

Abstract of Advisory Opinion No. 02-22

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR ADVISORY OPINION OF Public Officer

This matter came before the Nevada Commission on Ethics (hereinafter the "Commission") for hearing on the confidential request for advisory opinion filed pursuant to NRS 281.511, Subsection 1, by Public Officer.

The matter was properly noticed as a confidential matter and the hearing was closed pursuant to NRS 281.511, Subsection 5. Public Officer appeared in person and was sworn and presented testimony. Also present was Attorney. This Advisory Opinion is confidential pursuant to NRS 281.511, Subsection 5(c).

Public Officer requests the Commission's advisory opinion determining when he must disclose and abstain pursuant to NRS 281.501 with regard to three general circumstances.

The Commission, after hearing testimony and considering the evidence presented herein, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In his public capacity, Public Officer is an elected member of a public board.
2. In his private capacity, Public Officer serves as the managing member of Private Business A.
3. Private Business B is a Nevada limited liability company. Public Officer has no ownership interest in Private Business B.
4. Private Business A has entered into a long-term contract with Private Business B. Under the terms of the contract, Private Business A provides services to Private Business B and receives, on an ongoing basis, a percentage of the gross revenue of Private Business B.
5. Private Business B entered into a contract with Casino. Owner of Private Business B and Public Officer (on behalf of Private Business A) both signed the contract.
6. Casino is one of several members of Enterprise A. The members are all casino resorts that manage and control the "common area" that links the casino resorts. Each of the casino resort members proportionately funds Enterprise A.
7. One of the goals of Enterprise A is to promote the central business district of City to tourists, including providing entertainment, special events, advertising, merchandising, recreation and other amenities, and thereby increase the revenue of each member casino resort.
8. Private Business B and/or Private Business A may in the future contract for services with one or more of the other casino resort members of Enterprise A and/or other businesses fronting Enterprise A or in the immediate proximity thereof.
9. From time to time, Enterprise A and its resort casino members are the subject of matters before the public board

to which Public Officer was elected.

10. Private Business B is presently negotiating contracts with several tenants of Enterprise B. Enterprise B is privately owned and operated Company. Enterprise A and Enterprise B both benefit from the same tourist traffic.

CONCLUSIONS OF LAW

1. In his capacity as an elected member of the public board, Public Officer is a "public officer" pursuant to NRS 281.4365.

2. The Commission has jurisdiction to render an advisory opinion in this matter pursuant to NRS 281.511(1) and NRS 281.521.

WHEREFORE, on motion duly made, seconded, and unanimously approved, the Commission renders the following Opinion:

OPINION

The Commission is authorized to render an opinion interpreting the statutory ethical standards and apply the standards to a given set of facts and circumstances upon request from a public officer or public employee who is seeking guidance on questions which directly relate to the propriety of his own past, present or future conduct as a public officer or employee. NRS 281.511, Subsection 1.

The Commission's opinion may include guidance to the public officer or employee on questions whether: (a) a conflict exists between his personal interest and his official duty; (b) his 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) the conflict would materially affect the independence of the judgment of a reasonable person in his situation; (d) he possesses special knowledge which is an indispensable asset of his public agency and is needed by it to reach a sound decision; (e) 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. NRS 281.521, Subsection 1.

The statutes authorizing the Commission to render advisory opinions to public officers and public employees contemplate specific questions on specific facts and circumstances which may present a specific conflict between and public officer's or employee's private interests and public duties.

Since Public Officer's request for opinion presented no particular specific facts and circumstances for the Commission to consider in interpreting and applying the ethical standards of NRS Chapter 281 to Public Officer's past, present or future conduct as a public officer, the Commission provides to Public Officer the following general guidance with regard to Nevada's Ethics in Government law.

The Nevada Legislature has declared it to be the public policy of this state that a "public office is a public trust and shall be held for the sole benefit of the people" and that a "public officer or employee must conduct himself to avoid conflicts between his private interests and those of the general public whom he serves." Further, the Nevada Legislature has declared that, "to 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 role of persons who are both public servants and private citizens." NRS 281.421.

