



## 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 Employee**, Public Entity, State  
of Nevada,

Request for Opinion No. **14-09A**

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Public Employee. /

### ABSTRACT OPINION

#### I. STATEMENT OF THE CASE

Public employee ("Public Employee") for a public entity in the State of Nevada ("Public Entity"), requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1), regarding the propriety of Public Employee'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 quorum<sup>1</sup> of the Commission heard this matter and Public Employee appeared in person and provided sworn testimony.

Public Employee sought an opinion from the Ethics Commission regarding conflicts of interest between Public Employee's private business and public position, which both involve the provision of services by or to entities contracting with State and local governmental entities.

After fully considering Public Employee's request and analyzing the facts, circumstances and testimony presented by Public Employee, the Commission deliberated and orally advised Public Employee of its decision that Public Employee may continue to receive compensation for past services related to Public Employee's private business, but should avoid entering into agreements for future private compensation from the government entities which contract with the Public Entity to offer competing services.

The Commission rendered a final written Opinion stating its formal findings of fact and conclusions of law. Public Employee elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this abstract of the Opinion with modifications/redactions to protect the confidentiality of these proceedings.

The facts in this matter were obtained from documentary and testimonial evidence provided by Public Employee. For the purposes of the conclusions offered in this Opinion, the Commission's findings of fact accept as true those facts Public Employee 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.

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<sup>1</sup> The following Commissioners participated in this opinion: Chairman Lamboley, Vice Chairman Gale and Commissioners Carpenter, Cory, Lau, Shaw, and Weaver.

## **II. QUESTION PRESENTED**

Public Employee questions whether the activities and compensation received from Public Employee's private business create a conflict of interest with Public Employee's public duties for the Public Entity.

## **III. FINDINGS OF FACT**

At all material times related to this matter:

1. In Public Employee's public capacity, Public Employee is a public employee serving the Public Entity.
2. Public Entity contracts for the provision of certain services which it utilizes to provide related services to the State and local governments.
3. Public Employee's public duties include administrative matters and other duties relating to those contracts involving the provision of services by or to entities contracting with the Public Entity.
4. Public Employee does not have any involvement in the services provided to or by the Public Entity and does not have any authority or influence over the decisions to choose services. However, Public Employee is responsible for outreach and education regarding services available from the Public Entity. Public Employee also has some oversight regarding compliance in administering the services. Public Employee further ensures that the contracting parties fulfill their obligations with the Public Entity.
5. In Public Employee's private capacity, Public Employee and a spouse own a private business which provides similar or competing services to the State and other government entities as are available from the Public Entity.
6. Various government entities may enter into contracts with the Public Entity as industry partners.
7. Public Employee's private business has existing contracts with certain government entities that were entered into prior to Public Employee's employment with the Public Entity, and the private business would like to maintain and service these private contracts.
8. Since Public Employee started working at the Public Entity, Public Employee is no longer involved in the management of the private business, which is now handled by the private business staff members, including Public Employee's spouse. Public Employee has continued to manage the accounting aspects of the private business and service the existing clients that Public Employee personally generated prior to being employed by the Public Entity.
9. Public Employee's private business and its owners continue to receive compensation on certain service agreements.
10. Public Employee's private business is not currently providing any new services to government entities that are industry partners with the Public Entity.

## **IV. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES**

### **A. ISSUES**

Public Employee seeks guidance regarding the nature and scope of any conflicts of interest between Public Employee's official duties for the Public Entity and Public Employee's private business interests. Specifically, Public Employee questions whether it is a conflict of interest to maintain Public Employee's employment with the Public Entity while receiving compensation from the private business on existing contracts with certain government entities entered into prior to Public Employee's employment by the Public Entity. Under the private business' current agreements, Public Employee receives continued compensation and, therefore, maintains a fiduciary responsibility to continue providing administrative services to existing clients' business.

### **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) Ethical Standards:**

**NRS 281A.400 provides, in relevant part:**

A code of ethical standards is hereby established to govern the conduct of public officers and employees:

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.

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, "unwarranted" means without justification or adequate reason.

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7. Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit a significant personal or pecuniary interest of the public officer or employee. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer or employee who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer's or employee's public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

→ If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

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10. A public officer or employee shall not seek other employment or contracts through the use of the public officer's or employee's official position.

