



STATE OF NEVADA  
COMMISSION ON ETHICS

BEFORE THE NEVADA COMMISSION ON ETHICS

IN THE MATTER OF THE REQUEST FOR OPINION  
CONCERNING THE CONDUCT OF  
MICHAEL MACK, Member, Las Vegas City Council.

Opinion No. 03-40

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This matter came before a quorum<sup>1</sup> of the Nevada Commission on Ethics (hereinafter the “Commission”) for hearing on November 13, 2003, pursuant to a Request for Opinion filed on September 11, 2003, on the Commission’s own motion pursuant to NRS 281.511(2)(c), and a determination on October 21, 2003, by a Commission panel finding just and sufficient cause for the Commission to hold a hearing on the matter and render an opinion on whether Las Vegas City Councilman Michael Mack’s conduct violated the disclosure and abstention provisions of NRS 281.501(2) and/or NRS 281.501(4).

The following issues are before the Commission in this matter:

1. Did Councilman Mack violate NRS 281.501(2) and deprive his constituents of the vote and voice he was elected to represent by abstaining from voting on a matter for which there are no facts to support that he (a) had accepted a gift or a loan, or (b) had a pecuniary interest, or (c) had a commitment in a private capacity to the interests of others (as defined by Subsection 8) which would materially affect the independence of judgment of a reasonable person in his situation?

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<sup>1</sup> The quorum consisted of Chairman Sheets and Commissioners Berman, Flangas, Keele and Kosinski. Commissioners Rick Hsu and Caren Jenkins served as the panel in this matter. Pursuant to NRS 281.462(4), panel members are prohibited from participating in any further proceedings of the Commission relating to the matter.

2. Did Councilman Mack violate NRS 281.501(2) by failing to disclose sufficient information concerning (a) his acceptance of a gift or a loan, or (b) his pecuniary interest, or (c) his commitment in a private capacity to the interests of others (as defined by Subsection 8) regarding his relationship with attorney Goodman to inform the public of the potential effect of his action as required by NRS 281.501(4) prior to determining whether the independence of judgment of a reasonable person in his situation would be materially affected by his interests/commitments under the circumstances presented in the particular matter and prior to abstaining from voting thereon pursuant to NRS 281.501(2)?

3. Did Councilman Mack violate NRS 281.501(4) by failing to disclose sufficient information concerning (a) his acceptance of a gift or a loan, or (b) his pecuniary interest, or (c) his commitment in a private capacity to the interests of others (as defined by Subsection 8) regarding his relationship with attorney Goodman to inform the public of the potential effect of his decision to vote or abstain from voting on the matter?

Notice of the hearing was properly posted and served. Councilman Mack was present with his counsel, Richard A. Wright, Esq., and Bruce M. Judd, Esq., of the law firm of Wright Judd & Winckler, and provided sworn testimony. Brad Jerbic, Esq., Las Vegas City Attorney, appeared in person as a witness on behalf of Councilman Mack and provided sworn testimony.

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. Michael Mack is an elected member of the Las Vegas City Council.
2. The Las Vegas City Attorney regularly and frequently advises and counsels members of the Las Vegas City Council regarding their ethical disclosure, participation and abstention obligations pursuant to NRS 281.501.
3. In advising and counseling members of the Las Vegas City Council on their ethical obligations, the Las Vegas City Attorney relies on the statutory ethics in government provisions of NRS Chapter 281 and published Commission Opinions.
4. The Las Vegas City Attorney is familiar with the entire agenda for each Las Vegas City Council meeting.
5. Prior to each Las Vegas City Council meeting, a member of Councilman Mack's staff reviews the meeting agenda for matters that may implicate Councilman Mack's personal and/or business interests and consults with the Las Vegas City Attorney's Office regarding Councilman Mack's disclosure, participation and abstention obligations with regard to those matters.
6. The agenda for the August 6, 2003, Las Vegas City Council meeting included item 120, a public hearing on a variance request, and item 121, a public hearing on a special use permit related to the variance. Both items identified the name of the applicant, a summary of the applicant's request, and the Las Vegas City staff and Planning Commission recommendations. Neither item identified the name of the attorney representing the applicant.<sup>2</sup>

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<sup>2</sup> The name of the attorney, if any, representing an applicant before the Las Vegas City Council is never listed on the agenda.

7. Eric Goodman, Esq., of the Las Vegas law firm Goodman, Brown and Premsrirut, appeared at the Las Vegas City Council meeting on August 6, 2003, to represent the applicants identified in agenda items 120 and 121.

