



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In the Matter of the First-Party Request for
Advisory Opinion Concerning the Conduct of
Public Officer, District Attorney,
State of Nevada,

Request for Opinion No. 11-100A
CONFIDENTIAL

Public Officer. /

ABSTRACT OF OPINION

I. STATEMENT OF THE CASE

Public officer ("PUBLIC OFFICER") requested a confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) regarding the propriety of his 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"). A quorum¹ of the Commission heard this matter on January 18, 2012. PUBLIC OFFICER appeared at the hearing, and provided sworn testimony.

PUBLIC OFFICER serves as an elected District Attorney and questions whether he may prosecute a criminal matter in which a member ("Commissioner X") of the County Board of Commissioners ("County Commission") was the victim of the crime. The County Commission has authority over the District Attorney's budget and certain staffing issues, and

PUBLIC OFFICER questions whether that budgetary and staffing authority creates a conflict of interest affecting his ability to objectively prosecute the crime.

At the conclusion of the hearing and after fully considering the facts, circumstances and testimony presented, the Commission deliberated and orally advised PUBLIC OFFICER of its decision that he had no conflict of interest under the Ethics Law which would require his disqualification from performing his official duties.

PUBLIC OFFICER elected to retain confidentiality with respect to this proceeding. Therefore, the Commission publishes this Abstract in lieu of the full Opinion.

II. QUESTION PRESENTED

PUBLIC OFFICER asks the Commission to advise him regarding whether the County Commission's authority over his agency's budget and certain staffing issues creates a conflict of interest in his ability to objectively perform his official duties in the

¹ The following Commissioners participated in this opinion: Chairman Erik Beyer and Commissioners Timothy Cory, Gregory Gale, Magdalena Groover, Paul Lamboley, James Shaw and Keith Weaver.

prosecution of the criminal matter in which a member of the County Commission was the victim of the crime.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

PUBLIC OFFICER, an elected District Attorney, has a statutory obligation to prosecute criminal offenses occurring within the jurisdiction of the county in which he was elected. PUBLIC OFFICER intends to prosecute a criminal matter in which Commissioner X was the victim of the crime. Because the County Commission is required to determine the operating budget and other county employment matters for the District Attorney's ("DA") Office, Commissioner X expressed a concern that PUBLIC OFFICER may have a conflict in prosecuting the matter. However, Commissioner X's true motivation in asserting a potential conflict may relate to another criminal matter in which the Commissioner had been recently named as a defendant. In that matter, as authorized by law, PUBLIC OFFICER delegated the prosecution of the case to the DA from another county.

PUBLIC OFFICER asks the Commission whether the Ethics Law prohibits him from performing his official duties to prosecute a criminal matter in which Commissioner X was a victim instead of a party to the legal action. In the prosecution of a criminal matter, the DA represents the State and the victim is not a party to the legal action against the defendant.

As a public officer, the provisions of the Ethics Law are applicable to PUBLIC OFFICER. Specifically, PUBLIC OFFICER must commit himself to avoid conflicts between public and private interests and ensure the public trust. The Ethics Law further prohibits PUBLIC OFFICER from using his public position to secure or grant unwarranted privileges, preferences, exemptions or advantages for any person to whom he has a commitment in a private capacity. NRS 281A.400(2).

The County Commission makes various budgetary and employment determinations affecting county agencies, including those of elected county officials such as the DA. PUBLIC OFFICER questions whether the County Commission's authority over his budget and certain staffing issues creates a commitment in a private capacity to the individual members of the County Commission, implicating various provisions of NRS 281A.

The Commission has not before determined whether a relationship between an elected public officer and any individual member of the county commission which has authority over the elected official's operating budget and/or other matters affecting the official's agency is substantially similar to an employment relationship or a substantial and continuing business relationship to create a commitment in a private capacity within the meaning established in NRS 281A.420(8). The Commission takes this opportunity to address this type of relationship, which affects several public officers throughout the State.

B. RELEVANT STATUTES

1) Public Policy

NRS 281A.020

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.

Nevada's Ethics Law mandates that public officers hold public office solely 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 the DA, PUBLIC OFFICER holds a public office and must therefore commit himself to avoid both actual and perceived conflicts between his private interests and those of the public he serves. Whether there would be such conflicts between his public duties and his 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.

