



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the Request for  
Advisory Opinion by **MELISSA A. FABER**,  
Deputy, Nevada State Public Defender and  
**KELLY C. BROWN**, Deputy District Attorney,  
Eureka County,  
Nevada

Advisory Opinion No. 10-21A

Public Employees.

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**OPINION**

Public employees Melissa A. Faber, Esq. (“Faber”) and Kelly C. Brown, Esq. (“Brown”) requested this confidential advisory opinion (“RFO”) from the Nevada Commission on Ethics (Commission) pursuant to NRS 281A.440(1). Faber and Brown appeared in person and provided sworn testimony before a quorum<sup>1</sup> of the Nevada Commission on Ethics (“Commission”) during a hearing on May 13, 2010. At the conclusion of the hearing, Faber and Brown waived their rights to keep the Commission’s opinion confidential.

Faber and Brown sought an advisory opinion from the Commission on the propriety of their present and future conduct as it relates to the Ethics in Government Law (Ethics Law) set forth in chapter 281A of the Nevada Revised Statutes (NRS).

Specifically, Faber and Brown questioned whether their private romantic relationship and respective public positions with the Nevada State Public Defender (“NSPD”) in and for Eureka County and the Eureka County District Attorney created any ethical implications.

After fully considering Faber’s and Brown’s request and analyzing the facts, circumstances and testimony presented, the Commission deliberated and orally advised Faber and Brown of its decision in the matter. The Commission now renders this written Opinion.

The facts in this matter were provided by Faber and Brown. Facts and circumstances that differ from those considered by the Commission in this Advisory Opinion may result in a different opinion.

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<sup>1</sup> The following Commissioners participated in this opinion: Chairman Keele and Commissioners Beyer Gale, Groover, Lamboley, Marvel, Moran and Shaw.

## **I. FINDINGS OF FACT**

1. Faber is a public employee with the State of Nevada serving as a Deputy Nevada State Public Defender representing indigent criminal defendants in and for the Seventh Judicial District of Nevada, which encompasses White Pine, Lincoln and Eureka counties. Faber is the General Office Manager for the NSPD's regional office located in Ely, Nevada.
2. As General Office Manager, Faber is responsible for assigning all cases in the district among herself and two other attorneys. Faber typically assigns cases by county. Faber is not involved in case management, legal work, supervision or client contact for pending cases other than those to which she is assigned. All case supervision is handled by the Carson City NSPD office.
3. Faber was the deputy assigned to handle all cases in Eureka County from that county between February 2010 and April 2010.
4. Brown is a public employee for Eureka County, Nevada serving as a Eureka County Deputy District Attorney. Brown prosecutes criminal cases in Eureka County. Prior to taking this position, Brown worked for the NSPD with Faber in the Ely Regional Office.
5. While working together in the Public Defender's office, Faber and Brown began a private romantic relationship. This relationship continued after Brown changed employment to the Eureka County District Attorney's Office.
6. As a Deputy District Attorney in Eureka County, Brown has no involvement in

any case that was pending with the NSPD during his employment with that office.

7. To avoid any conflicts of interest or appearances of impropriety resulting from their private relationship and the potential to represent adverse clients and public interests by virtue of their respective public positions, Faber assigned another deputy to handle all cases from Eureka County. Her decision followed an already existing internal policy established by the NSPD regarding case distribution.
8. Faber and Brown have received opinions from their respective employers, the State Bar and the judges in their District that their private relationship has no impact on their employment or job duties.

## **II. DISCUSSION**

Based on the facts provided to the Commission, Faber and Brown are acutely aware of the possible appearance of impropriety by virtue of their romantic relationship and adverse public positions as a criminal prosecutor and public defender. The Commission finds that the relationship itself does not violate any provision of the Ethics Law. However, the Commission advises Faber and Brown to consider various provisions of the Ethics Law as they may inhibit certain future conduct.

