

Abstract of Opinion No. 90-5

BEFORE THE NEVADA COMMISSION ON ETHICS

This opinion is in response to the request of a county commissioner. There are several questions posed by the opinion request, and each will be addressed in separate sections.

The Nevada Commission on Ethics takes jurisdiction in this matter pursuant to NRS 281.511.

This matter came before the Commission, meeting in executive session, at which time the Commission heard testimony from the commissioner. The Commission thereafter met for deliberations in executive session on that same day. Based upon the foregoing, the Commission makes these Findings of Fact and issues the opinion that follows:

FINDINGS OF FACT

1. The commissioner serves on a county board of county commissioners as vice-chairman.
2. The commissioner was appointed to a task force charged with the responsibility to study existing waste management practices and problems in the county and to recommend a waste management ordinance.
3. The task force consists of two county commissioners, one councilman each from two metropolitan areas and one member each from the hotel/motel industry and solid waste franchisee, and two members each from waste management industries and citizens-at-large.
4. The commissioner's brother is a stockholder in a corporation which holds a county secondhand dealer's license.
5. The commissioner does not own stock in the corporation nor does he receive any pecuniary remuneration from the corporation. The commissioner does not live with his brother nor does he share expenses with his brother.
6. The commissioner has resigned from the task force.
7. The commissioner shares a common grandfather with a local attorney.
8. The attorney represents the owners of a mansion who were awarded a zoning use permit to conduct business at the mansion.
9. The matter is before the county commission to hear complaints from neighbors that the business concern has not kept up the conditions placed on the zoning use permit. The owners will be represented by the attorney before the county commission.
10. The commissioner does not share a home or expenses with the attorney and has no interest in his law practice.
11. The commissioner owns partial interest in a (jewelry) store and thus holds a secondhand dealer's license in the county and one of the cities situated in the county.

OPINION

I. Generally

Based on the Findings of Fact, the Commission concludes that the commissioner is a public officer as defined by NRS 281.4365(1).

The Legislative Declaration and Findings which express the public policy of the Nevada Ethics in Government Law appear at NRS 281.421:

281.421 Legislative declaration and findings.

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 to avoid conflicts between his private interest and those of the general public whom he serves.

2. The Legislature finds that:

- (a) The increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interest.
- (b) To enhance the people's faith in the integrity and impartiality of public officers and employees, adequate guidelines are required to show the appropriate separation between the roles of persons who are both public servants and private citizens.

Consistent with that policy and the specific provisions of the Code of Ethical Standards (NRS 281.481 -281.511, inclusive), the opinions of the Commission may include guidance to the public official pursuant to NRS 281.521(1):

1. The commission's opinions may include guidance to a public officer or employee on questions of whether:

- (a) A conflict exists between his personal interest and his official duty.
- (b) His official duties involve the use of discretionary judgment whose exercise in the particular matter would have a significant effect upon the disposition of the matter.
- (c) The conflict would materially affect the independence of the judgment of a reasonable person in his situation.
- (d) He possesses special knowledge which is an indispensable asset of his public agency and is needed by it to reach a sound decision.
- (e) It would be appropriate for him to withdraw or abstain from participation, disclose the nature of his conflicting personal interest or pursue some other designated course of action in the matter.

II. DISCLOSURE

The standards to which public officers and employees must conform their conduct are found at 281.481.

NRS 281.481 General Requirements

....

- (2) Use his position in government to secure or grant unwarranted privileges, preferences, exemptions, or advantages for himself, any member of his household, any business entity in which he has a significant pecuniary interest.
- (3) No public officer or employee may approve, disapprove, vote, abstain from voting, or otherwise act upon any matter in which he has a significant pecuniary interest without disclosing the full nature and extent of his interest. Such disclosure must be made before the time when he is to perform his duty or concurrently with that performance. If the officer or employee is a member of a body which makes decisions, he shall make disclosure to the chairman and other members of the body. If the officer or employee is not a member of

such a body and holds appointive office, he shall make disclosure to the supervisory head of his organization or if he holds an elective office, to the general public in the area from which he is elected.

Disclosure is required if the public official or employee has a significant pecuniary interest in the matter pending before him or her. Such a significant pecuniary interest must be personal to the public official or employee.

III. Abstention

Additional standards govern the conduct of members of the legislative branch when performing a legislative function. NRS 281.501 states in pertinent part:

1. In addition to the general requirements of the code of ethical standards, a member of the legislative branch should not vote upon but may otherwise participate in the consideration of the matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
 - (a) His acceptance of a gift or loan;
 - (b) His pecuniary interest; or
 - (c) His commitment in a private capacity to the interest of others.

QUESTION 1

Does the Nevada Code of Ethical Standards prevent the commissioner from participation as a member of the task force, or from voting as a county commissioner on any ordinance affecting waste management?

The task force is faced with the responsibility to study existing waste management practices within the county and to recommend an ordinance. Prior to his resignation from the task force, the commissioner was to participate fully in review of the current status of waste management in the county and recommend an ordinance. Currently, the existing contract for waste collection in the county is a sole source contract with a particular company. The decision of the task force to recommend an ordinance will affect the waste management industry in the county. This ordinance will set the overall scheme for waste management, including who may or may not conduct the business of waste management. The commissioner's brother is a member of this industry by virtue of his ownership of a corporation which deals with this industry. He will be personally affected by the outcome of any decision of the task force and the ultimate decision of the county commission in adopting the ordinance as recommended by the task force or amended by the county commission. The effort of the task force may have the net result of so restricting the business of waste management that the commissioner's brother may no longer be able to do business.

