



**STATE OF NEVADA**

**BEFORE THE NEVADA COMMISSION ON ETHICS**

In the Matter of the First-Party Request for  
Advisory Opinion Concerning the Conduct  
of **Neil Schwartz**, Commissioner, Nevada  
Real Estate Division, Department of Business  
and Industry, State of Nevada,

Request for Opinion No. **16-13A**

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Public Officer. /

**OPINION**

**I. STATEMENT OF THE CASE**

Public officer, Neil Schwartz (“Schwartz”), a Real Estate Commissioner for the Nevada Real Estate Commission (“REC”) requested this confidential advisory opinion from the Nevada Commission on Ethics (“Commission”) pursuant to NRS 281A.440(1) regarding the propriety of his past, present or 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 on April 20, 2016. Schwartz appeared and provided sworn testimony.

Schwartz sought an opinion from the Commission regarding the applicability of the Ethics Law under circumstances involving: 1) Schwartz’s request to a private nonprofit organization, the Nevada Association of Realtors (“NVAR”), to provide funds (or “gift”) to either the REC or the Nevada Real Estate Division (“Division”) for distribution to allow a member of the REC to attend a conference sponsored by the Association of Real Estate License Law Officials (“ARELLO”), which provides education and resources to every state to assist real estate commissioners and regulatory administrators; and 2) Schwartz’s acceptance of the gift as a member of the REC and related determination on which REC member should receive funding to attend the conference.

After fully considering Schwartz’s request and analyzing the facts, circumstances and testimony presented by Schwartz, the Commission deliberated and has advised Schwartz of its decision that the Ethics Law does not preclude Schwartz from seeking or accepting funds to attend the conference sponsored by ARELLO.

The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.<sup>2</sup> After the hearing in this matter, Schwartz waived confidentiality with respect to the Commission’s proceedings. Therefore, the Commission publishes this Opinion.

<sup>1</sup> The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Weaver and Commissioners Gruenewald, Shaw and Stewart.

<sup>2</sup> The individual comments made by any Commissioner during the hearing are not binding on the Commission’s final opinion.

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

As a member of the REC, Schwartz questions whether seeking and accepting a gift of funds from NVAR, a nonprofit organization, to attend a conference that provides education to real estate commissioners and administrators implicates: 1) NRS 281A.400(1) regarding seeking or accepting any gift, service, favor, employment, engagement, emolument or economic opportunity which would tend improperly to influence a reasonable person in his public position to depart from the faithful and impartial discharge of his public duties; and 2) NRS 281A.400(2) regarding the use of his public position to secure unwarranted privileges.

## **III. FINDINGS OF FACT**

1. In his public capacity, Schwartz serves as a member of the REC, a Governor-appointed five-member advisory body to the Division, having been appointed by Governor Sandoval in 2013.
2. The REC adopts regulations to assist the Division in carrying out its duties associated with governing the real estate industry, including regulations governing licensing requirements for real estate brokers, real estate broker-salespersons, real estate salespersons, property managers and other business brokers. In addition, the REC conducts disciplinary hearings alleging violations of the provisions of NRS Chapter 645.
3. NVAR is a Nevada domestic non-profit cooperative corporation providing services to over 14,000 realtor members throughout Nevada. NVAR is invested in the success of its members by providing services and advocating for private property rights. [nvar.org/AboutNvar.aspx](http://nvar.org/AboutNvar.aspx). Though NVAR provides membership services for all members, such services do not extend to providing any personal services for licensees on matters heard by the REC, nor does NVAR appear on behalf of any person or entity on any disciplinary or other license matters.
4. With respect to State regulatory matters and laws, NVAR presents concerns of its membership in the form of public written and oral testimony to both the REC and the Nevada Legislature. These activities include lobbying members of the Legislature on license laws, laws related to private property rights, association laws, housing laws, and other laws affecting its members.
5. NVAR primarily reviews, advises and lobbies on provisions of law set forth in NRS Chapters 645, 116, and 113 and AC Chapters 645 and 116. In addition, NVAR consults with the Real Estate Administrator and the Director of Business and Industry on Legislation affecting the Division, licensees and members; however, NVAR's policy decisions on such matters are made by a committee established by NVAR and not its individual members.
6. NVAR employs a professional staff of eight who are not real estate licensees. Uncompensated volunteers comprise the leadership or policy making arm of the

Association, but the day-to-day operations are administered by the professional staff. All lobbying associated with the Legislature is conducted by a professional lobbying firm hired by NVAR.

