

Opinion No. 96-25

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion concerning the conduct of WILLIAM CURRAN, Member, Nevada Gaming Commission

This Opinion is in response to a third-party opinion request filed with the Nevada Commission on Ethics by Andrea Engleman regarding the conduct of William Curran, Chairman of the Nevada Gaming Commission. The issue presented was whether Mr. Curran properly disclosed his interest in a matter before the Gaming Commission before he abstained from participating in the matter.

A hearing on the opinion request was held on August 15, 1996 in Las Vegas, Nevada. At the hearing, the following witnesses were sworn and gave testimony: Andrea Engleman, Mr. Curran, and Scott Bodeau. Harvey Dickerson represented Mr. Curran. The hearing and all documents related to the matter were public. Based on the foregoing, the Commission makes the following Findings of Fact, Conclusions of Law, and Opinion.

FINDINGS OF FACT

1. William Curran is Chairman of the Nevada Gaming Commission and as such is a public officer pursuant to NRS 281.4365(1). Mr. Curran is also a private attorney.
2. On September 15, 1994, the Gaming Commission approved a stipulation and order between its staff and Lonnie Theodore Binion by which Mr. Binion's gaming license would be suspended subject to a right to seek reinstatement later.
3. A reinstatement hearing for Mr. Binion was scheduled to be held on April 29 and 30, 1996.
4. Mr. Curran prepared for the Binion reinstatement hearing as he regularly prepared for such hearings, including reviewing all materials presented by staff and Mr. Binion. Not until Mr. Curran received a memorandum from a client (Client X) on April 13, 1996 did Mr. Curran realize that his relationship with and representation of Client X would require him to abstain from participation in the Binion reinstatement hearing because of a potential conflict between his representation of Client X and the Binion reinstatement matter.
5. Mr. Curran had represented Client X for several years prior to the scheduling of the Binion reinstatement hearing. When he became aware of the potential conflict between his representation of Client X and his role as Chairman of the Gaming Commission, Mr. Curran considered ending his representation of Client X, but he concluded that he could not do so because Client X needed representation at the time and there would be no way for Client X to be adequately represented by another attorney within the time constraints of Client X's matter.
6. After discussing the matter with Client X on April 16, 1996, Client X authorized Mr. Curran to disclose the nature of the attorney-client relationship -but not Client X's identity -to the deputy attorneys general who represented the Gaming Commission. After discussing the matter with the deputy attorneys general (Joe Ward and, later, Scott Bodeau), a Notice of Recusal was prepared for Mr. Curran, which he signed on April 16, 1996. The Notice of Recusal provided in pertinent part:

On April 13, 1996, the Chairman learned of a situation relating to a longstanding client of his private law practice that may present a conflict between the Chairman's interests of his private client in unrelated proceedings. Neither the

nature nor the possibility of this potential conflict was previously apparent or foreseeable.

Therefore, based on independent review of the applicable statutes, Supreme Court Rules, Attorney General Opinion 95-19 and consultation with Commission counsel on this matter in the Attorney General's Office, it is determined that this Notice of Recusal should be given to the parties herein and that the undersigned will no longer participate in the above referenced proceedings. Continued participation could compromise the interests of the private client, undermine the perception of impartiality in the resolution of the proceedings herein or allow a situation in which the potential conflict becomes an actual conflict during the resolution of the proceedings herein and thereby greatly complicate achievement of a fair conclusion herein. Under the circumstances, recusal is deemed the appropriate course of action.

7. Mr. Curran said that revealing the identity of Client X would be tantamount to revealing Client X's matter, and for that reason Client X had forbade Mr. Curran from revealing even Client X's identity.

8. Mr. Curran spoke with Cathy Olendorf, counsel to the Nevada State Bar Association, and she supported Mr. Curran's understanding that if Client X forbade him from revealing Client X's identity and matter, especially where such a revelation could harm Client X's interests, then Mr. Curran was duty bound to maintain Client X's confidences as directed.

9. Mr. Bodeau, chief deputy attorney general representing the Gaming Commission, said that he assisted in the preparation of the Notice of Recusal after discussing with Mr. Curran his concerns regarding the potential conflict that might exist between Client X's interests and Mr. Curran's service as Chairman on the Binion reinstatement hearing. Mr. Bodeau felt that the disclosure in the Notice of Recusal was as much as could possibly be made under the circumstances.

