



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

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

Advisory Opinion No. 19-096A

Former Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Former Public Officer ("Public Officer") for Public Entity ("Public Entity"), State of Nevada, requested this advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.675 regarding the propriety of Public Officer'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 holding an advisory-opinion hearing.¹ The Commission considered the request for an advisory opinion, testimony provided by Public Officer that Public Officer affirmed as true, and publicly available information.

Public Officer seeks an opinion from the Commission regarding the applicability of the Ethics Law and its "cooling-off" requirements set forth in NRS 281A.410 and NRS 281A.550(3) to Public Officer's prospective services for a private client relating to two pending matters filed with Public Entity. After fully considering Public Officer's request and analyzing the facts, circumstances and testimony Public Officer presented, the Commission deliberated and advises that the "cooling-off" provisions of NRS 281A.410(1)(b) are applicable and Public Officer is prohibited from providing paid representation or consulting services to a private person on any issue under consideration during the term of Public Officer's public service for Public Entity. NRS 281A.410(1)(b) applies to services that may be provided to a client of Public Officer's employer, Private Employer. ("Private Employer"). In addition, the Commission provides guidance on the scope of conduct regulated by the provisions of NRS 281A.550(3) should Public Officer seek employment with any other person, business or entity regulated by Public Entity.

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 testimonial evidence provided by Public Officer. For the purposes of the conclusions offered in this opinion, the Commission's findings of fact set forth in the full-written opinion accept as true those facts Public Officer 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 opinion. Although the full written opinion was served on Public Officer, 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 the requester.²

¹ The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Weaver and Commissioners Gruenewald, Lowry, 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 advisory opinion, public

II. QUESTION PRESENTED

Public Officer seeks guidance on the application of the Ethics Law to Public Officer's circumstances. Specifically, Public Officer asks whether the "cooling-off" provisions of the Ethics Law set forth in NRS 281A.410(1)(b) or NRS 281A.550(3) would prohibit Public Officer, for one year after Public Officer's separation from public service, from providing private services to a prospective client that is regulated by Public Entity. If NRS 281A.550(3) applies, Public Officer seeks relief from its strict application pursuant to NRS 281A.550(6).

III. FINDING OF FACTS

1. Public Officer was formerly employed by Public Entity.
2. Public Entity is responsible for regulating certain licensing matters and holds proceedings and issues rulings applicable to such matters.
3. Public Officer's former duties for Public Entity were associated with processing licensing matters and issuing associated rulings.
4. Prior to Public Officer's separation from public service, Public Officer performed public duties that included access to certain confidential information pertaining to the anticipated private services to be provided to the prospective business client.
5. After separating from public service, Public Officer became employed by Private Employer that provides consulting work on matters not regulated by Public Entity.
6. Given Public Officer's knowledge of matters regulated by Public Entity, Public Officer was requested by a prospective client to provide certain representation and consulting services on certain matters pending before Public Entity, and if such services are restricted by the Ethics Law, Public Officer confirms that Public Officer will comply with applicable law.
7. Public Officer did not perform any public duties for Public Entity pertaining to the prospective client or its pending licensing matters. However, some of Public Officer's public duties had connectivity to the pending licensing matters.
8. Public Officer characterizes the connectivity between the proposed consulting services and the former public duties of Public Officer as a "gray area."
9. All public filings with Public Entity are considered public records, and there are no internal files having proprietary trade secrets pertaining to the regulated entity, to which Public Officer was privy during Public Officer's public service for Public Entity.
10. Based upon the differences between Public Officer's public duties and the anticipated work for the prospective client, Public Officer does not believe the representation should be precluded.

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).

11. During Public Officer's last year of public service, Public Officer performed activities that controlled or influenced a decision, investigation or other action that significantly affected the regulated business or industry.
12. If the Commission determines that the prohibitions set forth in NRS 281A.550(3) apply, Public Officer seeks relief from their strict application pursuant to NRS 281A.550(6) based upon the following:
 - a. The ability to provide competent consulting services on matters that Public Officer was not involved in at the Public Entity is in the best interest of the public.
 - b. The ethical integrity of Public Entity is not jeopardized because the conflict can be controlled.
 - c. Public Officer's view that the services provided to Public Entity are dissimilar to the services Public Officer anticipates providing to the prospective client.

IV. STATEMENT OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

The Ethics Law promotes public integrity through the appropriate separation between public duties and private interests by Nevada's public officers and employees. In furtherance of that mission, the Ethics Law imposes a one-year "cooling-off" requirement against former public officers and employees to prevent these government actors from using any proprietary or regulatory information or relationships belonging to the public to create competitive disadvantages or other misuse of government information in the private sector regulated by the governmental entity.