### 3) "Commitment in a private capacity" defined.

#### NRS 281A.065 provides, in relevant part:

"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, 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 subsections 1 to 5, inclusive.

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## **V. COMMISSION DECISION**

### **A. INTRODUCTION**

Nevada's Ethics Law mandates that public employees must commit themselves to avoid conflicts between their private interests and those of the general public whom they serve. NRS 281A.020. The Ethics Law is concerned with situations involving public employees that create appearances of impropriety and conflicts of interest, as well as actual impropriety and conflicts to promote integrity in public office. Public Employee has a duty to protect the public trust and separate Public Employee's responsibilities to the Public Entity from Public Employee's private interests.

Under NRS 281A.460, the Commission may offer an opinion which includes guidance to a public employee regarding whether a conflict exists between the public employee's personal interest and official duty, and whether the public employee possesses special knowledge which is an indispensable asset of the public employee's public agency and is needed by it to reach a sound decision. In this case, the Commission acknowledges that Public Employee's private sector experiences and expertise that create the conflict in this matter are also the qualifications and skills necessary to serve the Public Entity. The Commission supports and encourages the benefits of private sector knowledge in government to promote the integrity of government service and competition. Nevertheless, in this case, Public Employee has created a conflict of interest by entering into government service in an area in which Public Employee maintains private sector interests and therefore must appreciate the circumstances in which Public Employee has certain obligations under the Ethics Law.

The Ethics Law does not prohibit Public Employee from pursuing private pecuniary and business interests while simultaneously serving as a public employee. However, Public Employee must not engage in activities that improperly influence Public Employee's public duties or create unwarranted or improper private benefits through the use of Public Employee's public position. *See In re Stangle*, Comm'n Opinion No. 12-05A (2012). Whether an improper conflict arises between Public Employee's public duties for the Public Entity and Public Employee's private interests must be considered in light of the provisions set forth in NRS 281A.

### **B. ANALYSIS**

#### **1) Commitment in a private capacity**

The Commission questions whether Public Employee's position in Public Employee's private business would influence Public Employee's role in public decisions affecting the private business clients. In addition to Public Employee's general obligation to maintain the public trust and avoid conflicts of interest, the Legislature has deemed certain specific relationships to implicate conflicts of interest, such as familial relationships and relationships with employers and those with whom a public officer or employee shares significant and continuous business relationships, or relationships substantially similar to those, and require disclosure of the relationship and possibly abstention from voting. (See NRS 281A.065(4), (5) and (6)). In the present case, the Commission evaluates whether the status of Public Employee's current employment and business relationship with the private business constitutes a commitment in a private capacity to the interests of that entity which may conflict with Public Employee's public duty to serve the Public Entity.

By statute, Public Employee has a commitment in a private capacity to the private business pursuant to NRS 281A.065(4), (5) and (6), as Public Employee and Public Employee's spouse are owners of the private business and therefore have an employment and substantial and continuing business relationship with the private business.<sup>2</sup> Beyond the commitment to the private business interests, Public Employee has a clear pecuniary interest in all matters affecting the private business. In relation to Public Employee's public duties with the Public Entity, Public Employee's pecuniary interest in the private business is established by the continuing compensation Public Employee earns from existing contracts entered into prior to Public Employee being hired by the Public Entity. This competition, whether actual or potential, triggers the Ethics Law as Public Employee has an interest in both the public sector and the private sector pertaining to industry services.

**2) A Public Employee Shall Not Accept Any Economic Opportunity Which Would Tend to Improperly Influence a Reasonable Person to Depart from Faithful and Impartial Discharge of Public Duties (NRS 281A.400(1))**

Public Employee's interests to serve both the Public Entity and private business clients are multi-faceted in application and evidence a private conflict of interest. This conflict involves both direct and indirect competition which creates an immediate conflict for Public Employee between Public Employee's personal pecuniary interests and Public Employee's duties as a public employee of the Public Entity.

