



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, Governing Body,
Local Government Entity, State of Nevada,

Request for Opinion No. **13-86A**

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer, Member of Governing Body of Local Government Entity in the State of Nevada, 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 past conduct and 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 Public Officer's disclosure and abstention obligations pertaining to Public Officer's private employment and business relationship with an entity that had contractual negotiations and/or business agreements with the Local Government.

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 Public Officer's prior conduct did not violate any of the provisions or intent of NRS 281A.420(1) and (3) regarding disclosure and abstention, but advised Public Officer that if a matter involving Public Officer's employment and business interests came before the Governing Body for public action, Public Officer should make a disclosure explaining the full nature and extent of the relationships and interests and their impact, if any, on the matter before the public body. The Commission further noted that abstention may not be necessary given the remote nature of the interests. However, such a decision would have to be made based upon the matter presented to the Governing Body for public action. The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.

¹ The following Commissioners participated in this opinion: Chairman Lamboley, Vice Chairman Gale and Commissioners Cory, Groover, Lau, Shaw, and Weaver.

Public Officer elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission will publish this abstract of this Opinion.

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 in this Opinion may result in different findings and conclusions than those expressed in this Opinion.

II. QUESTION PRESENTED

Public Officer questions whether the Ethics Law requires Public Officer to disclose a limited business association with a private entity which owes money to the Local Government.

III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES

A. ISSUES

Public Officer must commit to avoid actual and perceived conflicts of interest between Public Officer's public duties and personal employment, business and financial interests. NRS 281A.020. The Ethics Law has designated public disclosures of certain private interests which would reasonably affect public decisions as a means to properly avoid certain conflicts. NRS 281A.420(1). Public Officer must disclose whether Public Officer has a commitment in a private capacity to the interests of another person or entity or a significant pecuniary interest in a matter before or affecting the Local Government.

Public Officer has served as a member of the Governing Body for several years. In Public Officer's private capacity, Public Officer serves as an employee of a private company ("Firm") to perform various administrative functions. The Firm engages several other persons as independent contractors ("agents") to perform sales and services. In addition to Public Officer's employment role for the Firm, Public officer also serves as an independent contractor conducting sales and performing services. Public Officer receives a salary for the employment functions and independent commissions on sales and services. However, Public Officer but does not receive any direct compensation for sales or services provided by the other agents. All formal contracts and engagements through the Firm regarding any sales and services must be administered through Public Officer in Public Officer's employment capacity.

Public Officer recently learned that a few of the Firm's agents entered into informal negotiations and agreements to provide services to an entity which owes money to the Local Government ("Private Entity"). Before learning of those transactions, Public Officer participated in informal discussions as a member of the Governing Body to collect that debt. Since those discussions, Private Entity has encountered significant financial problems, and based on legal and financial priorities, it appears that the Local Government will not recover any of the debts owed by Private Entity.

Because Public Officer was unaware of the limited transactions between agents of the Firm and Private Entity, Public Officer questions whether Public Officer's business and employment association with the Firm established a duty to disclose and abstain from the informal discussions and participation on behalf of the Governing Body with Private Entity to recover the debts. Public Officer further questions Public Officer's responsibilities governing disclosure and abstention on future discussions with Private Entity given the presently dissolved status of those business transactions as a result of Private Entity's financial status.

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

NRS 281A.420(1) 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 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) 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 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.

4) "Commitment in a private capacity" Defined.

NRS 281A.065

"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.

IV. COMMISSION DECISION

A. INTRODUCTION

Nevada's Ethics Law mandates that public officers hold public office for the sole benefit of the public and avoid conflicts of interest, both actual and perceived. NRS 281A.020. The Governing Body is presently attempting to collect on a debt owed to it by Private Entity that is currently in default. As a member of the Governing Body, Public Officer has participated in informal discussions with Private Entity to recover the debt. Public Officer's employer and business affiliate, the Firm, had two prior informal agreements and/or negotiations with Private Entity through its agents: 1) an informal agreement to provide certain services on a monthly basis for a set price; and 2) contractual negotiations to provide a one-time service. These agreements were unrelated to the debt owed to the Local Government.

Although Public Officer administers various functions of the Firm, Public Officer was not aware of the existence of these informal transactions during Public Officer's participation with the Local Government's management team to engage in discussions with Private Entity regarding the debt owed to the Local Government because those transactions were not yet formal or finalized contracts. Moreover, the poor financial status of Private Entity resulted in the dissolution of both of the Firm's informal transactions, and it is questionable whether the Local Government will ever recover the debt.

