

Opinion No. 96-81

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for Opinion concerning the conduct of JOHN R. S. McCORMICK, Assistant City Attorney, City of Fallon

This opinion is in response to a third-party request for opinion filed with the Nevada Commission on Ethics (Commission) by Marilyn O'Connor concerning the conduct of John R. S. McCormick, Assistant City Attorney for the City of Fallon. A hearing on this matter was held by the Commission on February 28, 1997 in Reno, Nevada, at which Mrs. O'Connor, Dennis O'Connor, and Mr. McCormick testified and presented evidence. The Commission continued the hearing on the matter to April 24, 1997 to receive additional testimony. On April 24, 1997, John O'Connor, Mr. and Mrs. O'Connor, and Mr. McCormick testified and presented evidence. At the conclusion of the hearing the Commission publicly deliberated the matter and rendered its decision. The Commission now issues the Findings of Fact and Opinion which follow.

FINDINGS OF FACT

1. At all times pertinent to this request, John R. S. McCormick was an Assistant City Attorney for the City of Fallon, State of Nevada.
2. At all times pertinent to this request, Mr. McCormick had a private law practice in Fallon, Nevada.
3. On July 23, 1995, John K. O'Connor, the son of Dennis and Marilyn O'Connor, was arrested and booked by the City of Fallon Police Department on a charge of battery (domestic violence).
4. On July 24, 1995, Mr. O'Connor appeared before the Fallon Municipal Court and entered a plea of not guilty to the charge of battery (domestic violence). The case of *City of Fallon v. John K. O'Conner* (sic), Case No. 950033, was set for trial on August 17, 1995.
5. Mr. McCormick was assigned by the Fallon City Attorney's Office as the prosecutor in Case No. 950033.
6. On August 17, 1995, the Honorable W. E. Teurman, Fallon Municipal Court Judge, granted a continuance of the trial in Case No. 950033 to October 5, 1995, pursuant to a motion made by Mr. McCormick on behalf of the City of Fallon, and Mr. O'Connor's attorney, Paul Drakulich, Esq.
7. On August 30, 1995, Judge Teurman ordered a continuance of the trial in Case No. 950033 to October 12, 1995 because he would be out of town on October 5, 1995.
8. On or about September 15, 1995, Mr. McCormick was retained by John O'Connor's then wife, Christy O'Connor, to represent her in obtaining a divorce from John O'Connor. Mr. McCormick claims he did not realize at the time that Christy O'Connor's husband, John O'Connor, was the same person as the John O'Connor in Case No. 950033. On September 15, 1995, Mr. McCormick wrote a letter to John O'Connor advising of his representation of Christy O'Connor in this regard and requesting a meeting with John O'Connor on September 25, 1995.
9. John O'Connor's father, Dennis O'Connor, testified that on or about September 17, 1995, he spoke with Mr. McCormick regarding what he perceived to be a conflict of interest on Mr. McCormick's part. Mr. O'Connor felt that Mr. McCormick's prosecution of a criminal case against John O'Connor while representing John's wife in a civil divorce action constituted a conflict of interest.
10. Sometime after September 15, 1995, Mr. McCormick contacted Arthur Mallory, then Chief Deputy District Attorney for Churchill County, and advised him of his conflict of interest with respect to Case No. 950033. Pursuant to a long-standing agreement between these two prosecutors offices, he requested Mr. Mallory to take over the prosecution of the case, and Mr. Mallory agreed. At the time he referred the case to Mr. Mallory, Mr. McCormick stated he had not yet done any work on the case because, pursuant to the City Attorney's Office procedures, the

matter would not have come up for action until a week before the trial date in October. He gave Mr. Mallory what he had on the case - citation and a police report - but did not discuss the case with Mr. Mallory. No documentation was filed with the court evidencing the substitution of counsel.

11. Approximately one week before trial, Mr. McCormick received word from Mr. Drakulich that John O'Connor was going to enter a change of plea. Because the matter was no longer to be contested at trial, and would presumably be handled in a somewhat perfunctory manner, Mr. Mallory requested Mr. McCormick to appear at the change of plea hearing. Mr. McCormick testified he did not consider it a conflict of interest for him to attend the change of plea hearing, but that had John O'Connor changed his mind and gone to trial, Mr. McCormick would have insisted that Mr. Mallory handle the trial.