In performing their public duties, public officers should be mindful of the Nevada Legislature's public policy declarations of NRS 281.421 and conduct themselves to avoid conflicts between their private interests and those of the general public whom they serve. Public officers should also be mindful of the provisions of NRS 281.501

requiring them to adequately disclose private interests and commitments when considering matters before them and, as appropriate, refrain from advocating the passage or failure of matters and abstain from voting when their independence of judgment is materially affected by their personal interest.

NRS 281.501(1) provides:

Except as otherwise provided in subsection 2 or 3, a public officer may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group is not greater than that accruing to any other member of the general business, profession, occupation or group.

NRS 281.501(2) provides:

In addition to the requirements of the code of ethical standards, 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 members 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 subsection 3 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

NRS 281.501(3) provides:

A public officer or employee 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. Except as otherwise provided in subsection 6,^[1] such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the chairman and other members of the body...This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.

The Commission interpreted the disclosure, participation and abstention standards of NRS 281.501 in its [Opinion No. 99-56](#), *In The Matter of the Opinion Request of Bruce L. Woodbury* (hereinafter the “*Woodbury Opinion*”), and

refers Public Officer to that Opinion for guidance.

The Commission cautions Public Officer that when a matter comes before him in his capacity as Public Officer, he must carefully consider private commitments, pecuniary interests, and gifts and/or loans that may affect his decision in the matter and disclose sufficient information about them to inform the public and his constituents of the potential effect of his action [as required by NRS 281.501(3)]. After making such proper disclosure, Public Officer must then determine whether the independence of judgment of a reasonable person in his situation would, under the circumstances presented in the particular matter, be **materially** affected by his pecuniary interests, commitments, and/or gifts and loans and, if so, he must also refrain from advocating the passage or failure of the matter and abstain from voting upon the matter [as required by NRS 281.501(2)].^[2] His decision regarding abstention will, of course, necessarily vary depending on the particular issue before the public board and how his vote would be affected by, and could affect the basis of, his private commitments and/or pecuniary interests.

In that regard, under the facts and circumstances discussed herein, matters before the public board generally concerning Enterprise A and/or its members that are not a party to a contract in which Public Officer holds a pecuniary interest or in which he has a private commitment would require Public Officer to make an adequate and proper disclosure pursuant to NRS 281.501(3) and the *Woodbury Opinion*, but would not require him to refrain from advocating for or against the matter and would not require him to abstain from voting on the matter. Other matters before the public board, however, may require Public Officer to consider the abstention provisions of NRS 281.501(2) and the *Woodbury Opinion* in addition to making a sufficient and proper disclosure. In making his decision regarding abstention in a particular matter, Public Officer, on a case-by-case basis, should be guided by the provisions of NRS 281.501(2) and the standards and principles as discussed herein and as interpreted by the Commission in the *Woodbury Opinion*.

Abstaining from voting on a matter requires a public officer's careful consideration. As the Commission stated in the *Woodbury Opinion*:

Abstention in all such cases would be a safe harbor for public officers and employees. However, the public ... (and an elected official's constituents) have an interest in matters which come before such officers and employees. Abstention deprives the public and that official's constituents of a voice in governmental affairs. And, public officers and employees should have the opportunity to perform the duties for which they were elected or appointed, except where private commitments would materially affect one's independence of judgment. Compliance with disclosure requirements informs the citizenry as to how its public officers and employees exercise their discretion and independent judgment. And, in exercising their discretion and independent judgment, public officers and employees are accountable to their constituents or their appointing authority. The burden, therefore is appropriately on the public officer or employee to disclose private commitments and the effect those private commitments can have on the decision-making process, and to make a proper determination regarding abstention where a reasonable person's independence of judgment would be materially affected by those private commitments.

Nevada Commission on Ethics, Opinion No. [99-56](#), at page 8.

Should specific conflict of interest issues arise while Public Officer serves in his public capacity as an elected member of the public board, he may, pursuant to NRS 281.511(1) and NRS 281.521, request the Commission to render an opinion regarding his past, present or future conduct as a public officer in the context of the specific facts and circumstances of the issue.

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 4, 2003.

NEVADA COMMISSION ON ETHICS

By: /s/ TODD RUSSELL, Chairman

[1] The provisions of NRS 281.501, subsection 6, apply to members of the legislature.

[2] The provisions of NRS 281.501 do not require a public officer who is refraining from participating in the discussion of, and abstaining from voting on, a particular matter to leave the room while the public body considers and votes on the matter.