

Opinion No. 93-33

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion Regarding Nevada State Assemblyman RICHARD BENNETT

This opinion is in response to a request filed on June 28, 1993, with the Nevada Commission on Ethics (Commission), by D. Keith Kleven, Chairman of the Nevada State Board of Physical Therapy Examiners (Board) concerning Nevada State Assemblyman Richard Bennett. Generally, the issues in this matter are whether Assemblyman Bennett complied with the disclosure and abstention provisions of the Code of ethical Standards at NRS 281.501(2) and (3), during the 1993 legislative session, by requesting the preparation of a bill draft or otherwise acting on Assembly Bill 570 (AB 570). AB 570 provided for administration of physical therapy treatment by physical therapy assistants in the home health care setting.

A hearing on the merits of the request was held on April 5, 1994, in Las Vegas, Nevada, at which time the Commission heard testimony and accepted other evidence from Assemblyman Bennett, who was represented by Legislative Counsel Kim Morgan. Assemblyman Gene Porter also appeared and testified as a witness. Georgianna Barrett, Alex Delgado and Beverly Sygitowicz, appearing on behalf of the Nevada Board of Physical Therapy Examiners, also gave testimony and presented evidence. The opinion request and hearing were confidential pursuant to NRS 281.511(4) and (9), and accordingly, the hearing was not open to the public. Confidentiality was subsequently waived by Assemblyman Bennett. Immediately after the administrative hearing, the Commission deliberated and orally advised Mr. Bennett of its decision in the matter. The Commission incorporates its oral decision into the following Findings and renders the following Opinion.

FINDINGS

1. The Commission has jurisdiction over this matter pursuant to NRS 281.511(2).
2. During the 1993 Nevada Legislative Session, Assemblyman Bennett sat as a member of the Assembly Commerce Committee, to which Assembly Bill 570 (AB 570) was referred and considered. Assemblyman Gene Porter was the chairperson of the Commerce Committee.
3. AB 570 proposed to amend existing statutory provisions in Chapter 640 of the Nevada Revised Statutes. AB 570 would authorize physical therapy assistants to provide physical therapy treatment in the home of patients in specified circumstances under the supervision of licensed physical therapists.^[1]
4. A bill draft request for AB 570 was submitted by Assemblyman Bennett at the request of the Nevada Home Health Care Association (Association) to address delays in patients receiving physical therapy at home due to a shortage in available physical therapists to make home health care visits. The Association requested Mr. Bennett to draft the legislation after the Nevada Board of Physical Examiners failed to implement regulations providing for the administration of physical therapy by assistant physical therapists in the home health care setting.
5. Assemblyman Bennett requested the bill draft of, but did not personally sponsor AB 570. Rather, the Assembly Committee on Commerce sponsored AB 570. Assemblyman Bennett did not request any special consideration for the bill from the Committee Chairperson, Gene Porter.
6. The Board of Physical Therapy Examiners opposed AB 570. On May 19, 1993, Chairman Porter scheduled an Assembly Commerce Committee hearing on AB 570. Georgianna Barrett, a representative of the Board appeared

and testified in opposition of the bill. As part of her testimony before the Assembly Commerce Committee, Ms. Barrett testified that she thought sitting Committee member Richard Bennett had a conflict of interest in AB 570 based on his alleged professional interest in his father's home health facility, Charleston Home Health Care, Inc., which Ms. Barrett asserted would financially benefit from passage of AB 570.