Nearly every county in Nevada (if not all) requires the respective county commissions to set the county budgets, including the budgets of the DAs and other elected county officials, and determine certain matters affecting all

county employees, including those that may serve the elected officials. A DA's duties and obligations are independent from any authority of or oversight by the county commission. Instead, the DA is accountable to the public.

The public is entrusted with the right and obligation to elect a qualified DA to ensure that public offenders are appropriately and fairly prosecuted to ensure the public's safety and protect their property. Barring a specific commitment or relationship, it is reasonable to conclude that the Legislature deemed all county DAs capable of performing and fulfilling their public duties in an independent, objective manner with regard to a matter which involves or affects a member of a county commission as the victim of a crime. Mere budgetary authority and control regarding fair and equal treatment of county employees does not establish bias or conflict for a DA on matters affecting a member of the county commission in conducting official public duties. Accordingly, PUBLIC OFFICER would not violate the public trust to prosecute a criminal matter in which the victim of the crime is a member of the county commission.

2) Commitment in a private capacity defined

NRS 281A.420(8)(a) provides:

8. As used in this section:

(a) "Commitment in a private capacity to the interests of others" means a commitment to a person:

(1) Who is a member of the public officer's or employee's household;

(2) Who is related to the public officer or employee by blood, adoption

or marriage within the third degree of consanguinity or affinity;

(3) Who employs the public officer or employee or a member of the public officer's or employee's household;

(4) With whom the public officer or employee has a substantial and continuing business relationship; or

(5) Any other commitment or relationship that is substantially similar to a commitment or relationship described in subparagraphs (1) to (4), inclusive, of this paragraph.

Pursuant to State law, most county governments structure their respective governing bodies (county commissions) to have authority over budgets and certain employment matters that affect the various county departments and agencies (operational budgets, employment benefits, employee pay scales and retirements, etc.), including those affecting elected county officials. These structures are in place to create a system of checks and balances and create uniformity of government within the county. The county commissions, however, do not have any authority concerning the respective duties and obligations of other elected officials.

With these policies in mind, such structures are not intended to create private loyalties to members of the county commission or public influence over the autonomy of a public officer concerning his public duties, particularly those of another elected official. Accordingly, because PUBLIC OFFICER is an elected officer, the County Commission does not serve as PUBLIC OFFICER's employer or otherwise direct or control PUBLIC OFFICER's duties. Therefore, PUBLIC OFFICER does not have a commitment

in a private capacity to the interests of any member of the county commission.

3) Use of government position to secure unwarranted advantage

NRS 281A.400(2) provides:

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

(a) "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 281A.420.

(b) "Unwarranted" means without justification or adequate reason.

Because PUBLIC OFFICER has no commitment in a private capacity to the interests of any individual member of the County Commission, he could not be deemed to be using his position to create unwarranted benefits for any member of the County Commission through the performance of his official duties in the prosecution of a criminal matter. Moreover, no facts were presented to the Commission to suggest that PUBLIC OFFICER would not undertake his official obligations in the prosecution of this matter in an appropriate manner.

IV. COUNTY COMMISSIONER CONFLICT

While PUBLIC OFFICER cannot confirm Commissioner X's true motivations for claiming that PUBLIC OFFICER has a conflict, it appears to the Commission that any conflict may be more appropriately attributable to Commissioner X. Although Commissioner X is not properly before the Commission at this time, we nonetheless note that he appears to have the conflict of interest in this matter. Commissioner X has a personal interest in the criminal matter as the victim of the crime and could be deemed to be using his position as a member of the County Commission to exert influence over the DA's decision regarding whether and how to prosecute the criminal matter. Any suggestion by Commissioner X that the County Commission's authority regarding the DA's budget and employment matters should influence the DA's handling of criminal matters would be running afoul of several provisions of the Ethics Law.

V. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, PUBLIC OFFICER was a "public officer," 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. Based on the language and intent of the provisions set forth in NRS 281A.420(8), PUBLIC OFFICER does not have a commitment in a private capacity to the interests of

any member of the county commission.

4. Because PUBLIC OFFICER does not have a commitment in a private capacity to the interests of any individual member of the county commission, he may carry out the mission and responsibilities of the DA's Office and prosecute a criminal matter in which the victim of the crime was a member of the county commission.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

Dated this 13th day of December, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman