establishes a business entity. Furthermore, should the business entity be established, the Commission does not have authority to issue an advisory opinion to Public Entity on whether it will or will not permit other public officers or employees to make referrals to the business entity.

B. RELEVANT STATUTES

1) Declared Nevada Public Policy on Government Ethics

NRS 281A.020 (1) provides:

1. It is hereby declared to be the public policy of this State that:
 - (a) A public office is a public trust and shall be held for the sole benefit of the people.
 - (b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.

2) Commitment in a Private Capacity

NRS 281A.065 provides:

“Commitment in a private capacity,” with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

1. Who is the spouse or domestic partner of the public officer or employee;
2. Who is a member of the household of the public officer or employee;
3. Who is related to the public officer or employee, or to the spouse or domestic partner of the public officer or employee, by blood, adoption, marriage or domestic partnership within the third degree of consanguinity or affinity;
4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;
5. With whom the public officer or employee has a substantial and continuing business relationship; or
6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subsections 1 to 5, inclusive.

3) Pecuniary Interest

NRS 281A.139 “Pecuniary interest” provides:

“Pecuniary interest” means any beneficial or detrimental interest in a matter that consists of or is measured in money or is otherwise related to money, including, without limitation:

1. Anything of economic value; and
2. Payments or other money which a person is owed or otherwise entitled to by virtue of any statute, regulation, code, ordinance or contract or other agreement.

4) Code of Ethical Standards – NRS 281A.400

NRS 281A.400(1), (2), (3), (5), (7) and (10) provide, in relevant part:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in the public officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties.

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, "unwarranted" means without justification or adequate reason.

3. A public officer or employee shall not participate as an agent of government in the negotiation or execution of a contract between the government and 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.

5. If a public officer or employee acquires, through the public officer's or employee's public duties or relationships, any information which by law or practice is not at the time available to people generally, the public officer or employee shall not use the information to further a significant pecuniary interest of the public officer or employee or any other person or business entity.

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 a significant personal or pecuniary interest of the public officer or employee. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer or employee who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

↳ If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

10. A public officer or employee shall not seek other employment or contracts for the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity through the use of the public officer's or employee's official position.

5) Disclosure and Abstention

NRS 281A.420(1) provides:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

- (a) Regarding which the public officer or employee has accepted a gift or loan;
- (b) In which the public officer or employee has a significant pecuniary interest; or
- (c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interests of another person,
 - ↳ without disclosing information concerning the gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of the person that is sufficient to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's significant pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such a disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

V. DECISION

A. NRS 281A.400 - THE CODE OF ETHICAL STANDARDS

Public Employee is a public employee who must commit to avoid conflicts between Public Employee's private interests and those of the general public which Public Employee serves. Pursuant to NRS 281A.065, Public Employee has a commitment in a private capacity to both the interests of Public Employee's relative. In furtherance thereof, Public Employee has a duty to avoid actual and perceived conflicts of interest, and Public Employee may not use Public Employee's current public position to secure or grant unwarranted privileges, preferences, exemptions or advantages for Public Employee or Public Employee's relative, including the business entity. See NRS 281A.020 and NRS 281A.400.

Public Employee's public duties include compliance with the Code of Ethical Standards set forth in NRS 281A.400. Several sections of NRS 281A.400 are implicated when the interests of a relative listed in NRS 281A.065, and their associated business and employment interests, converge with the public duties of a public officer or employee, including:

1. NRS 281A.400(1) – seeking or accepting an employment or economic opportunity which would tend to improperly influence a reasonable person to depart from public duties.
2. NRS 281A.400(2) – using a public position to secure an unwarranted privilege/advantage.
3. NRS 281A.400(3) – participating as agent of government on a private contract in which one holds a significant pecuniary interest.

4. NRS 281A.400(5) – using information not publicly available, which is obtained through public duties or relationships to further a significant pecuniary interest or a commitment in a private capacity.
5. NRS 281A.400(7) – using government time, property, equipment or facility to further a private interest or private commitment.
6. NRS 281A.400(10) – seeking employment/contracts through use of a public position.

As the Commission opined in *In re Spiegel*, Comm’n Op. No. 15-25A (2015), “[t]he Ethics Law does not prohibit a public officer [or public employee] from pursuing private interests and engagements; however, it does set limitations on the nature and extent of the same to ensure the public officer maintains the appropriate separation between his or Public Employee’s private matters and public duties. In opinions applying the provisions of NRS 281A.400, the Commission has reviewed the circumstances on a case-by-case basis to determine whether there has been a use of a public position to seek or gain a business opportunity or private employment. In *In re Public Employee*, Comm’n Op. No. 18-080A (2019), the Commission found that a public employee’s conduct in using a public position and associated relationships with vendors implicated the improper use of a public position under the Ethics Law. Further, it is inappropriate to use a public position to access a target customer base for a private business or to market private services. See *In re Public Employee*, Comm’n Op. No. 16-72A (2017) at p. 7. Albeit a worthwhile cause for the anticipated business entity to provide services that are consistent with the work of Public Entity, the public must have faith that Public Employee is acting in the best interests of Public Entity and the public and is not directing business to Public Employee’s relative’s business entity.

