
State of Nevada

Before the Nevada Commission on Ethics

In the Matter of the First-Party Requests for
Advisory Opinions Concerning the Conduct of
Commissioners A and B, Members,
Board of County Commissioners,
State of Nevada,

Requests for Opinions Nos.
10-51A and 10-59A

Public Officers
_____/

ABSTRACT OF OPINION

I. STATEMENT OF THE CASE

Public officers Commissioner A and Commissioner B each requested confidential advisory opinions from the Nevada Commission on Ethics (“Commission”) pursuant to [NRS 281A.440\(1\)](#) regarding the propriety of their anticipated future conduct as it relates to the Ethics in Government Law (“Ethics Law”) set forth in [Chapter 281A](#) of the Nevada Revised Statutes (“NRS”). They agreed to consolidate their requests before the Commission. A quorum¹ of the Commission heard this matter on August 12, 2010. Commissioners A and B appeared at the hearing and provided sworn testimony. They were represented by counsel.

At the conclusion of the hearing, and after full consideration of the facts, circumstances and testimony presented, the Commission deliberated and orally advised Commissioners A and B of its decision that the Ethics Law requires Commissioners A and B to disclose their personal pecuniary interests or commitments in a private capacity to the interests of others prior to acting on a proposed public contract to retain legal counsel for the County on a cost-sharing basis in a matter involving litigation, but that they need not abstain from voting on whether to approve the contract.

Commissioners A and B elected to retain confidentiality with respect to this proceeding. Therefore, the Commission publishes this Abstract in lieu of the full opinion.

II. QUESTION PRESENTED

Commissioners A and B ask the Commission to advise them of their disclosure and abstention obligations as members of the Board of County Commissioners with respect to the Board's consideration of a proposed cost-sharing contract for legal services to be provided to the County and to private individuals, including Commissioners A and B, in litigation.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Commissioners A and B are members of the Board of County Commissioners. The Board will consider approval of a proposed contract under which Attorney would provide legal representation to the County in a litigation matter. The proposed contract provides that the County and private individuals also represented by Attorney would share in the costs relating to Attorney's common representation. Commissioners A and B are individuals represented by Attorney who would be part of this cost-sharing arrangement proposed by the contract. They request an advisory opinion respecting their disclosure and abstention obligations under the Ethics Law.

The Ethics Law provides that public officers must adequately disclose private interests, and where appropriate, abstain from acting on matters implicating their private interests. The Commission thus considers the obligation of Commissioners A and B to disclose their personal interests in the proposed County contract for legal representation and whether such interests merit their abstention from voting on whether to approve the contract.

B. RELEVANT STATUTES

1) Public Policy

[NRS 281A.020](#) provides in part:

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 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.

Nevada's Ethics Law mandates that public officers hold public office for the public benefit and avoid conflicts of interests. The Ethics Law is concerned with situations involving public officers that create appearances of impropriety and conflicts of interest, as well as actual impropriety and conflicts to promote the integrity in public service.

As members of the County Commission, Commissioners A and B hold public offices and must therefore commit themselves to avoid both actual and perceived conflicts between their private interests and those of the public they serve. Whether there would be such conflicts between their public duties as members of the County Commission

and their private interests must be considered in light of the provisions set forth in [NRS Chapter 281A](#) and as interpreted by applicable Commission precedent in similar circumstances.

2) Disclosure

Under [NRS 281A.420](#)(1)(b) and (c), when a public officer “has a pecuniary interest” in a matter or when the public officer's actions regarding the matter would “reasonably be affected by the public officer's . . . commitment in a private capacity to the interest of others,” the public officer “shall not approve, disapprove, vote, abstain from voting or otherwise act upon [the] matter . . . without disclosing sufficient information . . . to inform the public of the potential effect of the action or abstention . . . upon the public officer's pecuniary interest, or upon the persons to whom the public officer . . . has a commitment in a private capacity.”

Commissioners A and B testified that they would be among the private individuals represented by Attorney who would be encompassed within the cost-sharing arrangement in the proposed contract between the County and Attorney. Although they further testified that they would not personally benefit financially by the terms of the contract, it is clear that they nonetheless have pecuniary interests and commitments in their private capacity to the interest of others under [NRS 281A.420](#)(1) sufficient to require disclosure. The fees for the legal services are split between the County, Commissioners A and B, and the remaining private individuals. Such an arrangement necessarily requires that Commissioners A and B pay their proportionate share of the expenses and simultaneously benefit by discounted costs than they would otherwise pay for legal representation of their interests that were not shared by similarly affected parties. Such financial stakes in the representation amount to pecuniary interests in the matter under consideration by the County Commission. Furthermore, Commissioners A and B each have existing (and prior) attorney/client relationships with Attorney which amount to a substantial and continuing business relationship, or a commitment in a private capacity to the interests of Attorney pursuant to [NRS 281A.420](#)(8)(a)(4).

Thus, the Commission concludes that [NRS 281A.420](#)(1) obligates Commissioners A and B to disclose their pecuniary interests or commitments in a private capacity to the interests of Attorney when the proposed cost-sharing contract comes before the Board for approval. With appropriate consultation and advice from the District Attorney, their disclosures must be sufficiently detailed to allow members of the public to understand the potential effect of their participation in the Board's decision on their private pecuniary interests relating to the litigation and their attorney-client relationships with Attorney or any other commitments in a private capacity to Attorney's interests or the interests of others.