12. The court records indicate that John O'Connor entered a plea of guilty on October 12, 1995, and was given a suspended sentence by Judge Teurman.

13. John O'Connor subsequently completed the terms of his probation and the criminal case was dismissed.

ANALYSIS AND OPINION

The Commission has jurisdiction over this matter pursuant to NRS 281.511(2) because Mr. McCormick was and is a public employee as defined in NRS 281.436. The issue presented in this matter was whether Mr. McCormick violated NRS 281.481(1) or (2)^[1] by continuing to represent the City of Fallon in a criminal case against John O'Connor after being retained by John's then wife to represent her in a civil divorce action against John.

The analysis under NRS 281.481(1) is whether Mr. McCormick's representation of Christy O'Connor in a civil divorce action against John O'Connor improperly influenced Mr. McCormick in the performance of his duties as a city attorney in the simultaneous prosecution of a criminal case against Mr. O'Connor. The analysis under NRS 281.481(2) is whether Mr. McCormick's representation of the City of Fallon in a criminal case against Mr. O'Connor while representing Mr. O'Connor's then wife in a civil divorce action against Mr. O'Connor granted an unwarranted advantage to Mrs. O'Connor over Mr. O'Connor in the divorce case.

The requesters believe that their son was unfairly prejudiced in the criminal case due to Mr. McCormick's representation of his then wife in their divorce. The requester theorized that Mr. McCormick either required a plea of guilty rather than the plea of *nolo contendere*, which is more common in these cases, because a conviction against John O'Connor on a charge of domestic violence would give Mr. McCormick's client an advantage in the divorce.

There is a dispute as to whether Mr. McCormick actively participated in the prosecution of Mr. O'Connor. Mr. McCormick' position was that he was assigned John O'Connor's case, but he did no work on the matter prior to being retained by Christy O'Connor and his subsequent discovery that the defendant in the criminal case was the same John O'Connor who was married to his client. Upon discovering the connection, Mr. McCormick contacted Mr. Mallory and arranged for Mr. Mallory to take over the case and forwarded the file to Mr. Mallory. Mr. McCormick was advised approximately one week prior to trial that John O'Connor would be changing his plea, so Mr. McCormick appeared at the change of plea hearing at Mr. Mallory's request. Mr. McCormick stated his usual practice was to remain silent during change of plea hearings; however, he could not remember specifically whether he spoke at Mr. O'Connor's hearing. Mr. McCormick indicated that a plea of *nolo contendere* is standard in domestic violence cases and that there was no reason it should have been different in John O'Connor's case. Additionally, Mr. McCormick stated that Judge Teurman usually goes over a preprinted checklist with the defendant in court to verify that the plea is voluntary, although he does not recall specifically whether that was done in this case.

John O'Connor's testimony was that to his knowledge, Mr. McCormick was the only prosecutor for the City of Fallon in the criminal case against him; he had never heard of Mr. Mallory nor did he know who Mr. Mallory was. John O'Connor desired, on advice of his attorney, to enter a plea of *nolo contendere*. John O'Connor said that his attorney remained silent at the hearing and that Mr. McCormick entered a guilty plea and made disparaging remarks about John O'Connor to the court. It must be noted that Mr. McCormick cannot "enter" a plea for the defendant; at best he can only advise the court that pursuant to negotiations, or otherwise, the **defendant** will be entering such a plea. It must also be noted that for purposes of defining a conviction, a plea of *nolo contendere* and a plea of guilty each result in a conviction. It must also be noted that Mr. John O'Connor's memory of these events was extremely poor.

In an affidavit dated February 19, 1997, Judge Teurman stated that John O'Connor entered a plea of guilty and that Mr. McCormick was present but remained silent throughout the proceedings.

The O'Connors alleged that Mr. McCormick used his position as Assistant City Attorney to obtain a domestic violence conviction against John O'Connor so that he could use the domestic violence conviction against John in the divorce between John and Christy. However, no evidence was presented to the Commission that the sentence John O'Connor received was other than the typical sentence imposed at that time by the Fallon Municipal Court in similar domestic violence cases. In fact, John O'Connor testified that although he did not realize a plea of *nolo contendere* would result in a conviction, he knew he would be subject to sentencing, and he conceded the sentence he received for the guilty plea was no different from what he had expected to receive for a plea of *nolo contendere*.

