



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, State
Regulatory Body, State of Nevada,

Request for Opinion No. **13-46A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public officer, member of a State Regulatory Body, requested this confidential advisory opinion from the Nevada Commission on Ethics (“Commission”) pursuant to NRS 281A.440(1) regarding the propriety of Public Officer’s 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 and Public Officer appeared in person and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding potential conflicts of interest between Public Officer’s role as a member of the Regulatory Body and Public Officer’s membership on the board of directors of a private professional association (“Association”) for the industry in which the Regulatory Body has oversight.

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 there is no inherent Ethics Law limitation which would prohibit Public Officer from serving as a member of the Regulatory Body and simultaneously serving as a member of a governing board of the Association. The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.

Public Officer elected to retain confidentiality with respect to the Commission’s proceeding. Therefore, the Commission publishes this Abstract of the Opinion.

¹ The following Commissioners participated in this opinion: Chairman Lamboley, Vice Chairman Gale and Commissioners Cory, Groover, Lau, Shaw, and Weaver. Commissioner Carpenter was absent and Commissioner Groover voted against the majority decision.

The facts in this matter were obtained from documentary and testimonial evidence provided by Public Officer. For the purposes of the conclusions offered in this Opinion, the Commission's findings of fact set forth below accept as true those facts Public Officer presented. Facts and circumstances that differ from those presented to and relied upon by the Commission may result in different findings and conclusions than those expressed in this Opinion.

II. QUESTION PRESENTED

Public Officer questions whether any conflicts of interest exist between public service as a member of the Regulatory Body and private membership on the board of directors of the professional Association for the same industry in which the Regulatory Body has oversight.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Officer must commit to avoid actual and perceived conflicts of interest, and Public Officer is required to publicly disclose sufficient information concerning any private relationships and interests which would reasonably affect matters before the Regulatory Body. Public Officer is also required to abstain from voting or otherwise acting on matters in which such commitments would clearly and materially affect the independence of judgment of a reasonable person in Public Officer's position. See NRS 281A.420(1) and (3) and NRS 281A.065.

Public Officer presently serves as a member of the Regulatory Body and expects to serve as a member of the Association's Board of Directors, a private, professional association. The Association governs policies and professional standards in the regulated industry. The Regulatory Body governs the legal requirements for the industry in Nevada, including licensure, professional conduct and disciplinary action.

Based on the facts and circumstances presented, Public Officer's role as a member of the Association's Board of Directors establishes a commitment in a private capacity to the interests of the Association. Moreover, Public Officer has a significant pecuniary interest in the continuing education courses approved by the Association and the Regulatory Body for which Public Officer receives compensation as a teacher. Public Officer should disclose Public Officer's interests related to the Association before voting on those matters before the Regulatory Body, and Public Officer should abstain from participating and voting on issues involving the Association over which Public Officer has material influence that would affect the objectivity of a reasonable person in Public Officer's situation.

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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.

2) Disclosure and Abstention

NRS 281A.420(1) and (3) provide:

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 significant pecuniary interest; or
 - (c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interests of another person,
→without disclosing information concerning the gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of the person that is sufficient 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 significant pecuniary interest, or upon the person to whom the public officer or employee has a commitment in a private capacity. Such a 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 in public to the chair and other members of the body. If the public officer or employee is not a member of such a body and holds an appointive office, the public officer or employee shall make the disclosure to the supervisory head of the public officer's or employee's organization or, if the public officer holds an elective office, to the general public in the area from which the public officer is elected.

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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 which 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 significant pecuniary interest; or
- (c) The public officer's commitment in a private capacity to the interests of another person.

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 acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person 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 another person, accruing to the other person, is not greater than that accruing to any other member of any 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 acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

(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, significant pecuniary interest or commitment in a private capacity to the interests of another person 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, significant pecuniary interest or commitment in a private capacity to the interests of another person.

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3) “Commitment in a private capacity” Defined.

NRS 281A.065 provides:

“Commitment in a private capacity,” with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

1. Who is the spouse or domestic partner of the public officer or employee;
2. Who is a member of the household of the public officer or employee;
3. Who is related to the public officer or employee, or to the spouse or domestic partner of the public officer or employee, by blood, adoption or marriage or domestic partnership within the third degree of consanguinity or affinity;
4. Who employs the public officer or employee, the spouse or domestic partner of the public officer or employee or a member of the household of the public officer or employee;
5. With whom the public officer or employee has a substantial and continuing business relationship; or
6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subparagraphs 1 to 5, inclusive.

4) Opinions of Commission May Include Certain Guidance.

