

BEFORE THE NEVADA COMMISSION ON ETHICS

This opinion is in response to the request for guidance by a state legislator.^[1] The subject matter of this opinion is whether the legislator should disclose and abstain from voting on a particular matter before the legislature because she may have a personal interest in the matter.

This matter came before the Commission in a telephone conference call in Carson City, Nevada, on May 30, 1991, at which time the Commission heard testimony from the legislator.^[2]

The Commission thereafter met for deliberations in closed 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 legislator is a public officer as defined by NRS 281.4365. She is a member of the legislative branch of government as defined by NRS 281.4355.
2. In late 1990, while managing an election campaign the legislator was involved in a crash in rural Nevada. She sustained serious injuries in the crash and has had two of the vertebrae in her back fused. To date, she has incurred approximately \$70,000 in medical expenses due to the accident.
3. The legislator has engaged the services of an attorney to assist her in pursuing a claim against the manufacturer of the vehicle involved in the crash for injuries sustained in the crash, as well as other causes of action. To date, no action has been filed against the manufacturer of the vehicle, however, the legislator anticipates that a suit will be filed in the near future.
4. Other passengers in the vehicle may not be joined in the suit that the legislator is contemplating in this matter.
5. A bill was introduced in the legislature by a committee relating to public hazards, and referred to another committee. It was passed out of committee with amendments and is currently awaiting a general vote of one house of the legislature. The bill is an act relating to public hazards; prohibiting a court under certain circumstances from knowingly entering an order or judgment which conceals information that may be useful to members of the public in protecting themselves from injury which may result from a public hazard, and declares void any provision of a contract requiring the concealment of such information. It also provides for individual action for declaratory relief by the news media or other substantially affected individuals.
6. The bill was amended in committee to provide more flexibility to courts in the declaratory relief setting. It makes the contracts voidable instead of void, as well as amending the definition of a public hazard to be covered by the act.
7. Even as amended, the legislator indicates the nature of the case which she is pursuing against the manufacturer of the vehicle may fall within the type of 'hazard' which is embodied in the bill. If it is, then a tool of settlement used in her case may no longer be available to her and could impact a decision of the parties to the matter to enter into a settlement.

OPINION

I. Generally

Based on the Findings of Fact, the commission concludes that the legislator is a public officer as defined by NRS 281.4365(1) and is a member of the legislative branch of government as defined in NRS 281.4355.

The subject of this opinion is whether the legislator has a duty to disclose, as well as abstain from, voting on the bill as she is in the present position of filing a products liability action, settlement of which could be affected by the passage of this bill.

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 interests 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 NRS 281.481.

NRS 281.481 General Requirements.

...

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.

The first consideration before the commission is whether the legislator has a significant pecuniary interest in the bill sufficient to trigger the disclosure requirements of NRS 281.481. Based upon the facts as presented, that the legislator will be filing an action and that she sustained injuries which, to date have required expenditures in excess of \$70,000.00, the commission finds that the legislator has a significant pecuniary interest in her claim against the manufacturer of the aircraft involved in the crash. The amount of that claim, as well as the timing of potential settlement of that claim, may be affected by the passage of the bill. In her letter to the commission, the legislator states that she may be asked to sign a nondisclosure clause in a potential settlement of the matter. The use of the tool of nondisclosure is an incentive which could influence the early settlement of a matter and thus affect the recovery of any litigant. In this instance the passage of the bill removes the use of this tool for settlement purposes and may have a future impact on the willingness of parties to enter into any settlement agreement.

Specifically, the legislator is contemplating an action against the manufacturer of the vehicle. That action is based upon the facts surrounding the crash in rural Nevada in late 1990. Given the nature of the interest, the legislator has, in an action against the manufacturer, and the potential impact that passage of the bill may have on her ability to settle the matter, she should disclose the full nature and extent of her interest regarding the bill at all levels of consideration of the bill including the floor of the house of the legislature. Adequate disclosure requires the legislator to disclose that she is a potential litigant in a matter which would be affected by the bill. Disclosure is required not only prior to voting or abstaining in accordance with the discussion below, but at all times the matter is debated or discussed.