8. Prior to the August 6, 2003, Las Vegas City Council meeting, Councilman Mack had retained Puoy Premsrirut, Esq., an attorney in the law firm Goodman, Brown and Premsrirut, to provide legal representation to him on an unrelated matter regarding a personal business venture. Neither Eric Goodman, Esq., nor his law firm were involved financially with Councilman Mack in the business venture.

9. When the Public Hearing was declared “open” for agenda items 120 and 121 at the August 6, 2003, Las Vegas City Council meeting, Eric Goodman, Esq., of the law firm Goodman, Brown and Premsrirut, appeared on behalf of the applicant. Prior to any presentation by Eric Goodman, Esq., or discussion on the matter, Councilman Mack disclosed “for the record” that Eric Goodman, Esq., “also does some legal work for a personal venture that I’m involved with” and concluded that “I don’t believe it’ll have any effect on my voting ability here today.” At the end of the discussion on the agenda items, Councilman Mack stated, “Our City Attorney has mentioned that it’s probably prudent for me to abstain, even though I feel I could be – subjective of mind.” “But I will abstain, since Mr. Goodman is representing me on a separate matter.” Councilman Mack abstained from voting on agenda items 120 and 121.

10. The Las Vegas City Attorney routinely and consistently advises members of the Las Vegas City Council that an on-going attorney-client relationship between an attorney appearing on a matter before the Las Vegas City Council and a Las Vegas City Councilperson creates a commitment in a private capacity to the interest of another because it is a “substantial and continuing business relationship” and, therefore, it is the kind of relationship that should

always result in the councilperson's abstention in the matter under NRS 281.501. The Las Vegas City Attorney also routinely and consistently advises members of the Las Vegas City Council that in such a situation, the councilperson need disclose nothing more than that an attorney-client relationship exists.

11. In Advisory Opinion No. 02-22, the Commission provided to Councilman Mack general and specific guidance regarding the disclosure, participation and abstention provisions of NRS 281.501.

### **CONCLUSIONS OF LAW**

1. Councilman Mack is a public officer as defined in NRS 281.4365.
2. The Commission has jurisdiction to render an opinion in this matter pursuant to NRS 281.465 and NRS 281.511, Subsection 2(c).

**WHEREFORE**, based upon a preponderance of the evidence in this matter, the Commission by majority vote<sup>3</sup> renders the following Opinion:

### **OPINION**

In pertinent part, NRS 281.501(4) 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.

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<sup>3</sup> Commissioner Flangas dissented.

In pertinent part, NRS 281.501(2) provides:

...[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.

NRS 281.501(8) defines “commitment in a private capacity to the interests of others” as 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.

The disclosure and abstention provisions of NRS 281.501 are at the heart of Nevada’s public policy that requires public officers, who are both public servants and private citizens, to perform their public duties in a manner that will enhance the people’s faith in their integrity and impartiality.<sup>4</sup> When faced with a conflict between his private interests and those of the public whom he serves, NRS 281.501, therefore, requires a public officer to disclose sufficient information concerning his private interests and/or commitments to inform the public of the potential effect of his action or abstention upon those private interests and/or commitments. This gives the citizens represented by the public officer the opportunity they deserve to evaluate the nature of the conflict and the public officer’s exercise of discretion in determining whether the conflict will materially affect his judgment. The public officer must then make a proper determination regarding abstention where a reasonable person’s independence of judgment

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<sup>4</sup> See, NRS 281.421.

would be *materially* affected by those private interests and/or commitments. Public officers are the voice of and accountable to their constituents.<sup>5</sup> Therefore, when not prohibited from voting on a matter, a public officer has a duty to act on all matters that come before him.<sup>6</sup>

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 that 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.

See, Commission Opinion No. 99-56, *In the Matter of the Opinion Request of Bruce L. Woodbury*, dated December 22, 1999 (hereinafter the "Woodbury Opinion").

The Commission has previously referred Councilman Mack to the *Woodbury Opinion* for guidance,<sup>7</sup> reminding him that the burden is on the public officer 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."

Since at least 1999,<sup>8</sup> the Las Vegas City Attorney's Office has regularly and consistently advised members of the Las Vegas City Council that an attorney-client relationship falls under NRS 281.501 and creates the kind of relationship that should always result in disqualification for a member of the Las Vegas City Council. Further, the Las Vegas City Attorney's Office has

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<sup>5</sup> See, Commission Opinion No. 99-56, *In the Matter of the Opinion Request of Bruce L. Woodbury*, dated December 22, 1999.

<sup>6</sup> See, Commission Opinion No. 99-56, *In the Matter of the Opinion Request of Bruce L. Woodbury*, dated December 22, 1999.