Based upon Public Officer's former service for Public Entity, Public Officer is a public officer as that term is defined in NRS 281A.160 and NRS 281A.180. Public Officer seeks guidance from the Commission on whether NRS 281A.410(1)(b) or NRS 281A.550(3) restrict Public Officer from providing private services to a prospective client on its pending matters with Public Entity. If NRS 281A.410(1)(b) applies, public officer will not provide the private services to the prospective client. If NRS 281A.550(3) applies, Public Officer requests relief from the strict application pursuant to NRS 281A.550(6).

B. RELEVANT STATUTES

1. Duty to Avoid Conflicts of Interest

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. “Cooling-Off” – Representing or Counseling

NRS 281A.410(1)(b), (2) and (3) provide:

In addition to the requirements of the code of ethical standards:

1. If a public officer or employee serves in a state agency of the Executive Department or an agency of any county, city or other political subdivision, the public officer or employee:

...
(b) If the public officer or employee leaves the service of the agency, shall not, for 1 year after leaving the service of the agency, represent or counsel for compensation a private person upon any issue which was under consideration by the agency during the public officer’s or employee’s service. As used in this paragraph, “issue” includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations.

...
2. Except as otherwise provided in subsection 3, a State Legislator or a member of a local legislative body, or a public officer or employee whose public service requires less than half of his or Public Officer’s time, may represent or counsel a private person before an agency in which he or Public Officer does not serve.

3. A member of a local legislative body shall not represent or counsel a private person for compensation before another local agency if the territorial jurisdiction of the other local agency includes any part of the county in which the member serves. The Commission may relieve the member from the strict application of the provisions of this subsection if:

(a) The member files a request for an advisory opinion from the Commission pursuant to NRS 281A.675; and

(b) The Commission determines that such relief is not contrary to:
(1) The best interests of the public;
(2) The continued ethical integrity of each local agency affected by the matter; and

(3) The provisions of this chapter.

3. “Cooling-Off” – Accepting Employment with Regulated Entity and Relief from Statute

NRS 281A.550(3) and (6) provide:

3. In addition to the prohibitions set forth in subsections 1 and 2, and except as otherwise provided in subsections 4 and 6, a former public officer or employee of a board, commission, department, division or other agency of the Executive Department of State Government, except a clerical employee, shall not solicit or accept employment from a business or industry whose activities are governed by regulations adopted by the board, commission, department, division or other agency for 1 year after the termination of the former public officer’s or employee’s service or period of employment if:

(a) The former public officer’s or employee’s principal duties included the formulation of policy contained in the regulations governing the business or industry;

(b) During the immediately preceding year, the former public officer or employee directly performed activities, or controlled or influenced an audit,

decision, investigation or other action, which significantly affected the business or industry which might, but for this section, employ the former public officer or employee; or

© As a result of the former public officer's or employee's governmental service or employment, the former public officer or employee possesses knowledge of the trade secrets of a direct business competitor.

...

6. A current or former public officer or employee may file a request for an advisory opinion pursuant to NRS 281A.675 concerning the application of the relevant facts in that person's case to the provisions of subsection 3 or 5, as applicable, and determine whether relief from the strict application of those provisions is proper. If the Commission determines that relief from the strict application of the provisions of subsection 3 or 5, as applicable, is not contrary to:

(a) The best interests of the public;
(b) The continued ethical integrity of the State Government or political subdivision, as applicable; and

© The provisions of this chapter,
→ it may issue an advisory opinion to that effect and grant such relief.

V. DECISION

The focus of this request is the "cooling-off" prohibitions of the Ethics Law under NRS 281A.410(1). The Legislature has identified limited circumstances in which a public employee may be restricted in future employment endeavors in the private sector so as not to dilute the public's faith in government. Notably, the Legislature, in enacting the distinct and separately enforceable restrictions in NRS 281A.410 and NRS 281A.550, has not prohibited all future private income or employment opportunities. Each statute has a varied focus, but similarly serve to protect the public trust and associated relationships acquired during public service, or expertise obtained as a result of public duties. The Legislature enacted NRS 281A.410(1)(b) to restrict for a period of one year, the representation, counseling and employment engagements that directly signal impropriety when they converge with private sector income and employment opportunities.

The Commission considers Public Officer's circumstances in representing the prospective client on matters pending with Public Entity, to determine whether any or all identified matters constitute issues under consideration pursuant to NRS 281A.410(1)(b). Second, the Commission provides education on the application of NRS 281A.550(3) and the scope of the "cooling-off" restrictions established in NRS 281A.550(3), but under these circumstances, the Commission need not address relief from the strict application of these provisions under NRS 281A.550(6).

