

Abstract of Advisory Opinion No. 93-11
BEFORE THE NEVADA COMMISSION ON ETHICS
IN THE MATTER OF THE REQUEST FOR AN ADVISORY OPINION OF PUBLIC OFFICER

This opinion is in response to an opinion request by a member of a state regulatory board (Board Member). The member is represented by legal counsel.

The Nevada Commission on Ethics (Commission) met to receive testimony and other evidence on this matter on April 2, 1993 in Las Vegas, Nevada. Testimony was given by the Board Member and other interested parties. The Board Member did not waive statutory confidentiality. Accordingly, the hearing was closed to the public and the opinion remained confidential as required by NRS 281.511(4). This hypothetical opinion is issued as required by NRS 281.511(8).

FINDINGS OF FACT

Based upon the testimony, the Commission makes the following findings of fact:

1. The Board Member is one of three members of a regulatory board, and was appointed in late 1989.
2. The board exercises regulatory and enforcement jurisdiction over an industry in Nevada.
3. The Board Member is married.
4. The Board Member's spouse is an attorney with a law firm. She is employed as an associate of the firm and is paid a fixed salary, which is for all work assigned to her, is not limited to work related to the regulatory board's jurisdiction and is not contingent upon her work in this particular area.
5. The law firm represents clients before the regulatory board. The law firm also represents and does work for clients outside of the scope of the regulatory board's statutory authority.
6. Salary payments received by the Board Member's spouse are deposited by her and maintained in a separate bank account in her name only.
7. The Board Member's spouse does work in this regulatory area and outside of this particular area for the law firm.
8. The Board Member has no knowledge of the law firm's business or work that his spouse is involved in.
9. The Board Member's spouse has no knowledge of related work involving the senior partner or other partners or employees of the law firm, as a matter of policy.
10. The Board Member and his spouse have not and will not discuss matters involving her work at the law firm or his work as a member of the regulatory board.
11. In the event the Board Member's spouse appears before the regulatory board, the Board Member will recuse himself and not participate or vote in the board's decision.
12. The Board Member, his spouse and the law firm she is employed by have and will continue in good faith to follow the foregoing policies and practices described in findings 8, 9, 10 and 11 above.

OPINION

Based upon the above stated Findings of Fact, the Commission concludes that the Board Member is a public officer as defined by NRS 281.4365.

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

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(l):

1. The Commission's opinions may include guidance to a public officer or employee on questions 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.

Reviewing the Code of Ethical Standards, the standards found in NRS 281.501(2), (3), and (4) are relevant to the Commission's present inquiry:

2. In addition to the requirements of the code of ethical standards, a member of the legislative branch shall not vote upon or advocate the passage or failure of, 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:
 - (a) His acceptance of a gift or loan;
 - (b) His pecuniary interest; or
 - (e) His commitment in a private capacity to the interests of others.It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest where the resulting benefit or detriment accruing to him is not greater than that accruing to any other member of the general business, profession, occupation or group.
3. A public officer or employee shall not approve, disapprove, vote, abstain from voting, or otherwise act upon any matter:
 - (a) Regarding which he has accepted a gift or loan;
 - (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
 - (c) In which he has a pecuniary interest, without disclosing the full nature and extent of the gift, loan, commitment or interest. Such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the chairman and other members of the body. If the officer or employee is not a

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

4. If a member of the legislative branch declares to the legislative body or committee in which the vote is to be taken that he will abstain from voting because of the requirements of this action, the necessary quorum to act upon and the number of votes necessary to act upon the matter, as fixed by any statute, ordinance or rule of a board of county commissioners or governing body of a city, is reduced as though the member abstaining were not a member of the body or committee.

NRS 281.521 requires the Commission to issue an opinion with respect to a public officer or employee as to whether, among other things, (i) a conflict exists between his personal interest and his official duty, (ii) 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, (iii) the conflict would materially affect the independence of the judgment of a reasonable person in his situation, (iv) it would be appropriate for him to disclose the nature of his conflicting personal interest, and (v) it would be appropriate for him to withdraw or abstain from participation in the matter.