The Commission takes this opportunity to commend Public Employee for seeking preventative guidance on the application of the Ethics Law to Public Employee’s public duties, if Public Employee’s relative proceeds to establish the proposed business entity. However, Public Employee’s commitment in a private capacity to Public Employee’s relative under NRS 281A.065 creates conflicts for Public Employee when such interests implicate Public Employee’s public duties. Even though the business entity would be performing worthwhile and some similar functions as those conducted by Public Entity, the business entity has its own business interests, including operational matters and associated costs of staff and operations.

Consequently, if Public Employee were to make referrals to Public Employee’s relative’s business entity or provide it other benefits or privileges in Public Employee’s capacity as an employee of Public Entity, these activities would provide particular benefits, privileges and economic opportunities for Public Employee’s relative that would be unwarranted, and tend to improperly influence a reasonable person in Public Employee’s position to depart from the faithful and impartial discharge of public duties.³ Consequently, in order to avoid a violation of NRS 281A.400, the Commission advises Public Employee to refrain from using Public Employee’s public position to make referrals to Public Employee’s relative’s business entity or providing it with any other benefits or privileges. See *also* NRS 281A.020.

³ As indicated in the Overview of Issues, the Commission does not have authority over Public Employee’s relative, nor does it determine policy for Public Entity applicable to referrals to any business entity. Public Entity may determine what referrals to a business entity benefits and is complementary to its programming goals.

B. DISCLOSURE AND ABSTENTION REQUIREMENTS

“The public judges its government by the way public officials and employees conduct themselves in the posts to which they are elected or appointed. The people have a right to expect that every public official and employee will conduct himself/herself in a manner that will preserve public confidence in and respect for the government that the public officer or employee represents. Such confidence and respect can best be promoted if every public official and employee uniformly avoids both actual and potential conflicts between their private self-interest and the public interest. Helping public officials and employees achieve these goals is one of the objectives of the Ethics Law...” *In re Public Officer*, Comm’n Op. No. 13-86A (2014).

The duties of disclosure and abstention are rooted in preserving the public’s trust in its public officers and employees. These obligations are separately enforceable from the Code of Ethical Standards set forth in NRS 281A.400. In particular, “[a] public officer/employee has an obligation to preserve the public trust and commit himself to avoid conflicts between his private interests and public duties. Where these conflicts arise in the context and consideration of public matters, the public officer/employee may, under certain circumstances, honor his obligations through appropriate disclosures and abstentions.” *In re Public Officer*, Comm’n Op. No. 13-78A (2014). Specifically, the disclosure obligations of the Ethics Law require disclosure in matters: (1) in which a public officer or employee has accepted a gift or loan; (2) in which the public officer or employee has a significant pecuniary interest; or (3) which would reasonably be affected by the public officer’s or employee’s commitment in a private capacity to the interests of another person. NRS 281A.420(1).

Consistent with NRS 281A.420(1) and opinion precedent, if Public Employee’s relative establishes the business entity, in addition to compliance with NRS 281A.400, Public Employee is advised to make a proper disclosure to the organizational head of Public Entity in order to avoid any associated conflicts of interest and appearances of impropriety. See *In re Public Officer*, Comm’n Op. No. 11-26A (2012) at p. 4. The purpose of the disclosure is to provide sufficient information regarding the conflict of interest to inform the supervisory head of the organization about the full nature and extent of the conflict and the potential effect the matter has on Public Employee’s private interests and commitments. It makes no difference whether the effect constitutes a benefit or a detriment because the requirement established in NRS 281A.420(1) is one of proper disclosure. The disclosure will duly inform the supervisory head of Public Entity about the nature of the conflict of interest, so proper direction may be instituted to avoid the conflict and protect the public trust.

VI. CONCLUSIONS OF LAW

1. Public Employee is a “public employee,” as defined by NRS 281A.150.
2. Pursuant to NRS 281A.675, the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to the public officer or employee under NRS 281A.665.
3. Public Employee is advised to comply with the requirements of the Code of Ethical Conduct set forth in NRS 281A.400, and refrain from using Public Employee’s public position in furtherance of Public Employee’s relative’s interests including those associated with the proposed business entity.

4. In order to affirmatively avoid conflicts of interests and potential violations of the disclosure and abstention requirements of NRS 281A.420, Public Employee is advised to properly disclose and abstain on any matter relating to Public Employee's relative's interests, including the proposed business entity.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

The following Commissioners participated in this opinion.

Dated this 23rd day of January, 2020.

NEVADA COMMISSION ON ETHICS

By: /s/ Cheryl A. Lau
Cheryl A. Lau, Esq.
Chair

By: /s/ Teresa Lowry
Teresa Lowry, Esq.
Commissioner

By: /s/ Keith A. Weaver
Keith A. Weaver, Esq.
Vice-Chair

By: /s/ Philip K. O'Neill
Philip K. O'Neill
Commissioner

By: /s/ Brian Duffrin
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