7. ARELLO is a non-profit association for real estate license law officials, whose membership is comprised of governmental agencies and other official organizations that issue real estate licenses/registrations in addition to regulating real estate practice and enforcing real estate law. Its mission is to support jurisdictions in the administration and enforcement of real estate license laws to promote and protect public interests. ARELLO's website provides an important license/registration verification tool and contains links to other organizations that protect consumers in the real estate industry. It also provides the ability to simultaneously search records of multiple agencies. ARELLO hosts annual industry conferences and meetings and offers a Commissioner College to educate on licensing and enforcement matters. [www.arello.com](http://www.arello.com)
8. The Division is a member of ARELLO and has budgetary funding to send only the Division Administrator to the 2016 Annual Conference hosted by ARELLO ("Annual Conference") in the City of Vancouver, British Columbia, Canada, from September 12-15, 2016.
9. Schwartz had the opportunity to attend the 2015 Annual Conference sponsored by ARELLO and found the education and resources provided at the conference to be valuable and beneficial to Real Estate Commissioners in carrying out their public duties and regulatory obligations, thereby benefiting the public and regulated real estate licensees.
10. Schwartz indicates that it would be a great benefit to the public and Nevada's real estate licensees to have additional Division participation in ARELLO by having one or more Commissioners attend the Annual Conference, in addition to the Division Administrator.
11. Schwartz confirms that the Annual Conference does not provide continuing education credits to maintain personal licensing requirements of real estate professionals.
12. When Schwartz was informed that there is no budget funding available for members of the REC to attend the Annual Conference, he made a request to NVAR to make funds available to enable one or more Real Estate Commissioners to attend. NVAR agreed to provide up to \$2,000 to the Division/REC for the Annual Conference because providing education opportunities to REC members is consistent with those attending from other States and improves Nevada's regulation of real estate licensees, thereby better protecting public interest.
13. The selection of which REC member is to attend the Annual Conference would be made by the REC or the Division, not NVAR. The funding from NVAR is available to reimburse only conference registration, air fare, transportation, lodging and meal expenses, which are supported by receipt. The funding would not be available to pay for the attendance of spouses or other guests, entertainment or other non-conference activities, and the recipient would not be entitled to claim or seek reimbursement for any expense funded by NVAR from the State.

14. Schwartz has consulted with the REC's assigned legal counsel, legal counsel for NVAR and the Division Administrator regarding the propriety of seeking these funds and was referred to the Commission for guidance.

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

##### **A. ISSUES**

In this Opinion, the Commission considers the implications under the Ethics Law where a member of a regulatory licensing board seeks and accepts gifts of funding for educational purposes from a nonprofit organization in the regulatory industry, when that organization appears and lobbies on industry laws and regulations before both the regulatory board and the Nevada Legislature.

Under NRS 281A.020, a public officer must commit himself to avoid actual and perceived conflicts of interest, and he must comply with those preclusions as established in the Ethics Law associated with seeking and accepting gifts and economic opportunities, which are set forth in NRS 281A.400(1) and (2).

##### **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) Seeking Gifts or Economic Opportunity that would Improperly Influence a Public Officer to Depart from the Faithful and Impartial Discharge of Public Duties**

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

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.

## V. COMMISSION DECISION

### A. Prior Commission Opinions – Gifts for Educational Conferences

The Commission has issued fact-specific opinions addressing the propriety of receiving gifts or economic opportunities associated with educational conference fees, transportation, lodging and meals. In *In re Public Officer*, Comm'n Opinion No. 11-36A (2012), the Commission reviewed prior opinions and application of NRS 281A.400(1) and (2) to circumstances where a vendor, who had an existing contract<sup>3</sup> with a State Agency, offered an expense-paid trip for an agency representative to attend a symposium sponsored by the vendor. The vendor invited clients to the annual symposium to receive feedback on its products and services and also to share perspectives and experiences relevant to industry trends. The Commission determined the symposium was directly related to the State's interests in administering and promoting its programs as the conference was educational in nature and, importantly, that the invitation would not tend to improperly influence a reasonable public servant to depart from his official duties. See NRS 281A.400(1).

