

Abstract of Advisory Opinion No. 00-53
BEFORE THE NEVADA COMMISSION ON ETHICS
IN THE MATTER OF THE REQUEST FOR ADVISORY OPINION OF
PUBLIC OFFICER-ELECT

This matter came before the Nevada Commission on Ethics (hereinafter the "Commission") on the request for advisory opinion filed by Public Officer-Elect pursuant to NRS 281.511, Subsection 1. The matter was properly noticed as a confidential matter and the hearing was closed pursuant to NRS 281.511, Subsection 5.

Public Officer-Elect seeks an advisory opinion from the Commission regarding whether his/her anticipated employment in a private capacity as a lobbyist for Local Private Business creates a possible conflict of interest with regard to his/her public duties as an elected public officer, or is otherwise a "violation of our laws."

Public Officer-Elect appeared in person, was sworn and presented testimony. The Commission, after full consideration of the request for opinion, the testimony, and the evidence makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Public Officer-Elect is a resident of a Nevada city. In November 2000, he/she was elected to a public office beginning January 2001.
2. Prior to the November election, Public Officer-Elect was referred to the owner of Local Private Business by an attorney friend who suggested Public Officer-Elect would be an excellent person to act as a lobbyist for Local Private Business during the next legislative session. Following his/her conversation with the attorney friend, Public Officer-Elect contacted local private business owner by telephone.
3. Shortly after Public Officer-Elect's telephone conversation with local private business owner, and before the November election, Public Officer-Elect received a campaign contribution from Local Private Business.
4. After the November election, Public Officer-Elect met with local private business owner regarding his/her interest in acting as a lobbyist for Local Private Business.
5. Local Private Business is not involved in any way, nor does it intend to be involved in any way, in any matters regulated by the public agency to which Public Officer-Elect was elected. There is no relationship between the business of Local Private Business and public agency, and Public Officer-Elect does not envision that either local private business owner or Local Private Business will have any involvement in any matters that may come before him/her in his/her capacity as a public officer.
6. If Public Officer-Elect enters into a contract with Local Private Business to be employed as its lobbyist, he/she will track legislative bills, observe legislative committee and chamber proceedings, report his/her finding to local private business owner, and lobby legislators concerning issues and legislation relevant to local private business industry. Public Officer-Elect's compensation will include an hourly wage and reimbursement for actual expenses (including airfare, overnight accommodations, food, and necessary office supplies).
7. Public Officer-Elect has previous experience as a registered lobbyist for a public agency.
8. Public Officer-Elect intended to travel to Carson City after the Commission hearing to meet with public agency, where he/she intended to suggest that, because of his/her experience, he/she be considered to be the agency's lobbyist before the Nevada legislature.

CONCLUSIONS OF LAW

1. Public Officer-Elect is a public officer as defined by NRS 281.005 and NRS 281.4365.
2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.511, Subsection 1,

and NRS 281.521.

WHEREFORE, on motion duly made, seconded, and approved by unanimous vote, the Commission renders the following Opinion:

OPINION

The Nevada Legislature, in 1977 when it enacted the Nevada Ethics in Government Law (NRS 281.411, et. seq.), declared it 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; and (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. NRS 281.42 1, Subsection 1. Further, in creating the Nevada Ethics in Government Law of NRS Chapter 281, the Nevada Legislature found that “(a) [t]he increasing complexity of state and local government, more and more closely related to private life and enterprise, enlarges the potentiality for conflict of interests;” and “(b) [t]o 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.” NRS 281.421, Subsections 2(a) and (b).

The apparent intent of the provisions of NRS Chapter 281 is to prevent public officers and employees from becoming involved in situations generating conflicts between private and public interests so as to preserve and enhance impartiality of public office and faith in the integrity of government. Policy objectives for ethics in government laws in general include:[\[1\]](#)

- Impartiality, fairness and equality of treatment toward those dealing with government.
- Assurance that decisions of public importance will not be influenced by private considerations.
- Maintenance of public confidence in government (wherein enters the matter of appearances).
- Prevention of use of public office for private gain.

A conflict of interest (either actual or potential) is a situation requiring a public officer to serve two masters, presenting a *potential*, rather than an actuality, of wrongdoing.[\[2\]](#) The wrongdoing does not have to actually occur in order for a prohibited conflict to exist. A public official may have done no wrong in the ordinary sense of the word, but a conflict of interest may put him in danger of doing wrong. It is avoiding even the potential of doing wrong which is the focus of ethics in government laws.

For this purpose, ethics in government laws identify certain types of conflicts of interest and prohibit conduct by public officials that would allow these conflicts to affect decisions of the public official.

Nothing in the facts of this matter suggest, and the Commission does not infer, that Public Officer-Elect was considered for the lobbyist position with Local Private Business because he/she was running for public office and might become a public officer, thereby providing some benefit to Local Private Business through his/her public office.

In fact, serving in public office while being employed as a lobbyist for a private business does not, by itself, necessarily create an impermissible conflict between one’s private interest and public duty. Rather, the specific facts of each circumstance must be considered on a case-by-case basis in light of the provisions and legislative intent evidenced in NRS Chapter 281.