7. Assemblyman Bennett had been involved in home health care administration for approximately 13 or 14 years. At the time of the Assembly Commerce Committee hearing on May 19, 1993, as well as at the time of the Commission hearing on this matter on April 5, 1994, Assemblyman Bennett was Executive Director of the Clark County Medical Society and employed as Director of Finance for Nevada Home Partners, Inc., doing business as Charleston Home Health Care. Mr. Bennett was also sole proprietor of RCB Enterprises, a home health care consulting business which earned no income and had no clients at the time. From November 1984, until its sale on March 27, 1992, Assemblyman Bennett's father was sole stockholder of Charleston Home Health Care, Inc., a Nevada corporation for which, periodically, Mr. Bennett held various unpaid positions as a corporate officer as did, on occasion, his spouse, Marion R. Bennett. Mr. Bennett also worked during that period for his father, William Bennett, as a paid employee of the Corporation. His positions included that of Administrator, Chief Financial Officer and Director of Finance for Charleston Home Health Care, Inc. Until the time the Corporation was sold in March of 1992, most of Assemblyman Bennett's responsibilities related to the financial reporting of that business.

8. On March 27, 1992, William Bennett contracted to sell Charleston Home Health Care, Inc., to Nevada Home Care Partners, Inc., a Nevada Corporation which owned several other home health care related businesses for the sum of \$11,200.00. The sale included fixed assets, accounts and the corporate name of Charleston Home Health Care, Inc.

9. Sale of the business was contingent upon approval by the Medicare Program of Blue Cross of California. The Medicare Program of Blue Cross of California was notified that effective September 1, 1992, the Corporation would change ownership, but would continue to do business as Charleston Home Health Care, Inc. Assemblyman Bennett's employer, Nevada Home Care Partners, Inc., continued to participate in the federal Medicare reimbursement program in which Charleston Home Health Care, Inc., had heavily participated prior to its sale. Under the Medicare program, medical providers for qualified elderly or disabled individuals receive reimbursement for the cost of medical services provided. Not all costs incurred by participating medical providers are recognized as reimbursable under the Medicare program. Allowable reimbursement costs for each health care service provided are divided by Medicare into distinct categories, including one category for personnel salary and benefits. Therefore, Medicare reimbursement for physical therapy treatment administered by a licensed physical therapist is greater than reimbursement for a medical provider utilizing the services of an assistant physical therapist, based on the higher salary and benefits for a licensed physical therapist as opposed to an assistant. In either circumstance, there is no profit margin built into the Medicare's reimbursement formula. In these circumstances, medical providers have no financial motivation to utilize the services of a licensed physical therapy assistant over those of a licensed physical therapist.

10. When Ms. Barrett raised the question of Mr. Bennett's potential conflict of interest in AB 570 at the May 19, 1993, Assembly Commerce Committee hearing, Assemblyman Bennett responded that it was his intention to make a disclosure statement before participating in any discussion regarding the bill; that he had been, and was currently employed by a home health agency, but that his employment and compensation were in no way affected by the bill. Up until the time that the conflict of interest allegations arose at the May 19, 1993, hearing on AB 570, no member of the Committee had been given an opportunity to speak. Nor was a vote taken on AB 570 on that day.

11. On June 2, 1993, Chairman Porter scheduled AB 570 for another hearing before the Assembly Committee on Commerce. At that hearing, Assemblyman Bennett was asked by a member of the Assembly Commerce Committee, to explain the provision of AB 570 pertaining to qualifications required of a physical therapy assistant providing home health care physical therapy treatment. Assemblyman Bennett responded by first disclosing that he was employed by a home health care agency in Las Vegas, but stated that AB 570 did not impact his personal compensation, nor

did it affect the agency he worked for in any greater or lesser manner that it did any other home health care agency. Assemblyman Bennett declared that because there was a gray area concerning whether his commitment to the industry presented a conflict of interest, he would abstain from voting on the bill. However, he stated that he thought Nevada's ethics statutes allowed him to participate in the discussion of the bill in a factual and explanatory way, and therefore proceeded to answer Ms. Kenny' s question. Assemblyman Bennett then explained that a physical therapy assistant was authorized to provide treatment in the home of a patient if he or she had completed a two-year educational course, followed by one year of experience in a clinical setting under the direct supervision of a therapist. Once the physical therapist had accompanied a physical therapy assistant on the assistant's initial home visit, the therapist needed only to be accessible to that assistant by telephone during the time of home physical therapy treatment.