The Commission recognized that even under circumstances where the gift has an educational component and/or is beneficial to the public, there is a perceived quid pro quo. "Consequently, the Commission is careful to review requests for opinions regarding such invitations on facts specific to the request to ensure the propriety of the intended travel and to encourage agencies to adopt 'TOI' [Travel on Industry] policies appropriate to their needs." *Id.* At pgs. 4-6. The circumstances which were reviewed by the Commission in issuing its Opinion included: (1) the purpose of the conference; (2) whether the education provides insight into current and future issues facing the Agency and assists in fulfillment of public duties; (3) whether the gift is merely a show of appreciation; (4) whether the gift would influence a public officer to depart from his public duties; and (5) whether the gift is warranted rather than unwarranted and does not detract from maintaining appropriate industry relationships and avoids ethical concerns. *Id.*

In *In re Public Officer*, Comm'n Opinion No. 10-72A (2012), the Commission found no violation of NRS 281A.400(1) when an industry company offering programs to a regulatory agency offered to pay for attendance to an industry conference and opined that:

A review of the proposed program shows that the conference is intended to be a working conference, with little or no entertainment provided. In addition, no State money will be expended for the conference and COMPANY X's offer is limited to reimbursement of travel expenses and does not include any compensation to DEPUTIES. Payment of the expenses of any guest is also excluded.

We therefore conclude that PUBLIC OFFICER's acceptance of COMPANY X's invitation on behalf of DEPUTIES, and DEPUTIES' acceptance of the invitation, would not violate NRS 281A.400(1). The gift and/or economic opportunity of an all-expenses-paid trip to attend the conference, without payment of compensation or discretionary expenses, would not tend to

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<sup>3</sup> At the time, Vendor had already been awarded the contract based upon competitive bidding statutes so it was not offered as an incentive to contract.

improperly influence a reasonable person in the Public Officer or the Deputies' situations to depart from their official duties.

*Id.* At pgs. 3-4. The Commission reviewed whether the public officer or his deputies used their public offices to secure unwarranted privileges or advantages for themselves pursuant to the provisions of NRS 281A.400(2) and determined from the evidence that the Company had offered to pay the conference expenses with the intent to further the State's interests relating to managing a new Nevada State Program and to offer training and collaborations related to the State's interests. The invitation was not an enticement or encouragement related to the vending contract or to extend the vending contract. Further, management of the vending contract was not directly under the authority of the agency. *Id.*

The Commission's opinions in *In re Looney and Crowley*, Comm'n Opinion No. 92-17 (1993), provides an important consideration when reviewing any gifts or reimbursements in that care should be taken not to permit private funding of public salaries and benefits. Although the facts as presented do not appear to implicate private funding of public salaries and benefits; nonetheless, the Commission reviewed these opinions to assure itself that there was no implications based upon the facts presented. The opinions instruct that:

The public policy, which is the premise of NRS 281.481(4) (now NRS 281A.400(4)), is that the publicly elected Board of Regents is charged with responsibility for the mission, goals, policies and administration of the University of Nevada, its universities and community colleges. The execution of that responsibility requires the undivided and undiluted accountability of the officers and employees to the Board of Regents of the University. The jurisdiction to direct those officers and employees must be solely in the Board of Regents, just as must be the jurisdiction to pay, reward, and provide benefits to such officers and employees, whatever the original source of the funds to do so, whether public or private.

Implicit in this principle is the notion that just as the Regents have the duty to define the duties and policies of UNR officers and employees, the Regents retain the power to (i) judge and enforce their performance of such duties and policies, and (ii) determine the appropriate compensation, rewards and benefits for such performance, as distinct from a private party.

This is based upon the practice that only the government normally should compensate employees for government work, so that third parties do not reward, compensate, control or influence a government or public employee's decision or service. Accordingly, it is usual for the law to forbid a supplement to a public employee's salary from private or outside sources. It is this same principle which restricts, prohibits or requires disclosure of the receipt of gifts, honoraria or other economic benefits from others when given or paid for activity related to public or government employment. [Citing *Northwestern University Law Review*, Vol. 87 at page 57 (Fall 1982).

