



STATE OF NEVADA
COMMISSION ON ETHICS

BEFORE THE NEVADA COMMISSION ON ETHICS

**IN THE MATTER OF THE
REQUEST FOR ADVISORY OPINION OF
PUBLIC OFFICER, Member, City Council.**

**Abstract of Confidential
Advisory Opinion No. 05-04**

This matter came before the Nevada Commission on Ethics (hereinafter the “Commission”) for hearing on the request for advisory opinion filed by Public Officer, an elected member of the City Council, pursuant to NRS 281.511(a).

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 with legal counsel. Public Officer was sworn and presented testimony. The Advisory Opinion is confidential pursuant to NRS 281.511, Subsection 5(c).

Public Officer’s spouse is a candidate on the upcoming municipal election. Public Officer requests the Commission’s advisory opinion on whether participation in the spouse’s campaign activities may offend Nevada’s Ethics in Government law. Public Officer also requests the Commission’s guidance with regard to the implications of Nevada’s Ethics in Government Law (NRS Chapter 281) on public officer’s conduct as an elected member of the City Council should the spouse be elected.

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. Public Officer is in a second term as an elected member of the City Council. The term will expire in approximately two years.
2. Public Officer's spouse intends to file as a candidate for an office in another branch of government. The election will be held in approximately two months.
3. Public Officer's spouse is actively campaigning for the office to be decided in the municipal election.
4. Public Officer intends to assist spouse's campaign by providing emotional support, helping with organization, appearing in family photographs in campaign literature, and participating in door-to-door campaigning on behalf of spouse.
5. Public Officer has been successful in raising significant funds for public officer's own campaigns for public office.
6. As part of the annual city budget process, City Council ratifies the annual budget for branches of government within the city.

CONCLUSIONS OF LAW

1. As an elected member of the City Council, Public Officer 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 motions duly made, seconded, and unanimously approved,¹ the Commission renders the following advisory opinion:

¹ The vote was 5-0.

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.

Public Officer seeks the Commission's guidance on two issues: (1) participation in spouse's campaign; and (2) the implications of Nevada's Ethics in Government Law on Public Officer's conduct as an elected member of the City Council should spouse be the successful candidate in the municipal election.

1. Spouse's Campaign

The issue of Public Officer's participation in spouse's campaign involves specific questions and specific facts and circumstances against which the Commission can interpret and apply the statutory ethical standards for public officers and provide guidance to Public Officer on past, present, or future conduct as a public officer, as contemplated by the statutes authorizing the Commission to render advisory opinions to public officers. Within the issue of Public Officer's participation in spouse's campaign are the distinct issues of (a) appearing in spouse's campaign literature, (b) distributing spouse's campaign literature door-to-door, and (c) soliciting contributions for spouse's campaign.

NRS 281.481(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 business entity in which he has a significant pecuniary interest, or any person to whom he has a commitment in a private capacity to the interests of that person." As used in NRS 281.481(2), "commitment in a private capacity to the interests of that person" has the meaning ascribed to "commitment in a private capacity to the interests of others" in subsection 8 of NRS 281.501,² and "unwarranted" means without justification or adequate reason.

In its Opinion No. 98-41, the Commission interpreted the provisions of NRS 281.481(2) as it relates to a public officer's use of any or all of his position and/or other accouterments of his public office in political advertisements endorsing the candidacy of an individual. Therein, the Commission opined that although an endorsement by the public officer that shows, among other things, his official title would result in an "advantage" to the candidate,

² Pursuant to subsection 8 of 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 herein.

under the specific facts of Opinion No. 98-41 the Commission found that such endorsement did not violate NRS 281.481(2) because it was not 'unwarranted'. The Commission refers Public Officer to Advisory Opinion No. 98-41 for further guidance on this issue.

In applying the provisions of NRS 281.481(2) to the specific facts and circumstances presented by Public Officer to the Commission in this matter, and in light of the Commission's application of the statute in Advisory Opinion No. 98-41 in the context of a public officer's endorsement of a political candidate, the Commission addresses Public Officer's three campaign issues as follows.

a. Appearing in spouse's campaign literature.

Public Officer's photograph in spouse's campaign literature identifying Public Officer as the candidate's spouse and not identifying Public Officer as a member of the City Council will not violate the provisions of NRS 281.481(2).

b. Distributing spouse's campaign literature door-to-door.