NRS 281A.400(1) does not prohibit a public employee from engaging in private business that does not violate the public trust. The Commission finds that Public Employee may continue to receive the compensation from the private business obtained prior to employment with the Public Entity. Specifically, pursuant to NRS 281A.400(1), Public Employee would not be deemed to be seeking or accepting an economic opportunity that would tend to improperly influence a reasonable person in Public Employee's position to depart from the faithful and impartial discharge of Public Employee's public duties for the Public Entity. However, Public Employee must refrain from personally servicing current clients which are the Public Entity's industry or government partners and may not solicit new business relating thereto. These activities must be handled by other employees of the private business. If Public Employee were to service current clients of the private business or solicit new business relating to the Public Entity or its government partners, such scenario may provide opportunity for Public Employee to depart from the faithful discharge of Public Employee's public duties.

**3) A Public Employee Shall Not Use Public Employee's Government Position to Secure an Unwarranted Privilege or Advantage (NRS 281A.400(2))**

NRS 281A.400(2) does not prohibit Public Employee from acting in a manner consistent with Public Employee's personal interests. However, the statute prohibits the Public Employee from using Public Employee's public position to secure or grant *unwarranted* privileges, preferences, exemptions or advantages for himself or herself, Public Employee's private business or Public Employee's spouse.

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<sup>2</sup> By statute, Public Employee has a commitment in a private capacity to Public Employee's spouse, who is the other owner of the private business. NRS 281A.065(1). This is important to note, as Public Employee testified that Public Employee's spouse may become the sole owner of the private business in the future. Any such ownership change would not change this opinion.

As a public employee, Public Employee has a duty to avoid situations rife with potential conflicts between Public Employee's public duties and personal business interests. In order to avoid these conflicts, Public Employee must balance Public Employee's personal interests and the public's interests and erect a "Chinese Wall" to separate Public Employee and the private business activities in matters associated with any conflict that may exist with existing contracts in the private business and allow other employees to handle potential conflict situations.

The public deserves the benefit of Public Employee's private sector experience obtained prior to working at the Public Entity, which experience was a qualification sought by Public Employee's employer, the Public Entity. Thus, Public Employee's pecuniary interest in the private business must be tempered in order to preserve the public trust. The "Chinese Wall" will prevent any unwarranted benefit to the private business, whether intentional, inadvertent or only perceived.

**4) A public employee shall not use governmental time, property, equipment or other facility to benefit a pecuniary interest of the public employee (NRS 281A.400(7))**

Because Public Employee is no longer actively engaged in the daily management of the private business, there is no evidence that Public Employee would use government time, property or equipment for private business purposes. Public Employee testified that Public Employee only works for the private business on Public Employee's own time, and acknowledged Public Employee's ethical duty to fully separate Public Employee's private business work from duties as a public employee.

**5) A public employee shall not seek contracts through the use of his or her official position (NRS 281A.400(10))**

In this matter, Public Employee has stated that the private business is no longer providing new services. As the private business will not enter into any new agreements, the Commission addresses whether Public Employee may keep the existing business. Public Employee may retain Public Employee's existing business and clients, and receive the associated compensation; however, as discussed above, Public Employee cannot use Public Employee's position to solicit any new business.

## **VI. CONCLUSIONS OF LAW**

1. At all times relevant to the hearing of this matter, Public Employee was a public employee, as defined by NRS 281A.150 and 281A.180.
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 Employee does not violate the provisions of NRS 281A.020 and NRS 281A.400(1) and (2) by continuing to receive compensation through the private business on existing client business that Public Employee maintains as long as Public Employee does not continue to provide new services to those clients. However, Public Employee must commit to avoid the use of Public Employee's public position with the Public Entity to provide any unwarranted preferences or advantages to the private business.
4. Pursuant to NRS 281A.400(7), Public Employee may not use government time, property or equipment to conduct any business with the private business.

5. Pursuant to NRS 281A.400(10), Public Employee may not solicit any new business on behalf of the private business to any of the Public Entity's industry partners.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law 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<sup>3</sup> Participated in this Opinion:

Dated this 27th day of July, 2016.

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/ Cheryl A. Lau  
Cheryl A. Lau  
Commissioner

By: /s/ Timothy Cory  
Timothy Cory  
Commissioner

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

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

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<sup>3</sup> Chair Lamboley, Vice-Chair Gale and Commissioners Cory and Shaw participated in the oral opinion rendered during the hearing of this matter; however, they were no longer serving on the Commission as of the date of this Abstract Opinion.