Nevertheless, the Firm's transactions with Private Entity and Public Officer's employment and business affiliation with the Firm has raised concerns regarding conflicts of interest in Public Officer's role as a member of the Governing Body and the Local Government's efforts to recover a debt against Private Entity. Based on the nature of these relationships and their continuing effects on the Local Government's affairs, Public Officer is advised to disclose the nature of Public Officer's relationship with the Firm and its past or future associations with Private Entity before proceeding in any public matters relating to Private Entity. However, abstention may not be necessary given the remote nature of the interests, and such a decision would have to be made based upon the matter presented to the Governing Body for public action. Given the nature of Public Officer's informal participation on behalf of the Governing Body, the Firm's limited and informal association with Private Entity and Public Officer's unawareness of the transactions, the Commission concludes that Public Officer's past conduct has not violated the Ethics Law.

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B. DISCLOSURE AND ABSTENTION

1) Commitment in a private capacity

The Commission is concerned about whether Public Officer's role as an employee for the Firm and Public Officer's associated business relationship with the entity and its agents would influence Public Officer's role in public actions. In addition to Public Officer's general obligation to maintain the public trust and avoid conflicts of interest (NRS 281A.020), the Legislature has deemed certain specific relationships to implicate conflicts of interest, such as relationships with employers and significant business affiliates (NRS 281A.065(4) and (5)), and require disclosure of the relationships and possible abstention from voting. (NRS 281A.420(1) and (3)).

In the present case, the Commission must evaluate whether Public Officer's current employment and business relationships with the Firm constitute a commitment in a private capacity to the interests of the Firm which may conflict with the public interests of the Local Government in pursuing its contractual rights against Private Entity, the entity with which the Firm has had certain informal business relations. The relationship issues examined here involve Public Officer's employment and agency status with the Firm and its informal (and now dissolved) transactions procured by other agents with Private Entity, a private entity that owes the Local Government money from a defaulted agreement.

Public Officer serves as an employee of the Firm and receives a salary for that service. Public Officer also has a contractual agreement with the Firm in which Public Officer receives a commission on all of Public Officer's sales and services. In these capacities, Public Officer has a statutory commitment in a private capacity to the Firm as Public Officer's employer and business associate. NRS 281A.065(4)² and (5). Although no direct link exists between Public Officer and Private Entity, the link between Private Entity and the Firm, triggers disclosure implications.

In this matter, the Firm engaged in various informal transactions with Private Entity which currently owes the Local Government money under a defaulted agreement. Public Officer participated in discussions on behalf of the Governing Body regarding the collection of the debt through attorney/client meetings between the government attorney and Private Entity representatives. The Governing Body has not formally discussed or considered the matter as a public agenda item.

Based upon the record testimony provided by Public Officer, the limited (and now dissolved) interests of the Firm in Private Entity that are attributed to Public Officer via Public Officer's commitment as an employee and agent did not establish a direct link between Public Officer and Private Entity. Further, the Firm's interests in Private Entity are separate and distinct from the Local Government's interests in the defaulted agreement.

² Public Officer also has a commitment in a private capacity to the interests of the independent contractors/agents of the Firm pursuant to NRS 281A.065(5). (See *In re Public Officer*, Comm'n Opinion No. 13-71A (2013))

Public Officer did not earn any direct compensation for the Firm's transactions with Private Entity, and the Firm did not receive any actual benefits. Under the transaction for limited and fixed monthly services, Private Entity provided nominal compensation, sufficient only to pay for the limited services. The proposed benefit to the Firm was an informal deal for the Firm to receive future business engagements with Private Entity. However, the financial situation of Private Entity precluded that opportunity. Likewise, the other proposed transaction with Private Entity involved a contractual negotiation that never materialized as a result of the financial problems. Although there may have been potential for lucrative business transactions with Private Entity to have triggered commitments and conflicts in favor of the interests of Private Entity, they were insignificant at the time of Public Officer's participation in the informal Local Government matters and had not required Public Officer's involvement as an employee of the Firm.

The fact that Public Officer was unaware of the Firm's transactions with Private Entity at the time of Public Officer's official participation does not negate the potential conflict in this matter. The Commission has previously held that public officers should be informed about the economic interests of those to whom they have commitments in a private capacity to avoid potential conflicts with public duties. See *In re Public Officer*, Comm'n Opinion No. 10-07A (2012) (Public Officer advised to be informed of spouse's personal and financial interests that could be attributed to Public Officer to establish conflicts in public capacity.)

