



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**, Member, City Council,
State of Nevada,

Request for Opinion No. 12-10A

Public Officer. /

ABSTRACT OF OPINION

I. STATEMENT OF THE CASE

Public Officer requested this 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 March 21, 2012. Public Officer appeared at the hearing and provided sworn testimony.

After fully considering Public Officer's request and analyzing the

facts, circumstances and testimony presented by Public Officer, the Commission deliberated and orally advised Public Officer of its decision that the Ethics Law does not prohibit him from establishing a bail bonds company or performing services for local courts, except for the Municipal Courts, provided that he properly discloses his business interests and undertakes an abstention analysis on the record.²

Public Officer elected to retain confidentiality with respect to this proceeding. Therefore, the Commission publishes this Abstract in lieu of the full opinion.

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

² Commissioner Groover disagreed with this determination.

II. QUESTION PRESENTED

Public Officer is a public officer serving as a part-time member of the City Council. Public Officer questions whether it would constitute a conflict of interest under NRS 281A to serve as a City Councilman and establish a new company doing business in the bail bonds industry.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Officer is an elected member of the City Council. In his private capacity, Public Officer is considering establishing a company to provide bail bonds in the local area. As part of the contemplated bail bonds business, Public Officer would enter into contractual agreements with the courts and/or incarcerated persons to provide surety bonds to secure his clients' release on bail. Public Officer will agree not offer bail bonds to any person accused of a crime under the jurisdiction of the City's Municipal Court system, and intends to disclose his interest and abstain from voting in matters before the City Council affecting the bail bonds industry. He asks the Commission whether such a bail bonds business would create a conflict of interest with his duties as a public officer.

The Ethics Law prohibits Public Officer from: 1) seeking or accepting economic opportunities

which tend to influence the faithful discharge of his public duties (NRS 281A.400(1)); 2) using his position in government to secure unwarranted benefits for himself (NRS 281A.400(2)); or 3) representing or counseling a private person before the agency in which he serves (NRS 281A.410(2)). Furthermore, Public Officer is required to properly disclose his pecuniary interests in matters under consideration by the City Council and abstain from voting under certain circumstances (NRS 281A.420).

Public Officer's private interests in pursuing a business that is affected by the City (the jurisdiction of the Municipal Courts and legislative matters involving the bail bonds industry) while also serving as a City Councilman trigger these provisions.

B. RELEVANT STATUTES

1) Public Policy

NRS 281A.020(1), 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.

The Ethics Law promotes the appropriate separation between public duties and private interests.

As a City Councilman, Public Officer has specific public responsibilities to the City that he must separate from his private interests to preserve the public trust.

Whether conflicts exist between his public duties as Councilman and his private interests in the bail bonds business must be considered in light of the provisions set forth in NRS 281A and as interpreted by applicable Commission precedent in similar circumstances.

**2) Seek/Accept
Engagement Improperly
Influencing Public
Duties.**

NRS 281A.400(1), provides:

1. A public officer or 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 officer's or employee's position to depart from the faithful and impartial discharge of the public officer's or employee's public duties.

Public Officer would seek an economic opportunity by engaging in the bail bonds business. However, such business enterprise would not by itself improperly influence a reasonable city councilman from carrying out the faithful discharge of his public duties to the City. Public Officer testifies that he will not engage in business that has the potential to affect the City. To date, he understands that the City

(through the City Attorney's Office) files certain collections actions against bail bonds companies in the City's Municipal Court. Public Officer has agreed not to issue bail bonds for criminal defendants under the jurisdiction of the Municipal Court. Public Officer also indicates that he will disclose his interests in his private company regarding any matters involving the bail bonds industry under consideration by the City Council.

Because the State Insurance Commission regulates businesses related to bail, it appears that issues involving the bail bonds industry are infrequently considered or addressed by the City Council. To the extent the City Council does consider or address this industry, Public Officer has indicated his intent to create the proper separation between his public duties and private interests.

NRS 281A.400(1) does not prohibit a public officer from engaging in private enterprise that does not violate the public trust. No evidence has been presented that Public Officer's private interests would improperly influence a reasonable person in his position to depart from the faithful discharge of his public duties as a City Councilman, particularly given Public Officer's acknowledgment of his responsibilities toward disclosure and his willingness to refrain from doing business with individuals who would require bonds that come within the jurisdiction of the City.

**3) Use of Government
Position to Secure
Unwarranted
Preferences.**

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.

No evidence exists to suggest that Public Officer has used his position in any manner as a City Councilman to benefit his interests in pursuing a private business in the bail bonds industry. In fact, Public Officer intends to eliminate any possibility of using his public position by pledging not to do business that may come within the jurisdiction of the City. Furthermore, nothing in NRS 281A.400(2) prohibits public officers from pursuing private enterprise. Accordingly, Public Officer's pursuit of a private business in the bail

bonds industry will not result in his gain of an unwarranted advantage.