NRS 281A.460 provides:

The Commission’s opinions may include guidance to a public officer or employee on questions whether:

1. A conflict exists between the public officer’s or employee’s personal interest and the public officer’s or employee’s official duty.
2. The public officer’s or employee’s 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.
3. The conflict would materially affect the independence of the judgment of a reasonable person in the public officer’s or employee’s situation.
4. The public officer or employee possesses special knowledge which is an indispensable asset of the public officer’s or employee’s public agency and is needed by it to reach a sound decision.
5. It would be appropriate for the public officer or employee to withdraw or abstain from participation, disclose the nature of the public officer’s or employee’s conflicting personal interest or pursue some other designated course of action in the matter.

C. COMMISSION DECISION

1) No Inherent Conflict

The Ethics Law promotes the appropriate separation between public duties and private interests. As a member of the Regulatory Body, Public Officer has specific public responsibilities that Public Officer must separate from Public Officer's private interests. Whether there would be such a conflict between Public Officer's public duties as a member of the Regulatory Body and Public Officer's private interests as a member of the Association's Board of Directors must be considered in light of the provisions set forth in NRS 281A and as interpreted by applicable Commission precedent in similar circumstances.

Public Officer, in Public Officer's private capacity, expects to serve as a volunteer member of the Board of Directors for the Association, a professional trade organization focused on the same goals as the Regulatory Body. Both organizations focus on improving the performance of members and the related industry in Nevada. Based upon the facts presented, the nature of the relationship between the two entities is such that the common goals promote the public trust and any concern about conflicts may be properly resolved with appropriate disclosures and abstentions, if required.

Therefore, Public Officer's service for the Board of Directors of the Association and the Regulatory Body does not create an inherent conflict of interest that would prohibit simultaneous service on the respective board and public body.

2) Commitment in a Private Capacity

Pursuant to NRS 281A.065, the Legislature has deemed certain relationships to establish the type of private commitments that implicate certain conflicts of interest. In this instance, the Commission must determine whether volunteer service on the Board of Directors of a trade organization constitutes a commitment in a private capacity.

A professional trade organization can be analogized to a more traditional non-profit organization. The relationship between a nonprofit entity and a public officer does not constitute an employment relationship; however, the Commission has previously determined in several opinions that a public officer's role as a director of a nonprofit entity establishes a relationship that is substantially similar to a substantial and continuing business relationship. (See *In re Public Officer*, Comm'n Opinion No. 12-04A (2012); citing to *In re Public Employee*, Comm'n Opinion No. 10-66A (2012), *In re Public Officer*, Comm'n Opinion No. 11-84A (2012) and *In re Public Officer*, Comm'n Opinion No. 12-15A (2012)). Therefore, a public officer's volunteer service on the Board of Directors of a nonprofit organization constitutes a commitment in a private capacity to the interests of that organization. (See *Ids.*) The Commission concluded that people who volunteer their time and efforts to a nonprofit organization are interested in and committed to the goals of the organization, serve as a fiduciary to

the organization, and have a commitment in a private capacity to the interests of the organization and its members. (*See Ids.*)

In this case, the Commission concludes that such a commitment extends to a private trade organization when the public officer serves as a member of various governance committees of the organization, including the Board of Directors. The same fiduciary duties imposed on a member of the board of directors of a nonprofit organization are likewise applicable to a private trade organization. *See In re McCoy*, Comm'n Opinion No. 09-58A (2012) (A person who serves on the board of directors of a corporation, whether non-profit or for-profit, has a fiduciary obligation to the corporation, which is a commitment to the interest of others.) Accordingly, Public Officer has a commitment in a private capacity to the interests of the Association and its members.

3) Significant Pecuniary Interest

During the 2013 Legislative Session, the Nevada Legislature amended the provisions of NRS 281A.420 to require *significant* pecuniary interests rather than *any* pecuniary interests to trigger disclosure and abstention obligations. The Regulatory Body requires members to obtain the necessary continuing education credits to maintain their licenses. The Association develops curriculum for such continuing education courses and submits the curriculum and teachers' credentials to the Regulatory Body for approval. Public Officer testified that Public Officer teaches approximately two (2) continuing education classes per month for compensation of approximately \$225 per class. Based on the facts presented in this matter, the Commission concludes that the compensation and schedule of courses taught by Public Officer amounts to a significant pecuniary interest in the continuing education courses promoted by the Association.

4) Disclosure and Abstention

Based upon Public Officer's commitment in a private capacity to the interests of the Association and Public Officer's significant pecuniary interest in the courses Public Officer teaches, the Commission concludes that Public Officer should disclose sufficient information concerning those private interests and commitments to inform the public of the potential effect on those interests by any action before the Regulatory Body. After making a proper disclosure, Public Officer should determine under NRS 281A.420(3) whether the independence of judgment of a reasonable person in Public Officer's situation would, under the circumstances presented in the particular matter, be materially affected by those private interests and commitments. If so, Public Officer must refrain from advocating the passage or failure of the matter and abstain from voting upon the matter.

