

Abstract of Advisory Opinion No . 00-55
BEFORE THE NEVADA COMMISSION ON ETHICS
IN THE MATTER OF THE REQUEST FOR AN ADVISORY OPINION OF A PUBLIC OFFICER

This matter came before the Nevada Commission on Ethics (hereinafter the "Commission") on the request for advisory opinion filed by Public Officer, Member, City Board of Adjustment, 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 seeks the Commission's advisory opinion regarding whether NRS 281.481, Subsection 2, prohibits him from serving, in a public capacity, on the Board of Adjustment because, in his private capacity, he is a licensed civil engineer who advises clients seeking approval from such governing bodies as the City Council and the Board of Adjustment.

Public Officer appeared by telephone and 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. In his public capacity, Public Officer serves as a member of the City Board of Adjustment (hereinafter the "Board").
2. The Board was created pursuant to NRS 278.270 and City Municipal Code. Its members are appointed by the Mayor, subject to confirmation by the City Council. The members serve their terms without compensation. The members elect the Board chairperson.
3. Members of the Board must be residents of the City and may hold no other public office, except that one of the members may also be a member of the City Planning Commission. The meetings of the Board are public. The members adopt rules and set procedures.
4. The functions of Board are distinct from those of the City Planning Commission. Although not to the same level of complexity as the City Planning Commission, the Board hears zoning matters and appeals from zoning regulations and requirements involving special use permits dealing with such issues as signs, hazardous waste, grading, cuts and fills. NRS 278.290 through NRS 278.310 define the Board's powers, which include the power by majority vote to reverse any order, requirement, decision or determination of any administrative official or agency, or to decide in favor of the appellant. The Board is the final authority on the matters of variances and special use permits it hears, unless the matter is appealed. Appeals of Board rulings are decided by the City Council.
5. In his private capacity, Public Officer is a licensed Civil Engineer in Nevada and president of a consulting business that advises clients on such issues as land use planning, traffic engineering, civil engineering, and transportation planning. Public Officer advises clients who seek approvals from such governing bodies as the City Council, the City Planning Commission and the City Board of Adjustment. On behalf of his clients, Public Officer regularly appears before the City Planning Commission and the City Council. Since beginning his consulting business, Public Officer has represented no client before the Board.
6. Public Officer's past experience includes engineering-related positions in both public and private capacities.
7. In his capacity as a member of the Board, other than attorney-client privileged communication, Public Officer has access to no information that is not generally available to the public.

CONCLUSIONS OF LAW

1. Public Officer 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 281.421, 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.

One manner in which a public office may be used for private gain is for a public officer to use his public status as a tool or device to generate business for his private business by “marketing” his public position to clients who may benefit therefrom. Marketing materials such as a curriculum vitae, résumé, or brochure listing the public officer’s present public office may fall within the broad definition of using public office for private gain. The restriction, of course, applies only during the public officer’s term of service in a particular public position and not thereafter. Therefore, while Public Officer serves on the Board, he must exercise caution in how he markets his private consulting business to potential clients.

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.^[2] It is *avoiding* even the potential danger of doing wrong which is the focus of ethics in government laws.

For this purpose, ethics in government laws (such as NRS 281.481, Subsection 2) identify certain types of conflicts of interest and prohibit conduct by public officials that would allow these conflicts to occur.

NRS 281.481, Subsection 2, prohibits a public officer or employee from using “his position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for himself, any member of his house hold, any business entity in which he has a significant pecuniary interest, or any other person.” As used therein, “unwarranted” means “without justification or adequate reason.” NRS 281.481(2).

Public Officer’s service in a public capacity as a member of the Board while employed in a private capacity as a licensed civil engineer advising clients on land use and other related issues does not, by itself, create the type of misconduct contemplated by NRS 281.481, Subsection 2. Public Officer’s simultaneous public and private capacities do not, therefore, violate NRS 281.481, Subsection 2.

However, as a member of the Board, Public Officer’s private-capacity activities are subject to the restrictions of NRS 281.491, Subsection 1, which provides:

A . . . public employee of the executive branch shall not accept compensation from any private person to represent or counsel him on any issue pending before the agency in which that officer or employee serves, if the agency makes decisions. Any such officer or employee who leaves the service of the agency shall not, for 1 year after leaving the service of the agency, represent or counsel for compensation a private person upon any issue which was under consideration by the agency during his service. As used in this subsection, "issue" includes a case, proceeding, application, contract or determination, but does not include the proposal or consideration of legislative measures or administrative regulations.

Therefore, while Public Officer is a member of the Board, he may not accept compensation to represent or counsel any private person on any issue (as defined in NRS 281.491, Subsection 1) pending before the Board. Further, for one year after leaving his position on the Board, Public Officer may not represent or counsel for compensation a private person upon any issue (as defined in NRS 281.491, Subsection 1) which was under consideration by the Board during the term of Public Officer's service.

However, pursuant to NRS 281.491, Subsection 2, Public Officer may, in his private capacity, appear or represent clients before boards, commissions, and agencies other than the City Board of Adjustment.

Public Officer is also reminded that while he is a member of the Board, he is required to comply with the report filing requirements of NRS 281.491, Subsection 3, which requires a public officer who has, within the preceding year, represented or counseled a private person for compensation before a state agency of the executive branch to file with the Commission, by January 10 each year, a written disclosure of each such representation. The disclosure form for this purpose is available on the Commission's website (<http://ethics.state.nv.us>).

Finally, Public Officer is cautioned to follow the disclosure, participation and abstention requirements of NRS 281.501 and standards as discussed in Commission Opinion No. 99-56, which requirements and standards apply to all public officers and employees.

The Commission appreciates Public Officer bringing this matter before the Commission seeking an advisory opinion and encourages him to bring future questions concerning application of Nevada's code of ethics to specific cases, clients or conduct before the Commission on a case-by-case basis for consideration and evaluation.

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: March 6, 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 Harv. Law Rev. 1113, 1118 (1963) (addressing the federal ethics law).