

Advisory Opinion No. 02-23

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR ADVISORY OPINION OF SHERI EKLUND-BROWN, Member, Elko County Commission

This matter came before the Nevada Commission on Ethics (hereinafter the "Commission") for hearing on January 16, 2003, on the request for advisory opinion filed by Sheri Eklund-Brown, Member, Elko County Commission, pursuant to NRS 281.511(a). Ms. Eklund-Brown waived confidentiality pursuant to NRS 281.511(5)(c), and the Commission heard the matter in open session.

The matter was properly noticed. Ms. Eklund-Brown appeared in person in Elko, Nevada, by video conference and was sworn and presented testimony.

Ms. Eklund-Brown requests the Commission's advisory opinion concerning whether, under the very general facts and circumstances herein, her husband's position as Elko County Surveyor and the Director of Planning and Zoning for the Elko County Planning and Zoning Department and businesses owned by Ms. Eklund-Brown's brother, uncle and cousins create inherent conflicts of interest between her public duties and private interests that implicate the disclosure and abstention provisions of NRS 281.501 an/or any other provision of Nevada's Ethics in Government Law in NRS Chapter 281.

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 her public capacity, Ms. Eklund-Brown is an elected member of the Elko County Commission. She was elected to that position in the November 2002 general election and took office in January 2003.
2. In her private capacity, Ms. Eklund-Brown is employed as a real estate agent and sales associate for Gurr & Associates Realty 500.
3. Ms. Eklund-Brown's brother owns Eklund Drilling, a drilling company located in Elko County. Ms. Eklund-Brown's uncle and cousins own Ekco Drilling, another drilling company in Elko County. Ms. Eklund-Brown has no ownership or pecuniary interest in either Eklund Drilling or Ekco Drilling; however, Ms. Eklund-Brown has detailed knowledge of the drilling business and, in the past, has owned and operated a drilling business. Eklund Drilling and Ekco Drilling both bid on contracts for Elko County drilling projects.
4. Ms. Eklund-Brown's husband, Randy Brown, is employed by Elko County's Planning and Zoning Department as both the Elko County Surveyor and the Director of Planning and Zoning. He was appointed to those positions by the Elko County Commission in June 1991. Mr. Brown supervises a staff of four employees.
5. The Planning and Zoning Department is part of the Community Development Department, which also includes the Public Works Department and the Building Inspection Department.
6. As Elko County Surveyor, Mr. Brown conducts surveys and decides parcel map approval requests.
7. Mr. Brown's parcel map decisions are subject to appeal before the Elko County Commission.

8. In his position as Director of Planning and Zoning for Elko County, Mr. Brown, as staff, makes recommendations to the Elko County Planning Commission in matters of master plans, zoning and zoning changes, conditional uses, public right-of ways, and other such issues before the Planning Commission.

9. Planning Commission decisions are subject to appeal before the Elko County Commission.

CONCLUSIONS OF LAW

1. In her capacity as an elected member of the Elko County Commission, Ms. Eklund-Brown is a "public officer" pursuant to 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 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 Ms. Eklund-Brown's request for opinion presented no specific facts and circumstances for the Commission to consider in interpreting and applying the ethical standards of NRS Chapter 281 to Ms. Eklund-Brown's past, present or future conduct as a public officer, the Commission provides to Ms. Eklund-Brown 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 Ms. Eklund-Brown to that Opinion for guidance. The Commission cautions Ms. Eklund-Brown that when a matter comes before her in her capacity as a member of the Elko County Commission, she must carefully consider her private interests and commitments that may affect her decision in the matter and disclose sufficient information concerning her private interests and/or commitments to inform the public and her constituents of the potential effect of her action [as required by NRS 281.501(3)] and, after making such proper disclosure, she must then determine whether the independence of judgment of a reasonable person in her situation would, under the circumstances presented in the particular matter, be materially affected by her private interests and/or commitments, and, if so, she 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] Her decision regarding abstention will, of course, necessarily vary depending on the particular issue before the Elko County Commission and how her vote would be affected by, and could affect the basis of, her private interests and/or commitments. In that regard, not all matters before the Elko County Commission in which Ms. Eklund-Brown’s husband, Randy Brown, Elko County Surveyor and the Director of Planning and Zoning, is to some extent personally involved or interested will require Ms. Eklund-Brown to abstain. Rather, in making her decision regarding abstention, Ms. Eklund-Brown, on a case-by-case basis, should be guided by the NRS 281.501 disclosure and abstention 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 Ms. Eklund-Brown serves in her public capacity as a member of the Elko County Commission, she may, pursuant to NRS 281.511(1) and NRS 281.521, request the Commission to render an opinion regarding her 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: February 27, 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.