A. NRS 281A.410(1)(b) – COUNSELING OR REPRESENTING A PRIVATE PERSON FOR COMPENSATION ON ISSUES UNDER CONSIDERATION BY PUBLIC ENTITY

Public Officer seeks to represent a prospective client of Private Employer on matters that were filed with Public Entity during Public Officer's public service. Public Officer believes Public Officer may represent the prospective client without violating NRS 281A.410(1)(b) because the services would not conflict with maintaining the ethical integrity of Public Entity and Public Officer's former public duties for Public Entity did not relate to the potential client's pending matters.

NRS 281A.410(1)(b) restricts representing or counseling any private person (including an employer or other business entity or its clients) on any issue that was under consideration by the employing agency during the employment of a public officer or employee. See also *In re Public Employee*, Comm'n Op. No. 18-015A (2018), at pgs. 8-9 and *In re Public Officer*, Comm'n Op. No. 16-68A (2016), at pgs. 8-9. An issue under consideration includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations. See NRS 281A.410(1)(b). Further, private employment duties associated with representing or counseling to a private employer, who represents the interests of others, is encompassed in the restriction. See *In re Sweeney*, Comm'n Op. No. 15-70C (2016), (violation found even where the former employee did not realize Public Officer's counseling or representation of a private person (Public Officer's private employer) was restricted by NRS 281A.410(1)(b)). Except as specifically provided otherwise in NRS 281A.410(2) and (3), the statutory restrictions are mandatory, not subject to relief, and apply even when the provisions of NRS 281A.550 do not.

The proposed consulting services pertain to matters pending before Public Entity, which were pending when Public Officer was employed by Public Entity. Public Officer confirmed that Public Officer had not previously reviewed or worked on such matters and the matters were in their infancy in the administrative process. Further, Public Officer believes the proposed services to be provided are sufficiently dissimilar to Public Officer's former public duties.

Based upon the record, the Commission determines that matters pertaining to the prospective client's matters constitute issues under consideration under NRS 281A.410(1)(b) for three principle reasons: (1) the statutory language of NRS 281A.410(1)(b) confirms that the matters constitute an issue under consideration within the scope of the statute; (2) the statute does not provide an exception if the matter was not worked on by the public officer/employee; and (3) Public Officer's public duties have connectivity to the proposed services for the prospective client.

The statutory language and associated restrictions established in NRS 281A.410(1)(b) only require the issues be pending before the employing public agency. The statute makes no discernable distinction based upon whether the public officer/employee participated in the matter or what stage of proceedings a matter has or will traverse. Here, Public Officer's lack of knowledge of pending matters before Public Entity is not itself definitive, because Public Officer's position would have afforded Public Officer's access to information pertaining to the pending matters during the term of public service. As confirmed in *In re Public Officer*, Comm'n Op. No. 17-04A (2017):

NRS 281A.410 does not require the public officer or employee to have specific knowledge regarding the issue under consideration by the agency during their public service. It is sufficient that the issue was under consideration by the public agency and that the public officers and employees had access to the information during their term of service.

Public Officer's public duties for Public Entity provided access to confidential communications pertaining to matters connected to the prospective client's matters. Also, Public Officer's public duties for Public Entity were sufficiently similar to the duties anticipated to be provided to the prospective client including having certain connectivity thereto. The Commission is not satisfied that the pending matters should be categorized

as a new or a distinctly unrelated issue given the circumstances.³ Further, relief from the strict application of NRS 281A.410(1)(b) is only available to part-time Legislators and members of local legislative bodies under NRS 281A.410(2) and (3), which relief does not apply to Public Officer's former public position. Therefore, the Commission may not provide relief from the required provisions of NRS 281A.410(1)(b) and advises Public Officer that Public Officer may not, for one year after Public Officer's date of separation from public service, represent or counsel any clients upon any issue that was under consideration by Public Entity during Public Officer's tenure pursuant to NRS 281A.410(1)(b). See *In re Public Employee*, Comm'n Op. No. 11-96A (2012). Specifically, the Commission confirms that the prospective client's pending matters were issues under consideration by Public Entity during Public Officer's tenure of public service.