NRS 281.501(3) addresses when and how a public officer or employee must make disclosure. It requires that the public officer shall not approve, disapprove, vote, abstain from voting, or otherwise act upon any matter (i) regarding which he has accepted a gift or loan, (ii) which would reasonably be affected by his commitment in a private capacity to the interest of others, or (iii) in which he has a pecuniary interest, without disclosing the full nature and extent of the gift, loan, commitment or interest. Such disclosure must be made at the time the matter is considered. If the officer is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body.

The application of these standards appears in NRS 281.501(2), which is discussed in the context of the legislative branch. One must abstain from voting or otherwise participating in the consideration of a matter with respect to which the independence of judgment of a reasonable man in his situation would be materially affected by (i) his acceptance of a gift or loan, (ii) his pecuniary interest, or (iii) his commitment in a private capacity to the interests of others.

It is against these criteria and standards that the facts as determined in the preceding Findings of Fact must be viewed.

CONCLUSION

1. The Board Member has a pecuniary interest in the salary and earnings received by his spouse, who is employed as an associate by a law firm. Her earnings become the property of the marital community, just as do his earnings or salary paid to him as a public officer by the State of Nevada. That the Board Member's spouse may deposit her salary in a separately maintained bank account by herself does not render her earnings her separate property. Even if it did, or if the parties were to agree that her earnings are her separate property, her earnings constitute her ability to contribute to the support of the marital community and remain available to the community during the marriage. As such, the Board Member has and maintains a pecuniary interest in her employment, salary and earnings.

2. The Board Member has a commitment in his private capacity to the interest of his spouse. Such a commitment is implicit in the marital relationship and can only be reasonably presumed to exist in theirs. Necessarily, his commitment to her and her interests include her employment, her professional interests, and her success and advancement as a lawyer employed by the law firm.

The law firm represents, as clients, individuals and business entities which come before the regulatory board in its exercise of licensure, regulatory and enforcement jurisdiction pursuant to its statutory authority. Whether the actions or decisions of the regulatory board are final or are advisory, such actions or decisions substantially affect the interests of such clients. The jurisdiction, actions, and decisions of the regulatory board are the subject of the work and representation of such clients by the firm, as the employer of the Board Member's spouse.

3. Both the Board Member's pecuniary interests in the earnings or salary of his spouse and his commitment in a

private capacity to the interests of his spouse and her law firm, when a matter involving her or the law firm comes before regulatory board, or the Board Member individually as a member of the board, must be disclosed. Disclosure must be made of the full nature and extent of his pecuniary interest and commitment. Such disclosure must be made at the time the matter considered is before the regulatory board, and disclosure must be made in public to the chairman and other members of the board.

4. Both the Board Member's pecuniary interest and his commitment in a private capacity to the interest of his spouse, whether together or separately, are by their nature circumstances which would materially affect the independence of judgment of a reasonable person in his situation. While the Board Member testified that he would recuse himself and not participate or vote in the board's decision involving matters on which his spouse personally appeared before the regulatory board, as discussed in Finding of Fact No. 11, there is not a substantive distinction between her appearance personally and that of another member or associate of her law firm. The criteria for recusal is not solely whether there is a pecuniary interest or there is a commitment in one's private capacity to the interests of another; such are the criteria for disclosure only. The question of whether one must recuse from voting or acting is whether the independence of judgment of a reasonable person would be materially affected by the circumstances, that is to say whether a reasonable person could effectively set aside the circumstances and judge the matter entirely independently. We can conclude only that the "reasonable person" would not likely do so in these circumstances. Accordingly, the Board Member should recuse himself from voting upon, advocating with respect to the issue, or otherwise participating in the Board's consideration and decision in these circumstances.