The Commission now offers and applies the advice previously provided to similarly situated public employees and elaborates on various other ethical provisions outlined in NRS 281A to assist Faber and Brown in their efforts to avoid conflicts of interest or appearances of impropriety.

## A. Former Commission Opinion

The Commission previously considered whether a private romantic relationship between public employees serving adverse public interests in the same community violates the Ethics Law. **Confidential** Commission advisory opinion, RFO 96-45, contained nearly identical facts as provided by Faber and Brown. In RFO 96-45, a rural county Deputy District Attorney contemplated engaging in a private romantic relationship with the State Deputy Public Defender who served the same community.

The Commission expressed that it “only has an interest and authority over the private lives of public employees to the extent that their private lives affect their public duties.” Without finding that engaging in such a relationship would constitute a violation of the Ethics Laws, the Commission offered the following recommendations and advice:

[T]o assure that no violations of the Code of Ethical Standards occur and to lessen the perception that any such violations might occur:

1. You and Ms. X should never personally be opponents in a case. The Commission’s advice is that your offices develop a protocol whereby you will not be assigned to the opposite sides of the same case . . . .
2. You and Ms. X must not discuss ongoing cases. Each of you will be privy to information that cannot be divulged to the other outside the normal workings of the judicial system.

The advice offered to the public employees in RFO 96-45 is relevant to this RFO. In fact, the Commission specifically considered

the provisions of NRS 281A.400(1) and (2)<sup>2</sup> in rendering its advice. These provisions have remained unchanged since 1996 and therefore remain prudent considerations for Faber and Brown.

In addition to the broad advice offered in RFO 96-45, the Commission now specifically advises Faber and Brown to consider the effect of any actions and decisions in their private relationship on their public employment and duties. The Ethics Law establishes several prohibitions to guide Faber and Brown in their future conduct.

## B. Statutory Ethical Considerations

The Commission reminds Faber and Brown of the policy outlined in the legislative declaration and certain prohibitions enumerated in various statutes within the Ethics Law, as follows:

### 1. Legislative findings and declarations.

NRS 281A.020 provides:

1. It is hereby declared to be the public policy of this State that:

(a) A public office is a public trust and shall be held for the sole benefit of the people.

(b) A public officer or employee must commit himself or herself to avoid conflicts between the private interests of the public officer or employee and those of the general public whom the public officer or employee serves.

2. The Legislature finds and declares that:

(a) The increasing complexity of state and local government, more and more closely related to private

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<sup>2</sup> Formerly NRS 281.481(1) and (2).

life and enterprise, enlarges the potentiality for conflict of interests.

(b) 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 roles of persons who are both public servants and private citizens.

(Emphasis added.)

The public policy supporting the Ethics Law promotes that public officers and employees should avoid conflicts between their private interests and public service. To avoid such conflicts, the Commission advises Faber and Brown to consider the following provisions of the Ethics Law, which have the potential to implicate future conduct by virtue of their private interests.

A romantic relationship between two public employees in adverse public positions, by itself, does not violate the code of ethical standards. However, the relationship may draw much public scrutiny, particularly in a small community. The requesters' situation will require an abundance of caution and they should make every effort to preserve the public's trust by maintaining the appropriate separation between this relationship, their respective personal and pecuniary interests and their public duties.

## **2. Seeking/Accepting Favor/Economic Opportunity Influencing Public Service.**

NRS 281A.400(1) provides:

A public . . . employee shall not seek or accept any gift, service, favor, employment, engagement, emolument or economic opportunity which would

tend improperly to influence a reasonable person in the public . . . employee's position to depart from the faithful and impartial discharge of the public . . . employee's public duties.

(Emphasis added.)

In accordance with the advice proffered in RFO 96-45, the Commission advises Faber and Brown to ensure that their respective office protocols are committed to writing and strictly followed to avoid any circumstances in which their private relationship might influence them, or create a perception of influence, to depart from the faithful and impartial discharge of their public duties.