3) Abstention

[NRS 281A.420](#)(3) requires a public officer to abstain from voting on a matter “with respect to which the independence of judgment of a reasonable person in the public officer's situation would be materially affected by . . . (b) [t]he public officer's pecuniary interest; or (c) [t]he public officer's commitment in a private capacity to the interests of others.”

[NRS 281A.420](#)(4)(a) provides, in relevant part:

4. In interpreting and applying the provisions of subsection 3:
 - (a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the

public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of others, accruing to the other persons, is not greater than that accruing to any other member of the general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

As noted above, Commissioners A and B testified that they would not personally benefit financially from the cost-sharing contract between the County and Attorney. Moreover, the District Attorney testified that his office would “monitor” the matter to ensure that “there would not be any personal benefit from the [Board’s] decision.”

Commissioners A and B also testified that they would not realize any personal benefit or detriment accruing from the contract beyond that accruing to any other private individuals affected by the contract at issue. Pursuant to [NRS 281A.420\(4\)\(a\)](#), the independent judgment of a reasonable person in Commissioner A and B's situation would not be materially affected by the pecuniary interests or commitments at issue under these circumstances. Therefore, the Commission concludes that under [NRS 281A.420\(3\)](#) and (4), Commissioners A and B need not abstain from voting on the contract.

4) Other Statutory Considerations

[NRS 281A.400](#) provides in relevant part:

1. A public officer . . . shall not seek or accept any . . . economic opportunity which would tend improperly to influence a reasonable person in the public officer's . . . position to depart from the faithful and impartial discharge of the public officer's . . . public duties.

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

(a) “Commitment in a private capacity to the interests of that person” has the meaning ascribed . . . in subsection 8 of [NRS 281A.420](#).

(b) “Unwarranted” means without justification or adequate reason.

3. A public officer . . . shall not participate as an agent of government in the negotiation or execution of a contract between the government and any business entity in which the public officer . . . has a significant pecuniary interest.

Query:

Based on the testimony presented respecting the absence of any personal pecuniary benefits resulting from approval of the contract that might accrue to Commissioner A, Commissioner B or others to whom they may have commitments in a private capacity, the Commission perceives no economic opportunity under [NRS 281A.400\(1\)](#) that would tend improperly to influence Commissioners A and B from the faithful and impartial discharge of their public duties.

Similarly, the Commission concludes that by participating in and voting on whether to approve the cost-sharing contract, Commissioners A and B would not be deemed under [NRS 281A.400\(2\)](#) to be using their positions in government as public officers to secure or grant unwarranted privileges, preferences, exemptions, or advantages for themselves, any business entities in which they have significant pecuniary interests, or any persons to whom they may have commitments in a private capacity. Rather, it appears that Commissioners A and B are concerned with proceeding in a manner which is in the best interests of the community as a whole and of the taxpayers of the County.

Next, Commissioners A and B will not be deemed to be acting as agents of government under [NRS 281A.400\(3\)](#) in the negotiation or execution of the contract between the County and business entities in which they have a significant pecuniary interest. The testimony before the Commission established that the Office of the District Attorney was the agent of government that has been negotiating the contract between the County and the Attorney's law firm. Although the cost-sharing contract does affect business entities in which Commissioners A and B have significant pecuniary interests, as discussed above, that peripheral affect does not confer a material benefit or detriment on them or their interests beyond what will accrue to other similarly situated individuals in the community. Accordingly, provided that the contract negotiations and implementation proceed in the manner described in the testimony, the Commission concludes that Commissioners A and B's participation in the Board proceedings respecting the approval of the contract will not violate [NRS 281A.400\(3\)](#).

5) Abstention - Public Policy

[NRS 281A.420\(4\)\(b\)](#) provides:

The Commission must give appropriate weight and proper deference to the public policy of this State which favors the right of a public officer to perform the duties for which the public officer was elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, the public officer's pecuniary interest or the public officer's commitment in a private capacity to the interests of others.

Giving appropriate deference to this public policy, the Commission concludes that the testimony presented in this case does not demonstrate a clear case in which the independence of judgment of reasonable persons in Commissioner A or B's position would be materially affected by their pecuniary interests or commitments in a private capacity to the interests of others.

IV. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Commissioners A and B were members of the Board of County Commissioners and as such were “public officers” 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. When the proposed cost-sharing contract comes before the Board for approval, [NRS 281A.420](#)(1) obligates Commissioners A and B to disclose their pecuniary interests (cost-sharers in the proposed contract) and commitments in a private capacity to the interests of others (Attorney) in sufficient detail to allow members of the public to understand the potential effect of their participation in the Board's decision on their private pecuniary interests and their commitments in a private capacity to the interest of others.
4. Commissioners A and B are not required to abstain from voting on the cost-sharing contract under [NRS 281A.420](#)(3) and (4) because the independent judgment of a reasonable person in Commissioner A's or B's situation would not be materially affected by the pecuniary interests or commitments at issue and because no greater benefit or detriment will accrue to them from the contract than will accrue to other private individuals affected by the contract.
5. The testimony before the Commission does not establish that Commissioner A or B will violate [NRS 281A.400](#)(1), (2), or (3) by participating in the Board's decision regarding the cost-sharing contract.

Dated this 4th day of October, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman²

¹ The following Commissioners participated in this opinion: Chairman John T. Moran, III, Esq., and Commissioners Erik Beyer, Gregory Gale, CPA, Magdalena Groover, George M. Keele, Esq., Paul Lamboley, Esq., and John W. Marvel.

² At the time this written opinion was issued, then-Chair Moran no longer served on the Commission. Current Chair Beyer signs this opinion on behalf of the participating Commissioners.