

Abstract of Advisory Opinion No. 01-19

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR ADVISORY OPINION OF

PUBLIC OFFICER, Member, Nevada State Regulatory Board

This matter came before a quorum^[1] of the Nevada Commission on Ethics (hereinafter the "Commission") on June 21, 2001, on the request for advisory opinion filed by Public Officer, Member of a Nevada State Regulatory Board, 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 appeared by telephone, was sworn and presented testimony. The Advisory Opinion is confidential pursuant to NRS 281.511, Subsection 5(c).

Public Officer seeks an opinion from the Commission advising him as to whether his filing of a complaint with the Regulatory Board of which he is a member against a former associate was "required and/or ethical."

The Commission, after full consideration of the request for advisory opinion, and the testimony and evidence presented to the Commission, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Public Officer is a licensed professional in Nevada.
2. Governor Guinn appointed Public Officer as a professional member of the Regulatory Board. Public Officer presently serves as a member of that board.
3. Public Officer is presently involved in litigation with his former associate, a Nevada-licensed professional. The litigation was initiated prior to Public Officer's appointment to the Regulatory Board.
4. After his appointment to the Regulatory Board and during the course of examining the business and practice activities of his former associate, Public Officer became aware of what he believed to be violations of Nevada law and/or regulations governing the profession.
5. Public Officer thereafter sought advice from his legal counsel, the Nevada Attorney General's office, and a senior member of the Regulatory Board as to what action he should take with regard to the suspected violations of his former associate. He received "mixed" advice on the propriety or advisability of filing a complaint with the Regulatory Board against his former practice associate since he serves as a member of that board.
6. Nevada Revised Statutes identifies practices which are grounds for disciplinary action by the Regulatory Board against those licensed thereunder. A specific statute provides that any person who becomes aware that a person practicing the profession in this state has, is, or is about to become engaged in conduct which constitutes grounds for initiating disciplinary action may file a written complaint with the Regulatory Board.
7. Pursuant to NRS, Public Officer filed a complaint with the Regulatory Board against his former practice associate. The complaint is pending before the board.
8. Public Officer' action in filing the complaint is being questioned by some members of the Regulatory Board.

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 Commission's jurisdiction to render an advisory opinion to a public officer is limited to that provided in NRS Chapter 281. NRS 281.521 authorizes the commission to render advisory opinions and provide guidance to public officers on questions concerning (a) whether a conflict exists between the public officer's personal interest and his official duty; (b) whether the public officer's official duties involve the use of discretionary judgment whose exercise in the particular matter would have a significant effect upon the disposition of the matter; (c) whether the conflict would materially affect the independence of the judgment of a reasonable person in his situation; (d) whether he possesses special knowledge which is an indispensable asset of his public agency and is needed by it to reach a sound decision; and (e) whether it would be appropriate for him to withdraw or abstain from participation, disclose the nature of his conflicting personal interest or pursue some other designated course of action in the matter.

An advisory opinion, therefore, regarding whether Public Officer was required pursuant to law to file a complaint against his former associate once he became aware of conduct which he believed violated the provisions of NRS which govern the profession is beyond the jurisdiction of this Commission.

However, based on the provisions of NRS 281.521, the Commission does have jurisdiction to render an opinion advising Public Officer whether his filing a complaint with the Regulatory Board against his former associate violated any provision of NRS Chapter 281 and providing guidance to Public Officer on how the provisions of NRS Chapter 281 may impact his participation as a member of the Regulatory Board with respect to his complaint pending before the board.

It is the opinion of the Commission that Public Officer violated no provision of NRS Chapter 281 by the mere filing of a complaint with the Regulatory Board against his former associate.

However, with regard to Public Officer's involvement as a member of the Regulatory Board in its consideration of and action on the pending complaint, Public Officer's conduct is governed by the disclosure, participation, and abstention provisions of NRS 281.501(2) and 281.501(3).^[2]

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: August 7, 2001.

NEVADA COMMISSION ON ETHICS

By: TODD RUSSELL, Chairman

^[1] Commission Chairman Bernhard, Commission Vice Chairman Russell, and Commission Members Flangas, Hsu, Kosinski, and Smith constituted the quorum. Commission members Avansino and Hatcher were absent.

^[2] As it relates to the circumstances of this opinion, NRS 281.501(2) provides that in addition to the requirements of the code of ethical standards [NRS 281.481], a public officer 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 or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in NRS 281.501(3) relating to

the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

As it relates to the circumstances of this opinion, NRS 281.501(3) provides that a public officer 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 sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Such disclosure must be made in public to the chairman and other members of the board at the time the matter is considered.

As used in NRS 281.501, "commitment in a private capacity to the interests of others" means a commitment to a person (a) who is a member of his household, (b) who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (c) who employs him or a member of his household, (d) with whom he has a substantial and continuing business relationship, or (e) any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.