The commissioner's concerns arise out of his relationship with his brother, who is in the waste management business and who will be affected by the adoption of any ordinance. The commissioner has no pecuniary interest in his brother's business. Having no such interest takes the commissioner out of the purview of NRS 281.481 (3) which requires the disclosure of any significant pecuniary interest regarding the development of the ordinance and indeed the consideration of any proposed ordinance at the county commission level.^[1] The second inquiry raised by the opinion request in this factual situation is whether the commissioner may participate in the task force and ultimately vote on the final version of the proposed ordinance, whatever that may be. A discussion of the language governing the additional standards for members of the legislative branch is illuminating.

NRS 281.501 (1) advises that a member of the legislative branch should not vote but may otherwise participate in the consideration of the matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by, in this instance, his commitment in a private capacity to the interest of others. Regardless of the affect upon his independence of judgment, the clear language of the statute provides for

the participation of the commissioner in the task force.^[2]

The additional standards for voting embodied in NRS 281.501 provide for a member of the legislative branch of government (as a member of a county commission is when voting on an ordinance) to abstain from voting when (c) his commitment in a private capacity to the interest of another materially affects the independence of judgment of a reasonable man in his situation. The relationship of brothers necessarily imposes some degree of commitment or concern from one brother to another. Whether it materially affects the independence of judgment is a question of fact which must be analyzed on a case-by-case basis. In this instance, the relationship of brother to brother must be weighed against the public policy considerations of adopting a comprehensive scheme of regulation which:

- 1) would determine how waste would be collected;
- 2) what rules pertain to the collection, transportation and recycling of waste would be;
- 3) who would be allowed to compete in the collection, transportation and recycling; and
- 4) what would the criteria be for being given a franchise.

The commissioner's brother's very livelihood will be affected by the determination of the nature of the ordinance. Due to the tremendous impact the ordinance may have on his brother, the commissioner's commitment to his brother would materially affect the independence of judgment of a reasonable man in his circumstances and therefore he must abstain from voting on any ordinance proposed by the task force. The commissioner may however participate in the consideration of the matter under the current codification of NRS 281.501.^[3]

QUESTION 2

Does the Nevada Code of Ethical Standards prevent the commissioner's participation as a county commissioner when individuals appearing before the board of county commissioners on business are represented by his cousin?

The question posed by this inquiry calls into question the very nature of the commissioner's relationship with his cousin. The Commission has previously determined in advisory opinions that the relationship of a husband to a wife creates a commitment in a private capacity to the interest of another. Additionally, the Commission has determined that the relationship of a brother to sister creates the commitment in a private capacity to the interest of another. Whether this commitment in a private capacity to the interest of another materially affects the independence of judgment of a reasonable person in the public official's position must be decided on a case-by-case basis. It is reasonable to conclude that the family relationship of cousin to cousin could create a commitment in a private capacity to the interest of his cousin. It is also reasonable to conclude that when a family member appears directly in front of a body which makes decisions concerning the interests of a person he is representing, the direct nature of the appearance (with the family members standing face to face) would materially affect the independence of judgment of a reasonable person such that it would require the abstention of the public official when voting on the matter pending regardless of the attenuated relationship. In the instant matter, given the above analysis, the commissioner should abstain from participation in the consideration of the application of a zoning use permit when the individual is represented by his cousin. The analysis of when a familial relationship materially affects the independence of judgment is not limited to the nature of the relationship. It must be evaluated in light of the context in which the relationship may impact the judgment of the individual."

QUESTION 3

The commissioner owns part interest in a jewelry store and therefore holds a secondhand dealers license in the county and in the city. Do these facts preclude the commissioner from voting on all waste management issues? Should he abstain from voting on zoning issues for other jewelry businesses?

Addressing the commissioner's concerns regarding his ability to vote on waste management issues, due to the fact

that he holds a secondhand dealers license requires not an analysis of the type of license he holds, rather it requires an analysis of the type of business in which he is engaged.

Secondhand dealers licenses are the licenses granted to all shops and businesses' who deal with used goods. A secondhand jewelry store, however, is a completely different type of business from a recycling business. They do not directly compete with one another, such that waste management issues would create a significant pecuniary interest requiring disclosure or abstention pursuant to NRS 281.481 and 281.5011 by the commissioner when considering such matters, simply by virtue of his holding a secondhand dealers license.

The ethics law does not preclude him from voting on all waste management issues. The simple fact that he has the license cannot by itself preclude him from the discharge of his duties. If the question remains one of broad public policy, the benefit or detriment to him is no different than that to any other member of the business.

Regarding zoning requests for other secondhand jewelry businesses, absent a specific case, the Commission cannot advise the commissioner because the opinions of the commission must be related to a specific set of facts and each zoning request may be different.

DATED: September 30, 1992.

NEVADA COMMISSION ON ETHICS

By: /s/ THOMAS R.C. WILSON, II, Chairman

[1] This opinion is based upon the ethics in government law as it exists prior to October 1, 1991. On that date the disclosure provision of NRS 281.481 (3) will be amended to require disclosure of a commitment in a private capacity to the interest of others and the acceptance of a gift or a loan, as well as the current provision which provides for disclosure of a significant pecuniary interest in a matter.

[2] This provision also changes beginning October 1, 1991.

[3] On October 1, 1991, a member of the legislative branch may no longer advocate the passage or failure of a matter, but may otherwise participate in consideration of the matter upon which he may not vote due to the considerations of NRS 281.501.