**4) Contract with
governmental agency**

NRS 281A.430(1) provides:

1. Except as otherwise provided in this section and NRS 281A.530 and 332.800, a public officer or employee shall not bid on or enter into a contract between a governmental agency and any business entity in which the public officer or employee has a significant pecuniary interest.

Public Officer informed the Commission that posting bail for an individual requires depositing a bond with the court to secure an individual's release from custody. Posting of bond, in essence, forms a contract with the court that bail will be paid should the defendant fail to appear. In the event that the bail is forfeited, any action to collect is taken against the bonding company and not the bail bondsman directly. Therefore, should bail be forfeited the court will seek payment from the surety rather than Public Officer's company. Thus, this would not be the type of contract contemplated by the restrictions in NRS 281A.430(1).

Nonetheless, conflicts would certainly arise should Public Officer enter any such arrangements with the City's Municipal Court. The evidence presented established that a clear conflict of interest would arise in the event a bail bond posted by Public Officer was forfeited in the City court system. The City Attorney's Office is responsible for

bail bond forfeiture proceedings in Municipal Court, and the City Council has direct authority over the City Attorney. Should a bail bond posted by Public Officer's company be forfeited, the City Attorney would be required to commence an action against a City Councilman's business. To avoid any possible conflict that would arise from bail forfeiture, Public Officer should not post a bail bond for a client involved in the City's Municipal Court.

5) Represent or Counsel

NRS 281A.410(2), in relevant part, provides:

2. A State Legislator or a member of a local legislative body, or a public officer or employee whose public service requires less than half of his or her time, may represent or counsel a private person before an agency in which he or she does not serve. Any other public officer or employee shall not represent or counsel a private person for compensation before any state agency of the Executive or Legislative Department.

Although Public Officer has assured the Commission that he does not intend to accept clients in the City's municipal justice system, the Commission emphasizes that the Ethics Law prohibits such conduct. As a part-time City Councilman, Public Officer is permitted to represent or counsel a private person before an agency in which he does not serve. Public Officer's posting of a bail bond for a defendant under the jurisdiction of the Municipal Court, however,

amounts to representing or counseling a private person before the City. NRS 281A.410(2) prohibits this conduct.

6) Disclosure

NRS 281A.420(1), in relevant part, provides:

1. Except as otherwise provided in this section, a public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon a matter:

(a) Regarding which the public officer or employee has accepted a gift or loan;

(b) In which the public officer or employee has a pecuniary interest; or

(c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,

- without disclosing sufficient information concerning the gift, loan, interest or commitment to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the public officer's or employee's pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such disclosure must be made at the time the matter is considered. If the public officer or employee is a member of a body which makes decisions, the public officer or employee shall make the disclosure to the chair and other members of the body...

Public Officer has testified that he will disclose his interests in his

private bail bonds business anytime a legislative matter involving the bail bonds industry comes before the City Council for approval. Since the scope of his business enterprise is not yet known, Public Officer is advised to properly disclose the nature and extent of his business interests at the time the City Council considers such matters. He must also disclose when the City Council considers an item that relates to his company in particular, and when any of his bail bonds clients appear before the City Council. Furthermore, Public Officer must disclose the potential effect on his business interest through his vote or abstention on such matters. See *In re Woodbury*, Comm'n Opinion No. 99-56 (1999)

7) Abstention

NRS 281A.420(3) and (4) provide:

3. Except as otherwise provided in this section, in addition to the requirements of subsection 1, 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 the independence of judgment of a reasonable person in the public officer's situation would be materially affected by:

(a) The public officer's acceptance of a gift or loan;

(b) The public officer's pecuniary interest; or

(c) The public officer's commitment in a private capacity to the interests of others.

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 person, 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.

(b) 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.

Although Public Officer has testified that he intends to abstain on any legislative matters before the City Council involving the bail bonds industry, Public Officer is reminded of the provisions of NRS 281A.420(3) and (4) which encourage public officers to vote unless there is a clear conflict of interest. The law creates a presumption in favor of voting despite a conflict of interest where the public officer's private interests will not benefit or detriment any more or less than any other member of the group affected by the matter, such as other bail bonds companies serving the same community.

In this instance it is presumed that Public Officer would be able to exercise independent judgment in such matters unless the outcome of the issue would affect his business differently than any other bail bonds business. If there is no greater or lesser effect on his business interests, Public Officer should undertake that analysis on the record, but may otherwise vote on the matter.

IV. 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. Public Officer's formation of a bail bonds company will not violate NRS 28A.400(1) or (2) or NRS 281A.430(1), provided he does not provide bail bond services for those under the jurisdiction of the City's Municipal Court.
4. Public Officer's issuance of bail bonds to individuals under the jurisdiction of the City's Municipal Court would violate NRS 281A.410(2), and is therefore prohibited.
5. When matters involving the bail bonds industry come before the City Council, or if his business or any of his clients should appear before the Council, Public Officer must disclose his business relationship and undertake an abstention analysis as required by NRS 281A.420.

Dated this 4th day of October, 2012.

NEVADA COMMISSION ON ETHICS

By: /s/ Erik Beyer
Erik Beyer
Chairman