<sup>7</sup> See, Advisory Opinion No. 02-22, *In the Matter of the Request for Advisory Opinion of Michael Mack, Member, Las Vegas City Council*, dated March 4, 2003. (Pursuant to NRS 281.511(5), the content of Advisory Opinion No. 02-22 is no longer confidential and was discussed openly and freely by Councilman Mack and his counsel during the hearing in this matter.)

<sup>8</sup> Following the 1999 legislative changes to NRS 281.501.

regularly and consistently advised members of the Las Vegas City Council in such situations that a disclosure need provide no information other than a simple statement that the City Council member has an attorney-client relationship with the attorney appearing before the City Council. The Las Vegas City Attorney's position is based on the generally privileged nature of attorney-client relationships, which are much like relationships between doctor-patient and priest-confessor.<sup>9</sup> However, the Las Vegas City Attorney's position on this issue effectively creates an attorney-client exception to the disclosure and abstention requirements provided in NRS 281.501. Such an exception does not exist in the language of the statute or in the legislative history. The Commission, therefore, respectfully disagrees with the Las Vegas City Attorney's position on this issue and declines to adopt such an exception to the disclosure and abstention requirements of NRS 281.501. The issue is not the personal relationship between a public officer and his or her attorney (or doctor or priest). Rather, it is the action that is being taken by the public officer and how that action affects that attorney (or doctor or priest) given the context of the matter before the public body.

On August 6, 2003, Councilman Mack made the following disclosure after Agenda Items 120 and 121 were discussed before the Las Vegas City Council:

Our City Attorney has mentioned that it's probably prudent for me to abstain, even though I feel I could be – subjective of mind. But I will abstain, since Mr. Goodman is representing me on a separate matter.

However, NRS 281.501 and the Commission opinions interpreting NRS 281.501 require a more substantial disclosure. Councilman Mack's disclosure failed to meet the requirements of NRS 281.501 because it failed to provide sufficient information to inform the public of the

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<sup>9</sup> The Las Vegas City Attorney's Office believes that the mere "an attorney-client relationship exists" disclosure is sufficient because the public understands the confidential and/or business nature of such a relationship.



potential effect of his action or abstention upon the attorney given the context of the matters before the Las Vegas City Council in Agenda Items 120 and 121.

By way of disclosure, Councilman Mack should have had the opportunity on August 6, 2003, to disclose to the public and his constituents not only that he had an attorney-client relationship with the attorney (or the attorney's law firm) appearing before the Las Vegas City Council on behalf of the applicants in Agenda Items 120 & 121, but also sufficient information about the effect that relationship would have on the decision-making process so that the public and the citizens represented by Councilman Mack would have had the opportunity they deserved to evaluate the nature of the conflict and Councilman Mack's exercise of discretion in determining whether the attorney-client relationship would materially affect his judgment on the matter pending before the Las Vegas City Council. After such proper disclosure, the burden was on Councilman Mack to make a proper determination regarding whether to abstain in the matter based upon whether a reasonable person's independence of judgment in acting on the matter would have been materially affected by the attorney-client relationship. Councilman Mack was deprived of that opportunity when his disclosure and abstention decision making process was preempted by advice from the Las Vegas City Attorney's office that compelled him to abstain, disclosing merely and attorney-client relationship.

Unless the attorney-client relationship would have materially affected a reasonable person's independence of judgment in acting on Agenda Items 120 and 121, Councilman Mack, by abstaining from voting on those agenda items on August 6, 2003, failed to perform the duties for which he was elected and deprived his constituents of a voice in those matters.

Councilman Mack's disclosure did not meet the requirements of NRS 281.501. However, the long-standing practice of the Las Vegas City Attorney's Office of advising

members of the Las Vegas City Council to automatically abstain and disclose nothing more than “an attorney-client relationship” appears to have created an environment in which members of the Las Vegas City Council believed they were compelled in such matters to act in accordance with advice and instruction from the Las Vegas City Attorney’s Office. Further, on August 6, 2003, the Las Vegas City Attorney’s Office specifically advised Councilman Mack to abstain on Agenda Items 120 and 121 based solely on an attorney-client relationship between Councilman Mack and the attorney representing the applicants in those agenda items. Based solely on those limited circumstances in this particular matter, the Commission declines to find that Councilman Mack violated the provisions of NRS 281.501 subsection (2) or (4).

However, by this opinion, public officers are admonished that the Commission takes seriously the issues of proper disclosure and abstention. The Commission will not hereafter under circumstances substantially similar to those discussed herein tolerate disclosures or abstentions that fail to meet the requirements of NRS 281.501 and the standards of the Commission’s published opinions.

**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: June \_\_16\_\_, 2004.

NEVADA COMMISSION ON ETHICS

By: \_\_\_\_\_/S/\_\_\_\_\_  
RICK HSU, Chairman