B. THE "COOLING-OFF" PROVISIONS OF NRS 281A.550(3) APPLY TO PUBLIC OFFICER IF EMPLOYMENT IS SOUGHT RELATED TO THE REGULATED INDUSTRY

Pursuant to NRS 281A.665, the Commission takes this opportunity to guide Public Officer on the implications of NRS 281A.550(3). Under NRS 281A.550(3), Public Officer, is prohibited from soliciting or accepting employment from an entity or industry whose activities are regulated by Public Entity for one year after the termination of Public Officer's public service if any of the following criteria are met: (a) Public Officer's principal public duties included formulating policy contained in regulations governing certain businesses (NRS 281A.550(3)(a)); (b) Within the immediately preceding year, Public Officer directly performed activities, or controlled or influenced an audit, decision, investigation or other action, which significantly affected the business or industry which might otherwise employ Public Officer's (NRS 281A.550(3)(b)); or (c) Public Officer has obtained trade secrets of a direct business competitor (NRS 281A.550(3)(c)). The presence of any one of the criteria set forth in NRS 281A.550(3)(a), (b) or (c) is sufficient to apply the "cooling-off" provisions to the former public officer or employee.

Because Public Officer performed activities that controlled or influenced a decision, investigation or other action that significantly affected the regulated business or industry during the last year of employment, the statutory provisions of NRS 281A.550(3) are implicated. Here, Public Officer anticipates providing professional consulting services through Private Employer for a client that is regulated by Public Entity.⁴ See *In re Public Officer*, Comm'n Op. No. 13-09A (2013). These circumstances are distinguishable from *In re Public Officer*, Comm'n Op. 16-58C (2016), which indicates that NRS 281A.550 does not apply to a nonregulated employer because the former public officer did not intend to and agreed not to represent clients regulated by the former board.

³ Based upon the presented circumstances, the Commission is concerned about inadvertently exposing the confidentiality of Public Entity's protected information/proceedings, which could occur if it were to categorize the pending matters as a new matter instead of an issue under consideration during Public Officer's public service.

⁴ A public officer may not avoid application of the "cooling-off" statutes by asserting that the "employment" is with a private firm that is not regulated by the agency, instead of a direct employment relationship with the regulated business or person. The Commission has previously opined that "employment" in the context of cooling-off statutes includes employment through a consulting firm and/or as an independent contractor because this arrangement effectively establishes an employment relationship with the regulated business. The Commission has confirmed it is the nature, scope and content of the engagement that are determinative and the statutory references to employment in NRS 281A.550 include engaging the services of the public officer or employee for compensation in any business form that is available. *In re Public Officer*, Comm'n Op. No. 13-09A (2013).

However, Public Officer has confirmed that, if NRS 281A.410(1)(b) restricts the provision of the proposed consulting services, Private Employer would not represent the client. Because the Commission determined the proposed consulting services are restricted by NRS 281A.410(1)(b) as “issues under consideration,” the circumstances do not demonstrate that Private Employer will render services to the potential client pertaining to regulated matters. Consequently, the Commission determines that NRS 281A.550(3) does not apply to Public Officer’s current employer because it is not a regulated entity, it does not (and will not) have clients who are regulated by Public Entity during the restricted time period and Public Officer has pledged compliance with NRS 281A.410(1)(b), which precludes Public Officer from representing the prospective client because the services requested by such client only pertain to issues that were under consideration during Public Officer’s tenure with Public Entity.

However, if Public Officer’s circumstances were to change within one year of Public Officer’s separation from Public Entity, NRS 281A.550(3) should be reviewed for application. NRS 281A.550(3) would restrict Public Officer from seeking or obtaining employment with the regulated business or industry during the restricted period unless Public Officer seeks and obtains relief from the Commission under NRS 281A.550(6). This guidance is provided so that Public Officer will comply with the Ethics Law in the future if Public Officer contemplates such employment. Public Officer is advised to use the Commission’s advisory opinion process to request relief under NRS 281A.550(6), before soliciting or accepting such an employment opportunity. See NRS 281A.550(9).

VI. CONCLUSIONS OF LAW

1. Public Officer is a public officer as defined by NRS 281A.160 and NRS 281A.180.
2. Pursuant to NRS 281A.675 and NRS 281A.550(6), 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 under NRS 281A.665.
3. Pursuant to NRS 281A.410(1)(b), Public Officer may not represent or counsel a private person or entity for at least one year after Public Officer’s separation from public service on any issues that were under consideration by Public Entity during Public Officer’s tenure including, without limitation, providing services to the prospective client on matters that were pending before Public Entity.
4. Given the public duties associated with Public Officer’s former public position, Public Officer is subject to the “cooling-off” provisions of NRS 281A.550(3). However, based upon the presented circumstances, Public Officer’s current private employment is not with a regulated entity and is not otherwise restricted by the Ethics Law and its interpretative opinions.

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

Dated this 6th day of February, 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: Absent
Philip K. O'Neill
Commissioner

By: Absent
Brian Duffrin
Commissioner

By: /s/ Kim Wallin
Kim Wallin
Commissioner

By: /s/ Barbara Gruenewald
Barbara Gruenewald, Esq.
Commissioner

By: /s/ Amanda Yen
Amanda Yen, Esq.
Commissioner