12. A roll call vote on AB 570 was taken in the Assembly Commerce Committee on June 2, 1993, which resulted in a 6-6 tie to amend and pass the bill; Assemblyman Bennett abstained from the vote. AB 570 was not passed in the 1993 session of the Nevada Legislature.

OPINION

Based upon the findings of fact, the Commission concludes that Assemblyman Bennett is a public officer and member of the legislative branch of government as defined in NRS 281.4365 (1) and NRS 281.4355, respectively.

The issue presented is whether Assemblyman Bennett had a pecuniary interest and/or commitment in his private capacity to the interest of others which created a conflict of interest in his public capacity as a State Assemblyman and required him to disclose, and in addition, to abstain from, advocating, voting, discussing, or otherwise participating in any legislative activity associated with AB 570 during the 1993 legislative session.

The standards found at NRS 281.501(2) and (3) are relevant to this matter and provide the following:

281.501. Additional standards: Voting by members of legislative branch and other public officers or employees; effect of abstention from voting on quorum; required disclosures.

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
- (c) 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 head of his organization or, if he holds an elective office, to the general public in the area from which he is elected.

The language of NRS 281.501 (2) and (3) provide standards legislators must follow in discussing, advocating, voting, or otherwise acting on a legislative matter, with respect to which the independence of judgment of a reasonable person in his or her situation would be materially affected by (i) the acceptance of a gift or loan, (ii) a pecuniary interest, or (iii) a commitment in a private capacity to the interest of others. Evaluation of the independence of judgment of a reasonable person is an objective test, not one which is personal or subjective to the individual.

A. Disclosure

Assemblyman Bennett had an interest in the home health care business to the extent that he was employed as director of finance for Nevada Home Care Partners, Inc., a home health care business, and also owned an inactive home health care consulting firm, RCB Enterprises. Contrary to the initial impression, of the opinion requestors in this matter, Assemblyman Bennett's father, William Bennett, did not own and Assemblyman Bennett was not an officer of Charleston Home Health Care at the time Assemblyman Bennett requested a bill draft for AB 570. Charleston Home Health Care had been sold over a year earlier, on March 27, 1992, to Nevada Home Care Partners, Inc., which continued to do business in the name of Charleston Home Health Care. Mr. Bennett's private, personal and pecuniary interests with Charleston Home Health Care had been severed prior to his request for a bill draft of AB 570 and well before the bill's first consideration by the Assembly Commerce Committee on May 19, 1993.

As a result, Assemblyman Bennett was required to disclose the full nature and extent of his employment with Nevada Home Care Partners when legislative discussions concerning AB 570 occurred. Pursuant to NRS 281.501(3)(c), disclosure was to be made publicly to the chairman and other members of the public body at the time the matter was considered.

Assemblyman Bennett fulfilled the statutory obligation to disclose such interests when AB 570 was addressed in legislative hearings held on May 19, 1993, and June 2, 1993. He therefore did not violate NRS 281.501(3).

B. Voting

The second issue before the Commission is whether Assemblyman Bennett was required to abstain from voting on AB 570 in committee, and ultimately on the floor of the assembly. Under NRS 281.501 (2) a member of the legislative branch of government is required to abstain from voting on a matter when his pecuniary interest or his commitment in a private capacity to the interest of others would materially affect the independence of judgment of a reasonable person in his circumstance.