As the Legislature has recognized the importance of continued involvement of private citizens in the operation of our public service, the Commission acknowledges and supports the efforts of private citizens with varied interests to serve the public in

related capacities. Public Officer has private interests, knowledge and experience in the industry which makes Public Officer a valuable member of the Regulatory Body. Public Officer's membership and service to a private professional association is expected in Public Officer's role as a member of the Regulatory Body. In most instances, the Association supports the goals and objectives of the Regulatory Body. In those few areas where there may be conflicts of interest, Public Officer can maintain public integrity and trust through appropriate disclosures and abstentions and continue to serve the public in Public Officer's capacity as a member of the Regulatory Body.

While there is no inherent conflict for Public Officer to serve as a member on the Regulatory Body and as a member of the board of directors for the Association, there are instances where disclosure and abstention are necessary. Public Officer asked for advice regarding disclosure and abstention pertaining to three scenarios which will be addressed below.

a) Continuing Education

As stated above, members in Nevada must complete continuing education courses in order to maintain their licenses. All of the continuing education courses must be approved by the Regulatory Body. One of the Association's platforms is providing continuing education classes for members. The Association drafts continuing education class proposals, and submits the same for the Regulatory Body approval. In Public Officer's role as a member of the Association, Public Officer teaches approximately two (2) classes a month for compensation of approximately \$225 per class, which creates a significant pecuniary interest.

As a member of the Regulatory Body, Public Officer must disclose Public Officer's commitment in a private capacity to the interests of the Association and Public Officer's significant pecuniary interest as an instructor of continuing education courses when related matters appear before the Regulatory Body. The disclosure should include sufficient information to inform the public of the nature and extent of Public Officer's private interests in and duties for the Association, the Association's interests in any matter before the Regulatory Body, and how or whether Public Officer's action or inaction would affect those private interests. Public Officer's private interest in the Association will include Public Officer's membership on the Board of Directors, including the corresponding duties regarding overall governance and policy of the organization, and approval of continuing education courses. Likewise, Public Officer should disclose Public Officer's pecuniary interests as an instructor of continuing education courses.

Public Officer's interests in the Association create a clear case in which the independence of judgment of a reasonable person in Public Officer's position would be materially affected by Public Officer's public duties on the Regulatory Body with regard to the approval of continuing education courses developed by the Association. Public Officer serves as an instructor for such courses and has a significant pecuniary interest regarding whether the Regulatory Body approves the course. Accordingly, Public

Officer must also abstain from voting on any matter before the Regulatory Body regarding continuing education.

b) Disciplinary Action

The Association and the Regulatory Body promote standards of professional conduct for members, and their members and licensees are subject to disciplinary action. Although the standards, processes and discipline are different, the same individual could be subject to separate disciplinary actions before both entities for the same action. The Association's Board of Directors issues disciplinary decisions regarding the conduct of its members and the Regulatory Body holds hearings and imposes discipline respecting licensure and other conduct. The Association can suspend a membership and the Regulatory Body can suspend the professional license.

Public Officer, in Public Officer's dual service to both the Association and the Regulatory Body, may be involved in disciplinary hearings for both entities. This creates a potential conflict of interest for Public Officer. Although the standards are separate and distinct for each entity, Public Officer should disclose Public Officer's involvement in Association disciplinary matters and abstain from participating as a member of the Regulatory Body on any matters which affect an individual that has already been subject to discipline by the Association. Public Officer attested to abstention from participating in any Association disciplinary matters to eliminate any potential conflicts before the Regulatory Body. However, the Commission does not impose disclosure and abstention obligations against public officers in their private capacities. If Public Officer acquires information regarding any disciplinary matter before the Regulatory Body as a result of Public Officer's service on the Association Board of Directors, Public Officer must disclose and abstain.

Presumably, Public Officer's commitment in a private capacity to the Association's interests in enforcing disciplinary action could be attributed to Public Officer's role in disciplinary action by the Regulatory Body, and the commitment triggers the disclosure and abstention provisions. To the extent that the commitment to the Association does not implicate disclosure and abstention in this instance, the Commission nevertheless advises Public Officer that disclosure and abstention would be appropriate under general conflict of interest principles. NRS 281A.460 permits the Commission to offer guidance to public officers and employees of a more general nature regarding conflicts.

c) Law and Regulation

The Association and the Regulatory Body share similar goals pertaining to governing professional standards of members and overall policy regarding the related industry. Both the Association and the Regulatory Body strive for high professional standards in the industry through education, advocacy, discipline, regulation and legislation. In fact, both organizations may collaborate on regulatory and legislative efforts governing the industry. Public Officer's service on the Association's board and

the Regulatory Body does not create a conflict of interest based upon Public Officer's service to both organizations.