However, the Commission has distinguished reasonably unknown circumstances from "deliberate ignorance of readily knowable facts." See *In re Atkinson Gates, Williams and Malone*, Consolidated Comm'n Opinion Nos. 97-54, 97-59, 97-66, 97-53 and 97-52 (1997) ("each public official [must] vigilantly search for reasonably ascertainable potential conflicts of interest" and "public officials cannot remain willfully ignorant of readily knowable facts and must, instead, design and implement systems to spot and respond to potential ethical conflicts"). Based on the facts present herein, the transactions by the Firm's agents were informal and/or incomplete with the financial default of Private Entity, and the nature of those transactions did not warrant or require consideration by Public Officer as an employee of the Firm. Public Officer testified that all formal agreements required administration through the Firm, but these transactions were of such an informal or preliminary nature that they had not crossed Public Officer's desk. Nevertheless, Public Officer has now instituted procedures within the Firm to ensure that any transactions that may involve government-related activities are brought to Public Officer's attention.

Based on the aforementioned conclusion regarding the informal activities by the Governing Body, the limited nature of the private interests by the Firm and Public Officer's lack of knowledge regarding the transactions, the Commission finds that Public Officer did not violate the Ethics Law by failing to disclose the matter or abstain from participating in the informal government discussions. However, because the Ethics Law is concerned with the appearance of impropriety, disclosure and consideration of abstention should occur if the matter comes before the Governing Body for future public action. While disclosures of conflicts and related abstentions are typically reserved for public meetings,

the principles remain relevant and necessary even with informal proceedings such as internal discussions and actions on behalf of the public trust. However, the nature of the transactions identified herein would not have materially affected Public Officer's judgment on behalf of the Local Government's interests and would not have required abstention.

2) Significant Pecuniary Interest

The Ethics Law also requires disclosures and abstentions by public officers and employees who have a significant pecuniary interest in a matter before or affecting the public body or entity. NRS 281A.420(1)(b). Public Officer is a salaried employee of the Firm. While Public Officer earns commissions on sales and services that Public Officer personally handles, Public Officer does not receive a percentage of any commissions earned by other agents. Nevertheless, Public Officer has an indirect pecuniary interest resulting from all positive business transactions because Public Officer is also employed by the Firm. However, the Firm is not before the Governing Body. Instead, Private Entity, an entity which has entered into various informal, and now defunct, agreements with the Firm, has a matter before the Governing Body. Public Officer has not provided any evidence that the transactions between the Firm and Private Entity will be affected by the Governing Body's actions against Private Entity regarding the defaulted agreement. Accordingly, no evidence exists to conclude that Public Officer has a significant pecuniary interest in the debt issue between Private Entity and the Local Government.

V. CONCLUSIONS OF LAW

The public judges its government by the way public officials and employees conduct themselves in the posts to which they are elected or appointed. The people have a right to expect that every public official and employee will conduct himself/herself in a manner that will tend to preserve public confidence in and respect for the government that the public officer or employee represents. Such confidence and respect can best be promoted if every public official and employee uniformly avoid both actual and potential conflicts between their private self-interest and the public interest. Helping public officials and employees achieve these goals is one of the objectives of the Ethics Law and therefore the Commission concludes:

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 Public Officer's employer and business affiliate, the Firm.
4. Public Officer has not violated the provisions of NRS 281A.420(1) or (3) by failing to disclose or abstain on the matter involving Private Entity under consideration by the Governing Body based on the nature of the Firm's remote and otherwise nonexistent interests in the matter. However, to avoid any appearance of impropriety, Public

Officer is advised to disclose sufficient information concerning Public Officer's commitment in a private capacity to the interests of the Firm regarding Private Entity if the matter comes before the Governing Body for public action. Further, abstention should be considered in future matters depending on the scope of the issue before the Governing Body.

5. Pursuant to NRS 281A.420(1) and (3) Public Officer does not have a significant pecuniary interest in the Private Entity debt matter before the Governing Body because the transactions between the Firm and Private Entity did not involve the defaulted agreement before the Governing Body.

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.

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: /s/ John C. Carpenter
John C. Carpenter
Commissioner

By: /s/ Magdalena Groover
Magdalena Groover
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