As expressed in [Opinion No. 93-20](#), the Nevada Legislature is a "citizen legislature", implicit in which is a recognition of the fact that each member has an occupation during the 18 months when the legislature is not in session. Thus, the Commission cannot conclude under NRS 281.501(2), that a legislator may not advocate or vote on a matter related to his or her occupation without determining on sufficient facts shown that the "independence of judgment" of a "reasonable person" would be "materially affected" by a pecuniary interest or a commitment in his private capacity to the interest of others, however indirect or attenuated. There must be a sufficiently direct and strong correlation between such a pecuniary interest and/or a commitment to the interests of others in a private capacity that a reasonable person's independence of judgment is materially affected. That is to say, a pecuniary interest or a

commitment to the interests of others by itself does not mean that one's judgment is no longer independent. The evidence must demonstrate that one's independence of judgment has been materially affected by those circumstances.

Assemblyman Bennett did not in fact vote on AB 570. However, based upon the sale of his father's business, which occurred prior in time to Assemblyman Bennett's legislative action concerning AB 570, and the absence of financial motivation for Assemblyman Bennett's present employer, Nevada Home Care Partners, to see passage of AB 570, there was no evidence in the record of a pecuniary interest or commitment to the interest of others on the part of Assemblyman Bennett which would have materially affected his independence of judgment in regard to AB 570, such that he would have been required to abstain from voting. The fact that Assemblyman Bennett chose to abstain from voting reflects a heightened sensitivity to allegations of a conflict of interest than to the actual existence of a conflict of interest requiring him to abstain from voting under NRS 281.501(2).

Even if NRS 281.501(2) were interpreted to require Assemblyman Bennett to abstain from voting on AB 570, he would still have been permitted to "otherwise participate in the consideration of the matter. If Thus, he would still not have been prohibited from participating in the hearings to provide factual information on the substance of the bill or from submitting a bill draft on the topic to the Assembly Committee on Commerce, although advocating for or against patronage of the bill would have been prohibited.

Assemblyman Bennett never testified or advocated passage or defeat of AB 570; the request of the bill draft was in response to the request of a constituent. AB 570 was processed by the Chairman of the Assembly Commerce Committee in the same manner as any bill. Assemblyman Bennett therefore was not required to abstain from voting on AB 570 pursuant to the requirements of NRS 281.501(2) after his appropriate disclosure of his association with the home health care industry as required by NRS 281.501(3).

CONCLUSION

Based upon the administrative record developed in this matter, there is no evidence of a violation of the Code of Ethical Standards in connection with Assemblyman Bennett's participation in legislative action concerning AB 570 during the 1993 legislative session.

DATED: November 2, 1994.

NEVADA COMMISSION ON ETHICS

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

[1] AB 570 added the following, most pertinent language to Chapter 640 of the Nevada Revised Statutes:

Section 3. A physical therapy assistant:

1. Shall not perform any activity which requires the unique skill, knowledge or judgment of a physical therapist and may be subject to disciplinary action for performing any such activity, regardless of whether the activity was delegated to him by a physical therapist.
2. May provide treatment to a patient in the home of the patient if the physical therapy assistant has at least 1 year of experience under the direct supervision of a physical therapist.

Section 4. 1. A physical therapy assistant who provides treatment to a patient in the home of the patient must be supervised by a physical therapist in the manner provided in this section. The supervising physical therapist shall:

- (a) Perform the initial visit with and evaluation of the patient.

- (b) Accompany the physical therapy assistant the first time the assistant provides treatment in the home of the patient.
 - (c) Be accessible for communication by telephone at the time the physical therapy assistant treats the patient.
 - (d) Conduct a supervisory conference with the physical therapy assistant to discuss the status of the patient and the goals and necessary modifications of treatment at least once after every five treatments by the assistant or once every two weeks, whichever occurs first.
 - (e) Provide the required treatment and re-evaluate the patient at least every sixth treatment or every 2 weeks, whichever occurs first.
2. A physical therapist who supervises a physical therapy assistant who provides treatment to a patient in the home of a patient shall record each of his evaluations of the patient. The record must at least:
- (a) Provide a functional assessment of the patient in his home.
 - (b) Review the activities that the patient performs in his home.
 - (c) Reassess the plan of care; and
 - (d) Reassess the use of other resources by the physical therapy assistant.