#### **B. Acceptance of Gifts – NRS 281A.400(1)**

In reviewing the record as presented, including the purpose for seeking the donation was to fund a representative of REC to attend the ARELLO Annual Conference, which attendance is consistent with those attending from other States, the Commission determines that the purpose of the Annual Conference is work-related and directly

promotes educational training for real estate license law officials. The Division's own established membership in ARELLO demonstrates connectivity to the furtherance of public duties or public purpose. Connectivity to public purposes of industry regulation is reflected in ARELLO's mission, the attendance of public officials and employees from all states and the education on real estate regulation and licensing provided at the conference. The educational components provided by ARELLO relate to issues faced by the REC and Division in performing public duties of regulating real estate licenses, the real estate practice and the enforcement of Nevada real estate laws.

Accordingly, the central issue to be determined by the Commission is whether NVAR's gift of funding the conference would cause an appearance of impropriety or tend to influence a public officer to depart from the faithful and impartial discharge of his public duties in violation of NRS 281A.400(1). The public duties implicated by the REC's or the Division's acceptance of the gift from NVAR are the perceived quid pro quo associated with receiving the gift and NVAR's activities in either lobbying or outreach to the Legislature or the REC with regard to regulations and laws affecting the members of NVAR.

The funding is specifically limited to funding conference expenses for the attending public official and is not for guests. In addition, continuing professional licensing educational credits are not offered by ARELLO. The funding is anticipated to assist perhaps one commissioner of a five-member body with expenses and fees associated with conference attendance. The attending member is to be chosen by the REC or the Division rather than NVAR. This minimizes quid pro quo concerns and demonstrates that there is no purposeful selection by NVAR of the recipient for purposes of gathering support for its policies or positions.

Further, there is no current law or regulation under consideration on which NVAR could be seeking support of REC members. Although NVAR may provide lobbying or comments on future regulations and laws, such activities are detached from the funding purpose for this gift, which purpose is to promote professionalism and education of REC members. The record establishes the purpose of NVAR'S funding is to provide education at the Annual Conference, which specifically assists public officers and employees in performing their public regulatory duties. There is no indication that the funding is provided to seek favoritism or a quid pro quo with respect to future regulations or laws yet to be processed. The funding is in furtherance of both NVAR's and the REC's common goal to strive for highly professional standards in governing the industry.

Based upon the record and the limitations placed upon the funding by NVAR, the Commission determines that the acceptance of the expense-paid trip to the Annual Conference does not create an appearance of impropriety and would not violate NRS 281A.400(1) because, even though it is a gift or economic opportunity, the gift would not tend to improperly influence a reasonable person in the public official's situation to depart from his official duties.

### **C. Securing Unwarranted Privileges or Advantages**

NRS 281A.400(2) mandates that 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. Further, Schwartz testified that he did not specifically seek funding for himself, but to fund a representative member from REC. The

Commission determines that Schwartz's actions in requesting the gift from NVAR had potential to implicate the provisions of NRS 281A.400(2); however, since the funding was not sought for private interests, the conference is educational, related to the public duties of a member of the REC, and the facts presented do not directly implicate quid pro quo concerns, such actions do not rise to the level of seeking an unwarranted privilege under the Ethics Law. NRS 281A.400(2) defines "unwarranted" as without justification or adequate reason, which is not demonstrated by these facts. Further, the record does not establish or reference the existence of the other types of relationships mentioned in NRS 281A.400(2).

#### **D. Other Implicated Laws**

Although the Commission is not charged with the enforcement of other State laws and regulations, it may reference such laws in its opinions even though it is not required to under the provisions of NRS Chapter 281A. Public officers and employees have an independent duty to determine the existence of other applicable laws and regulations associated with their own situations. Further, an opinion issued by the Commission does not excuse the duty to comply with the requirements of the law.