John O'Connor claimed that the divorce documents were altered by Mr. McCormick without his knowledge between the time he and Christy reached an agreement on the terms of the divorce and when he signed the documents, and he claimed that those changes adversely affected him. We are unconvinced by this allegation because John O'Connor was represented by counsel in the divorce and both had an opportunity to read the final documents prior to John's signing them.

The O'Connors asserted that in any event, Mr. McCormick had a conflict of interest in simultaneously representing the City of Fallon and Christy O'Connor in cases against John O'Connor. They argued that John O'Connor had a right to an impartial trial in the criminal matter and under the circumstances, they believed it was impossible for Mr. McCormick to be impartial in the performance of his duties as Assistant City Attorney in the prosecution of the criminal case. The record indicated that Mr. McCormick agreed that he had a conflict of interest, and so he withdrew from the criminal case. However, no formal documentation was filed with the court or mailed to John O'Connor's attorney evidencing the substitution of Mr. Mallory as prosecutor because it has been the common practice in Fallon to handle these types of substitutions by phone.

Pursuant to SCR 46 and SCR 48, a substitution of attorneys may be made at any time before final determination of a case, upon consent of the attorney and the client, and shall be accomplished by way of stipulation of counsel or order of the court. In Case No. 950033, Mr. McCormick's "client" was the City of Fallon for which he was a duly appointed representative; therefore, the only consents required were those of Mr. McCormick and Mr. Mallory. Such consent should have been evidenced by a written stipulation signed by Mr. McCormick and Mr. Mallory, filed with the court, with a copy sent to Mr. Drakulich. In failing to do so, Mr. McCormick remained as counsel of record in Case No. 950033 throughout the proceeding.

Therefore, under the circumstances of this matter, we find Mr. McCormick did violate NRS 281.481(1) when he failed to lawfully and completely withdraw from the prosecution of John O'Connor in the criminal case against him once he had been retained by Christy O'Connor to represent her in a civil divorce proceeding against John. Based upon the record before us, though, we cannot find that Mr. McCormick attempted to secure for his client, Christy, an unwarranted advantage or privilege through his participation in accepting John O'Connor's change of plea. Mr. McCormick was wrong to have participated in any way in John O'Connor's criminal matter once he became involved in the O'Connors' divorce, regardless of how perfunctory his participation may have been. Mr. McCormick recognized the conflict of interest, but he acted in contravention of his own acknowledged conflict of interest. The evidence did not show, though, that his participation in John O'Connor's hearing in any way affected the outcome, and furthermore, the record did not show that Mr. McCormick in any way attempted to influence the outcome to his civil client's advantage. Therefore, while Mr. McCormick violated NRS 281.481 (1) by failing to lawfully and completely remove himself from John O'Connor's criminal matter, Mr. McCormick did not violate NRS 281.481(2) when he participated in John O'Connor's hearing.

CONCLUSION

Based upon the record, the Commission concludes that Mr. McCormick did violate NRS 281.481 (1) by failing to lawfully and completely withdraw from representation of the City of Fallon in the criminal case against John O'Connor after being retained to represent Christy O'Connor in a divorce action involving John O'Connor. We also conclude that Mr. McCormick did not violate NRS 281.481(2) in the way in which he conducted himself in the hearing of John O'Connor's change of plea. Finally, we conclude that Mr. McCormick's violation was not willful under NRS 281.551 (1), and thus we assess no penalties against Mr. McCormick as a result of his violation.

Based upon the record of this case, the Commission recommends that the Fallon City Attorney's Office and the Churchill County District Attorney's Office adopt a formal policy and procedure for substitutions of counsel which will include filing the proper documentation with the court and notifying the defendant of the substitution to prevent situations such as this from occurring in the future.

COMMENT

It is specifically noted that the foregoing Opinion applies only to these specific facts and circumstances. The provisions of the Nevada Revised Statutes 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: June 11, 1997.

NEVADA COMMISSION ON ETHICS

By: /s/ MARY E. BOETSCH, Chairwoman

[\[1\]](#) NRS 281.481 (1) and (2) provide:

1. A public officer or employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties.
2. A public officer or employee shall not 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, or any other person.