## **3. Securing/Granting Unwarranted Privileges, Exemptions, Preferences or Advantages**

NRS 281A.400(2) provides:

A public . . . employee shall not use the public . . . employee's position in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for the public . . . employee, any business entity in which the public . . . employee has a significant pecuniary interest, or any person to whom the public . . . employee has a commitment in a private capacity to the interests of that person..

(Emphasis added.)

Faber and Brown should avoid situations in which they are using their positions in government to secure or grant unwarranted privileges, preferences, exemptions or advantages for themselves, one another or their respective public offices. For example,

Faber and Brown must not utilize any information they receive through their public positions or render any power or influence from their positions to grant an unwarranted preference to one another.

#### 4. Public Information for Private Use

NRS 281A.400(5) provides:

If a public . . . employee acquires, through the public . . . employee's public duties or relationships, any information which by law or practice is not at the time available to people generally, the public . . . employee shall not use the information to further the pecuniary interests of the public . . . employee or any other person or business entity.

(Emphasis added.)

As advised in RFO 96-45, Faber and Brown must not discuss ongoing cases among themselves. Additionally, they should not discuss other information from their respective offices due to the sensitive and confidential nature of the cases and adverse interests of each office. Faber or Brown may become aware of personnel or other internal matters, or matters relating to his or her respective governmental entity that has not been made public, but may create a benefit or detriment to the other in some way. Such information must not be shared.

#### 5. Suppressing Public Information

NRS 281A.400(6) provides:

A public . . . employee shall not suppress any governmental report or other document because it might tend to affect unfavorably the public . . . employee's pecuniary interests.

Similar to the advice provided above regarding NRS 281A.400(5), suppressing non-confidential governmental information available to Faber or Brown by virtue of his or her public position to protect the other in any way could violate the Code of Ethical Standards.

#### 6. Using Government Time or Equipment

NRS 281A.400(7) provides, in relevant part:

Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit the public officer's or employee's personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general

public for nongovernmental purposes;  
or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

Faber and Brown should consult with their supervisors regarding internal policies and/or procedures that relate to the nominal use of governmental property, time and equipment for personal reasons. Some agencies do allow limited use under certain circumstances, if the use satisfies the four criteria set forth in NRS 281A.400(7)(a)(1)-(4). Items that should be considered are government-issued cell phones, computers, vehicles, fax machines, office telephones, etc. Even with approval, Faber and Brown should be careful to avoid even the appearance of impropriety.

#### **7. Seeking Other Employment or Contracts**

NRS 281A.400(10) provides:

A public officer or employee shall not seek other employment or contracts through the use of the public officer's or employee's official position.

As discussed in the analysis of NRS 281A.400(5), sharing personnel-related information which may lead to future employment or contracts between Faber and Brown may violate NRS 281A.400(10).

### **III. CONCLUSIONS OF LAW**

1. At all times relevant to the hearing of this matter, Faber and Brown were "public employees," as defined by NRS 281A.160.
2. Pursuant to NRS 281A.440(1) and NRS 281A.460, the Commission has

jurisdiction to render an advisory opinion in this matter.

3. A romantic relationship between two public employees in adverse public positions, by itself, does not violate the code of ethical standards.
4. Faber and Brown are advised to consider all future conflicts of interest or appearances of impropriety resulting from their private relationship. Specifically, Faber and Brown should not work on the same cases, exchange information related to any cases or discuss internal matters related to their respective public offices which could influence them to depart from their public responsibilities or unwittingly create unwarranted benefits for one another. Similarly, Faber and Brown should develop appropriate interpersonal mechanisms to assure that untoward communications or inappropriate use of governmental time or property or equipment do not occur.

Dated this 13<sup>th</sup> day of October, 2010.

NEVADA COMMISSION ON ETHICS

By: \_\_\_\_\_

  
George Keele

Chairman, May 13, 2010<sup>3</sup>

<sup>3</sup> George M. Keele, Esq. was the Chairman of the Commission during the hearing in this matter.