III. Abstention

NRS 281.501 provides additional standards for members of the legislative branch who vote on matters pending before them.

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 a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
 - b. his pecuniary interest; or
 - c. his commitment in a private capacity to the interest of others.
2. A member of the legislative branch may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a business profession, occupation or group, is not greater than that accruing to any other member of the business, profession, occupation, or group.

The second level of analysis pertinent to the question before the commission is whether the legislator should abstain from voting on the bill in committee, and ultimately on the floor of the house. A member of the legislative branch of government is required to abstain from voting when their pecuniary interests or their commitment in a private capacity to the interests of others, materially affects the independence of judgment of a reasonable person in her circumstance. The test is an objective test, not one which is personal or subjective to the individual.

The bill which addresses public safety concerns impacted by the practice of allowing parties to litigation the ability to keep confidential public hazards, which are known to the parties, or discovered through the process of litigation. The 'group' of individuals who are affected by the bill are both plaintiffs and defendants alike. It affects all individuals present and future who either have accrued an action affected by the bill or will have an action at some future date based upon a future incident. The legislator has a present interest in the bill due to her claim against the manufacturer who constructed the plane that crashed in rural Nevada, and on which she was a passenger.

The commission has previously determined that the legislator has a significant pecuniary interest such that disclosure of her interest is required. Whether the pecuniary interest materially affects the independence of judgment of a reasonable man in her situation such that abstention is required, is the question which must now be addressed. As stated, the bill affects the broad policy concern regarding the general public's right to know of public hazards and the individual litigant's right to maintain confidentiality to foster settlement of claims. Regardless of an individual accrued claim which may be affected, the policy considerations addressed in the bill go far beyond the personal pecuniary interest the senator may have in the bill. The commission determines that due to the broad policy issue which is embodied in the bill, affecting all future actions involving 'public hazards,' the pecuniary interest of the legislator would not materially affect the independence of judgment of a reasonable man in her position. Thus the legislator may vote on the bill should it come before her.

Further, based upon the facts that are before the commission today, the legislator is among a group of individuals who have pending actions, or will accrue in the future actions which are affected by the bill. As such, the benefit or detriment accruing to her as a result of the decision either individually or as a member of the group of litigants, both plaintiffs and defendants alike, is not greater than that accruing to any other member of a group. See NRS 281.501(2). The commission's opinion could differ if in fact the legislator was presently in a situation where she had actually been requested to sign such a confidentiality clause. It appears that the action she has, while having progressed to the point where suit is anticipated to be filed, it has not progressed to the point where the tool of confidentiality in return for early settlement has been raised. The commission cannot assume that such a request will be made. Opinions of the commission must be based upon facts which are presently known. Given other facts, the opinion of the commission may differ.

The guidelines set forth in chapter 281 represent the threshold standards to which public officials and employees should conform their conduct. They offer advice and counsel to officials and employees in the daily discharge of their official duties. The guidelines are not all inclusive. The legislator is free to consider other factors which do not weigh in the decision of the commission based upon chapter 281.

DATED: June ____, 1991.

NEVADA COMMISSION ON ETHICS

By: /s/ WILLIAM MORSE,^[3] Vice Chairman

DISSENTING OPINION:

Two commissioners disagree with the conclusions reached by the other members of the Commission for the following reasons:

The legislator seeks guidance from this Commission on whether or not she has a conflict of interest and if so, can she vote on a bill when the same comes before the Legislature for consideration.

The bill contains legislation relating to public hazards prohibiting a court under certain circumstances from entering

an order or judgment which conceals information that may be useful to the members of the public in protecting themselves from injury which may result from a public hazard, and declaring void any provision of a contract requiring the concealment of such information providing an action for declaratory relief and provide other pertinent matters relating thereto. A similar bill was introduced and considered by the legislature sometime back in this session of the Legislature. The legislator abstained and refused to vote when it came before the house in which this legislator serves.