10. At no time prior to making his decision did Mr. Curran or anyone acting on his behalf, including the deputy attorneys general representing the Gaming Commission request the advice of the Nevada Commission on Ethics.

11. Subsequent to the Notice of Recusal, Mr. Curran has continued to represent Client X and has not participated in the Binion reinstatement matter.

ANALYSIS AND OPINION

The Commission has jurisdiction in this matter pursuant to NRS 281.511(2). Based upon the Findings of Fact, the Commission concludes that at all pertinent times, Mr. Curran was a public officer as defined in NRS 281.4365(1).

This matter contrasts two important legal obligations to which Mr. Curran was beholden. NRS 281.501(3) provides that a public officer may not abstain from acting upon a matter "without disclosing the **full nature and extent** of the gift, loan, commitment or interest." (Emphasis supplied.) In contrast, SCR 156(1) provides:

A lawyer **shall not reveal information** relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections 2 and 3. (Emphasis supplied.)

A lawyer's violation of the rules of professional conduct, including SCR 156, is professional misconduct and may

result in discipline and litigation. SCR 203(1). In this matter, Mr. Curran found himself caught between a duty to disclose the "full nature and extent" of his attorney-client relationship with Client X and a duty not to reveal any information that might expose Client X and Client X's confidences.

Based upon the uncontroverted testimony of Mr. Curran, we find that if Mr. Curran disclosed the identity of Client X, the nexus between Client X and the Binion reinstatement hearing would become obvious and Client X's presently confidential business would be made public to an extent that Client X did not and does not desire. As SCR 156(1) makes clear, the client always controls whether his or her confidential matters become public. Mr. Curran was absolutely required to guard his client's confidences.

Nonetheless, as a matter of law, we conclude that under NRS 281.501(3) the Notice of Recusal does not disclose the "**full** nature and extent" of Mr. Curran's commitment to Client x. The duty imposed under NRS 281.501(3) is absolute, and mere substantial compliance is not sufficient, no matter how proper the reason. The Legislature has mandated **full** disclosure, with no exceptions, and with good reason. The salutary public policy behind the full disclosure requirement is that a public officer, when declining to exercise his public function, should reveal publicly precisely why he is unable to perform his public function.

Therefore, we must conclude that Mr. Curran did the only thing he could do under the circumstances, except for resigning his position as Gaming Commission Chairman, but in so doing, he violated NRS 281.501(3). In this case, the result is that while Mr. Curran acted correctly within the constraints of his ethical duties to his client and the Bar, he did not fulfill his ethical duty under NRS 281.501(3).

As was discussed at the hearing, any time a lawyer accepts appointment to a commission or other public position and who continues to maintain a private law practice courts the very real possibility that those two occupations may at some point put him or her into a position of actual or potential conflict of interest or duty. Thus, it is incumbent upon that lawyer, such as Mr. Curran in this case, to be ever vigilant to avoid representing a client whose interest might ever involve, directly or indirectly, his or her public position. In this instance, Mr. Curran testified, without contradiction, that it was impossible to foresee the conflict until it was upon him. However, in the general case, the lawyer should be able to avoid the bind in which Mr. Curran found himself in this matter by either being allowed by the client to fully and publicly disclose his commitment to the client or by seeing similar conflicts in duties well enough in advance that he or she can timely and effectively terminate one of the two relationships, either by ceasing to represent the client or by ceasing to serve as a Commissioner or other public appointee.

Because this matter involved a novel question, because Mr. Curran could not timely and effectively terminate his relationship with Client X under the circumstances of this matter, and because Mr. Curran sought the advice of several attorneys before drafting the Notice of Recusal, we conclude that his violation of NRS 281.501(3) in this case was not willful.

CONCLUSION

The Commission concludes that Mr. Curran violated NRS 281.501(3) when he failed to fully disclose the nature and extent of his commitment to Client X, although Mr. Curran's failure to make full disclosure was required by his ethical obligations as an attorney. Mr. Curran's violation was not willful.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific circumstances. The provisions of NRS 281.501 quoted and discussed above must be applied on a case-by-case basis, with results which may vary depending on the specific facts and circumstances involved.

DATED: September 15, 1996.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY E. BOETSCH, Chairwoman