This situation is similar to the circumstances identified in *In re Public Officer*, Comm'n Opinion No.12-04A (2012). In that matter, service upon the board of a general improvement district and the board of a non-profit entity which had the same goals as the general improvement district mandated disclosure but not abstention. (*See id.*) Abstention was not required due to the common goals shared by the entities and the lack of personal benefit to the public officer. The Commission determined that the relationship to the nonprofit did not establish a clear case in which the independent judgment of a reasonable person in the public officer's situation would be materially affected by public officer's commitment in a private capacity to the interest of the non-profit. (*See id.*) The same analysis can be applied to Public Officer's situation.

The Association and the Regulatory Body share the same underlying goals, to promote standards of professional conduct for the related industry. Both organizations strive to improve the industry in Nevada through rules/regulations, continuing education, and discipline. When the goals of the governmental body and the volunteer organization are similar and there is no direct financial gain to the public officer or organization, abstention is generally not required under the Ethics Law.

Although there may be certain situations where serving in a dual capacity as a member of a Regulatory Body and the Association may create conflicts between Public Officer's ability to independently represent the best interests of the public served by the Regulatory Body versus that of the Association, Public Officer's general involvement in the Association does not materially affect the policy decisions of the Regulatory Body. The Commission does not suggest that certain facts in such dual representative circumstances could not create conflicts requiring disclosure and abstention, in particular if those interests are competing for time, resources or other priorities. However, when those issues do arise, disclosure and abstention are available to Public Officer to sufficiently avoid the conflict of interest.

Furthermore, Public Officer's dual public and private service is not contrary to Public Officer's commitment to the public trust. Both organizations have similar goals and seek the same officers to govern their missions, members who have a high commitment to their profession. Accordingly, both organizations will at times attract the same officers such as Public Officer. The Ethics Law does not intend to hamper this type of public service and synergy between organizations.

Synergy in this instance is founded upon the complementary missions of a private trade organization and government regulatory body devoted to crossing the public and private divide through efforts to govern the industry. The Association and Regulatory Body seek to improve the industry in Nevada, and Public Officer's service on both boards creates valuable insight in the private and public sectors based upon Public Officer's broad experience. The Legislature recognized that the State is served

by “citizen Legislators” (NRS 281A.020(2)(c)), and the Commission extends that recognition to citizen public officers, especially to part-time public officers.

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. Pursuant to NRS 281A.065, Public Officer has a commitment in a private capacity to the interests of the Association as a member of its Board of Directors. Pursuant to NRS 281A.420, Public Officer also has a significant pecuniary interest in the compensation Public Officer receives for the continuing education courses Public Officer teaches.
4. Pursuant to NRS 281A.020 and 281A.420(1) Public Officer is advised to disclose sufficient information concerning the nature and extent of Public Officer’s relationship with and significant pecuniary interests in the Association and how or whether Public Officer’s relationship and interests affect the Regulatory Body’s consideration of matters affecting the Association, including, without limitation, continuing education, disciplinary matters, and policy considerations (regulatory or legislative collaborations) which come under consideration by the Regulatory Body.
5. Under NRS 281A.420(3) and (4), Public Officer should abstain from participating on Regulatory Body matters involving continuing education courses proposed by the Association that Public Officer will teach and disciplinary matters in which Public Officer had involvement or information as a result of Public Officer’s service for the Association. Policy matters in common between the Association and the Regulatory Body, including regulatory and legislative considerations, do not automatically require Public Officer to abstain from participating or acting. Public Officer should evaluate such matters to determine whether a reasonable public officer in Public Officer’s situation would be materially affected by Public Officer’s affiliation with the Association concerning such matters.

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.

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The Following Commissioners Participated in this Opinion:

Dated this 31st day of July, 2014.

NEVADA COMMISSION ON ETHICS

By: /s/ Paul H. Lamboley
Paul H. Lamboley
Chairman

By: /s/ Gregory J. Gale
Gregory J. Gale
Vice-Chairman

By: ABSENT
John Carpenter
Commissioner

By: /s/ Magdalena Groover
Magdalena Groover²
Commissioner

By: /s/ Timothy Cory
Timothy Cory
Commissioner

By: /s/ Cheryl A. Lau
Cheryl A. Lau
Commissioner

By: /s/ James M. Shaw
James M. Shaw
Commissioner

By: /s/ Keith A. Weaver
Keith A. Weaver
Commissioner

² Commissioner Groover voted against the majority decision in this matter.