The proposed legislation has received widespread notoriety, and its proponents and its objectors have debated the subject matter widely in the halls of the legislature. The legislation relates to products liability actions and applies to any order or judgment pertaining thereto after July 1, 1991. Herein lies the problem of the legislator. The legislator was involved in a crash in late 1990, in rural Nevada, wherein she sustained serious and disabling injuries. The claimed cause of the accident will be that the vehicle was defectively manufactured and was dangerous. Her letter requesting an opinion from the commission states: "I may be requested to sign a non-disclosure or confidentiality agreement as part of any potential settlement "

There can be no other conclusion to these facts than that the proposed legislation directly affects her products liability action whether the settlement is immediate or in the future.

The facts as adopted by the Commission recognizes the threshold question of "significant pecuniary interest" as required by NRS 281.481(3) requiring the disclosure of such an interest before a public officer or employee may approve, disapprove, vote or abstain from voting or otherwise act upon a matter in which he has a "significant pecuniary interest. " The Commission, however, does not set forth how and in what manner the legislator should properly disclose, and we suggest the opinion is deficient because it does not set forth any disclosure requirements.

[4] Based on the facts which were disclosed at the meeting, we suggest the following:

- A. Date and place of accident;
- B. Name of manufacturer or manufacturers of the component parts as proposed defendants;
- C. Nature and extent of injuries;
- D. Names of persons occupying the vehicle other than the legislator;
- E. Nature of the claimed defect or defects.

After first determining that disclosure is mandatory, one must then turn to the requirements of NRS 281.501(1) and (2) to ascertain whether or not the legislator should abstain from voting.

The statutory mandate that "...a legislative member should not vote in the consideration of a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by...(b) his pecuniary interest." The legislator's "significant pecuniary interest" in this matter is a complete bar to her voting on the bill unless she falls within the purview of NRS 281.501(2) which states: "...may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a business profession, occupation or group." The foregoing opinion of the Commission concludes that the legislator falls within a broad undefined definition of an "occupation or group" where her interests are no different than that of all other potential plaintiffs who may or may not bring an action against any particular manufacturer of any product and thus concludes that she can vote because the benefit or detriment accruing to her is no different than any other person in that broad category. Clearly, "the occupation or group" that the legislator belongs to is a handful of people who were occupants in the crashed vehicle who have a claimed action against this particular vehicle manufacturer or the manufacturer of its component parts. Her "significant pecuniary interest" is patently clear

and it would clearly affect the "independence of judgment of a reasonable person in her situation." The passage or nonpassage of the bill affects her claim against the manufacturer of that particular vehicle or the manufacturer of its component parts one way or the other.

The public policy of the State of Nevada as defined in NRS 281.421(1) (b) states, "a public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves." The ethical standards as set forth in NRS 281.489 and 281.501 alluded to in the opinion are defined to assist those public officers to perform their public duties and to keep that which is private from conflicting with that which is in the public interest. The legislator should abstain from voting on any matter which has an immediate and direct effect upon her cause of action for substantial personal injuries.

By: /s/ GEORGE "BUD" ALBRIGHT, Commission Member

By: /s/ WILLIAM R. MORSE,^[5] Commission Member

^[1] This opinion is advisory in nature. It is based solely on the facts presented. Given other facts and circumstances, the opinion of the Commission may differ. The opinion interprets the Ethics in Government Law which existed prior to October 1, 1991.

^[2] Chairman Thomas Wilson II did not participate in the consideration of this matter.

^[3] The chairman of the Commission, Thomas R.C. Wilson, II, recused himself from consideration of this matter. Mr. Morse signs the majority opinion in his capacity as vice chairman.

^[4] See Ethics Commission Opinion 90-1, Lurie #2.

^[5] Mr. Morse signs the dissenting opinion in his capacity as a member of the Commission.