Public Officer may distribute spouse's campaign literature door-to-door without violating the provisions of NRS 281.481(2) provided that in the process Public Officer does not, for the benefit of spouse's campaign, proactively self-promote Public Officer as a member of the City Council or solicit or accept contributions to spouse's campaign. Public Officer indicated that he/she will not solicit or accept campaign contributions while distributing spouse's campaign literature door-to-door, and that if campaign contributions are offered, he/she will simply tell the prospective donors that their interest in making a campaign contribution will be conveyed to a campaign fundraiser, who will contact them. Such conduct offered by Public Officer does not violate the provisions of NRS 281.481(2).

c. **Soliciting contributions for spouse's campaign.**

Although Public Officer has experience as a successful fundraiser in Public Officer's own political campaigns, Public Officer specifically stated that, in an effort to avoid any appearance of impropriety, Public Officer has determined to not participate in any fundraising activity on behalf of spouse's campaign. The Commission supports Public Officer's decision to refrain from soliciting campaign contributions on behalf of spouse and renders no further opinion on the issue.

In rendering this advisory opinion, the Commission makes no determination whether any campaign activity discussed herein amounts to a "privilege, preference, exemption or advantage" for Public Officer's spouse, warranted or unwarranted.

2. **Implications of Ethics in Government Law on Public Officer should spouse's campaign be successful.**

The issue concerning Public Officer's potential conduct as an elected member of the City Council should spouse be successful in the municipal election is speculative in nature and, therefore, beyond the specific facts and circumstances contemplated by statutes authorizing the Commission to render advisory opinions to public officers. However, with regard to this speculative issue, the Commission provides to Public Officer the following general guidance concerning 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.

The Commission is charged with the responsibility of evaluating matters before it in light of public perception and commitment to the public trust, cautioning public officers of conduct that may undermine the public trust and holding public officers accountable when they fail to place public interest and public trust ahead of their private and/or pecuniary interests.

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(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. Except as otherwise provided in subsection 6,³ 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.

³ The provisions of NRS 281.501, subsection 6, apply to members of the legislature.

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 regularly refers public officers to Opinion No. 99-56 for guidance. The Commission cautions Public Officer that when a matter comes before Public Officer in the capacity as a member of the City Council, Public Officer must carefully consider all private interests and commitments that may affect Public Officer’s decision in the matter and disclose sufficient information concerning those private interests and/or commitments to inform the public and Public Officer’s constituents of the potential effect of Public Officer’s action [as required by NRS 281.501(4)] and, after making such proper disclosure, Public Officer must then determine whether the independence of judgment of a reasonable person in that situation would, under the circumstances presented in the particular matter, be materially affected by Public Officer’s private interests and/or commitments, and, if so, Public Officer 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)].⁴ Public Officer’s decision regarding abstention will, of course, necessarily vary depending on the particular issue before the City Council and how Public Officer’s vote would be affected by, and could affect the basis of, Public Officer’s private interests and/or commitments. In that regard, not all matters that may come before the City Council in which Public Officer’s spouse (should spouse be elected) may be to some extent personally involved or interested would require Public Officer to abstain. Rather, in making the decision regarding abstention, Public Officer, 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*.

⁴ 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.

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 Public Officer's spouse be elected and specific conflict of interest issues thereafter arise while Public Officer serves as a member of the City Council, Public Officer may, pursuant to NRS 281.511(1) and NRS 281.521, request the Commission to render an opinion regarding Public Officer's past, present or future conduct as a public officer in the context of the specific facts and circumstances of the issue.

NOTE: THIS MATTER IS A CONFIDENTIAL FIRST-PARTY ADVISORY OPINION REQUEST. FOR PURPOSES OF A FIRST-PARTY ADVISORY OPINION REQUESTED PURSUANT TO NRS 281.511(1), ALL FACTS IN THE MATTER ARE PROVIDED BY THE PUBLIC OFFICER REQUESTING THE ADVISORY OPINION, AND THE COMMISSION MAKES NO INDEPENDENT INVESTIGATION AS TO THE TRUTH OF THOSE FACTS. THE RECORD HEREIN, THEREFORE, CONSISTS SOLELY OF FACTS PROVIDED ON THE RECORD BY THE PUBLIC OFFICER, AND THIS OPINION IS BASED SOLELY UPON THOSE FACTS. FACTS AND

CIRCUMSTANCES THAT DIFFER FROM THOSE PROVIDED BY THE PUBLIC OFFICER IN THIS ADVISORY 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: April 29, 2005.

NEVADA COMMISSION ON ETHICS

By: /s/
 RICK HSU, Chairman