However, the Commission is concerned about the Public Officer-Elect serving in a public capacity as a member of and lobbyist for a public agency, while at the same time being employed in a private capacity as the lobbyist for Local Private Business:

- a. On one hand, in his/her private capacity as a lobbyist for Local Private Business, Public Officer-Elect’s travel from his/her home in City to Carson City, meals and lodging, and compensation could be paid for by Local Private Business. Yet, while he/she is in Carson City acting as a paid lobbyist for Local Private Business, he/she will also be serving in his/her public capacity as member of and lobbyist for public agency.
- b. On the other hand, in his/her public capacity as a member of and lobbyist for public agency, Public Officer-Elect’s travel from his/her home in City to Carson City, his/her meals and lodging and possibly other

compensation could be paid for with public funds. Yet, while he/she is in Carson City acting as a member of and lobbyist for the public agency (his/her expenses for which have been paid with public funds), he/she will also be working in his/her private capacity as lobbyist for Local Private Business.

NRS 281.481, Subsection 1, prohibits a public officer or public employee from seeking or accepting “any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in [the public officer’s] position to depart from the faithful and impartial discharge of his public duties.” Therefore, NRS 281.481, Subsection 1, would prohibit Public Officer-Elect from accepting a lobbying engagement under the circumstances outlined in this Opinion if a “reasonable person” could look at what he/she intended to do and have no confidence that he/she would be adequately representing the public agency because of his/her fiduciary or pecuniary interest in satisfying his/her private-interest lobbying clients.

NRS 281.48 1, Subsection 2, prohibits a public officer or public employee from using “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.” As used in this statute, “unwarranted” means “without justification or adequate reason.” In a hypothetical scenario where Public Officer-Elect is meeting with a legislator on a matter involving public agency, and he/she happens to hear about legislation that might affect Local Private Business, where the only reason he/she learned about the legislation is that he/she happened to be with the legislator in his/her capacity as a public officer, he/she could be perceived to have used his/her position in government to get an unwarranted privilege or preference for Local Private Business, in violation of NRS 281.481, Subsection 2.

NRS 281.481, Subsection 4, prohibits a public officer or public employee from accepting “any salary, retainer, augmentation, expense allowance or other compensation from any private source for the performance of his duties as a public officer or employee.” If Public Officer-Elect were at the Legislature acting in his/her private capacity as lobbyist for Local Private Business, and his/her expenses and salary to be there were paid by Local Private Business, yet while there, he/she acted in his/her public capacity as member of, and lobbyist for, the public agency for the benefit of the public agency but waived his/her right to receive reimbursement from the public agency for his/her travel and per diem, he/she has created a situation which could potentially violate NRS 281.481, Subsection 4.

If a public officer or employee acquires, through his/her public duties or relationships, any information which by law or practice is not at the time available to people generally, NRS 281.481, Subsection 5, prohibits him/her from using that information “to further the pecuniary interests of himself or any other person or business entity.” Therefore, should Public Officer-Elect acquire, through his/her public agency duties and lobbying, information that is not at that time available to people generally, NRS 281.481, Subsection 5, would prohibit him/her from using that information to help Local Private Business or to help himself/herself with other lobbying clients.

NRS 281.481, Subsection 10, prohibits a public officer or public employee from seeking “other employment or contracts through the use of his official position.” Therefore, Public Officer- Elect, as a member of public agency, is prohibited from soliciting lobbying positions or contracts with other business entities by “marketing” his/her acquaintance with and access to legislators gained through his/her position as a public officer.

The legislature has made it clear that one’s choice to serve as a public officer carries with it the obligation to put public duties first. By serving as a lobbyist in both private and public capacities, Public Officer-Elect may, in certain situation, have to disclose to Local Private Business, and other or prospective lobbying clients, that he/she is unable to act on their behalf on matters that might, in any way at all, appear under the code of ethical standards to compromise his/her public duties. Public duties must come first.

Public Officer-Elect, therefore, is permitted to undertake the lobbying activities proposed in this matter if, on a case-by-case basis for each individual lobbying situation, he/she reviews the provisions of the Nevada’s Code of Ethics (NRS Chapter 281), makes an independent determination that there would be no violation thereof, and, in matters before the public agency, complies with the disclosure and abstention requirements of NRS 281.501 (and the standards discussed in the Commission’s Opinion No. 99-56, the “Woodbury Opinion”) concerning his/her lobbying activities.

Should Public Officer-Elect have specific questions regarding other specific situations or lobbying contracts that

he/she may consider entering into in the future, he/she may bring those specific facts and circumstances before the Commission in the form of an advisory opinion request pursuant to NRS 281.511, Subsection 1.

NOTE: THE FOREGOING OPINION APPLIES ONLY TO THE SPECIFIC FACTS AND CIRCUMSTANCES DEFINED HEREIN. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE IN THIS OPINION MAY RESULT IN AN OPINION CONTRARY TO THIS OPINION. NO INFERENCES REGARDING THE PROVISIONS OF NEVADA REVISED STATUTES QUOTED AND DISCUSSED IN THIS OPINION MAY BE DRAWN TO APPLY GENERALLY TO ANY OTHER FACTS AND CIRCUMSTANCES.

DATED: January 24, 2001.

NEVADA COMMISSION ON ETHICS

By: /s/ PETER C. BERNHARD, Chairman

[\[1\]](#) See, Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. Law Rev. 1113,1118 (1963) (addressing the federal ethics law).

[\[2\]](#) See, e.g., *Glazer v. Commission on Ethics for Public Employees*, 431 So.2d 752 (La. 1983); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 81 S.Ct. 294, 5 L.Ed. 2d 268 (1961). Also see, Perkins, *The New Federal Conflict of Interest Law*, 76 Harvard Law Review 1113 (1963).