In this regard, the Commission references the existence of laws and regulations instituted by the State,<sup>4</sup> separate than those set forth in NRS Chapter 281A, establishing certain protocols for acceptance of gifts by state agencies. See NRS 353.335.<sup>5</sup> Also, the

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<sup>4</sup> This reference should not be deemed by Subject to be a complete search of applicable law and does not constitute legal advice.

<sup>5</sup> NRS 353.335 Procedure for acceptance of gift or grant of property or services.

1. Except as otherwise provided in subsections 5 and 6, a state agency may accept any gift or grant of property or services from any source only if it is included in an act of the Legislature authorizing expenditures of nonappropriated money or, when it is not so included, if it is approved as provided in subsection 2.

2. If:

(a) Any proposed gift or grant is necessary because of an emergency as defined in NRS 353.263 or for the protection or preservation of life or property, the Governor shall take reasonable and proper action to accept it and shall report the action and his or her reasons for determining that immediate action was necessary to the Interim Finance Committee at its first meeting after the action is taken. Action by the Governor pursuant to this paragraph constitutes acceptance of the gift or grant, and other provisions of this chapter requiring approval before acceptance do not apply.

(b) The Governor determines that any proposed gift or grant would be forfeited if the State failed to accept it before the expiration of the period prescribed in paragraph (c), the Governor may declare that the proposed acceptance requires expeditious action by the Interim Finance Committee. Whenever the Governor so declares, the Interim Finance Committee has 15 days after the proposal is submitted to its Secretary within which to approve or deny the acceptance. Any proposed acceptance which is not considered within the 15-day period shall be deemed approved.

(c) The proposed acceptance of any gift or grant does not qualify pursuant to paragraph (a) or (b), it must be submitted to the Interim Finance Committee. The Interim Finance Committee has 45 days after the proposal is submitted to its Secretary within which to consider acceptance. Any proposed acceptance which is not considered within the 45-day period shall be deemed approved.

3. The Secretary shall place each request submitted to the Secretary pursuant to paragraph (b) or (c) of subsection 2 on the agenda of the next meeting of the Interim Finance Committee.

4. In acting upon a proposed gift or grant, the Interim Finance Committee shall consider, among other things:

- (a) The need for the facility or service to be provided or improved;
- (b) Any present or future commitment required of the State;
- (c) The extent of the program proposed; and

Governor adopted Executive Order 2011-02 on January 5, 2011, identifying gifts to encompass training, transportation, local travel, lodging and meals, and limiting the ability of certain members of the Executive Branch to accept such gifts. Furthermore, Senate Bill 307, adopted in the 2015 Legislative Session, amended State law<sup>6</sup> with respect to disclosure and other requirements associated with gifts applicable to certain public officers and candidates for public offices, including imposing certain restrictions on gifts from lobbyists.

Separately, the Commission encourages Schwartz to coordinate with the REC and/or the Administrator to establish internal agency policies and procedures regarding travel funding for public officials and employees at the expense of private industry, including non-profits. Adoption of a travel-on-industry policy “would aid in balancing the overall interests of the agency, and that if its employees, in obtaining work-related skills and training with the agency’s need to be informed of and maintain appropriate industry relationships and avoid ethical concerns outlined herein.” See *In re Public Employee*, Comm’n Opinion No. 11-36A (2012).

## VI. CONCLUSIONS OF LAW

1. At all times relevant to the hearing of this matter, Schwartz 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.400(1), the acceptance of the expense-paid trip to the 2016 Annual Conference hosted by ARELLO under these particular circumstances, within the limitations expressed in this Opinion, does not create an appearance of impropriety and would not violate NRS 281A.400(1) because, even though it is a gift or economic opportunity, the gift would not tend to improperly influence a reasonable person in the public official’s situation to depart from his official duties.
4. Although Schwartz’s actions in requesting funding from NVAR had potential to implicate the provisions of NRS 281A.400(2), the record establishes the educational nature of the conference and direct connectivity to performance of public duties as well as the gift’s detachment from any associated quid pro quo concerns. Therefore, Schwartz’s action did not rise to the level of seeking an unwarranted privilege under

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(d) The condition of the national economy, and any related fiscal or monetary policies.

5. A state agency may accept:

(a) Gifts, including grants from nongovernmental sources, not exceeding \$20,000 each in value; and

(b) Governmental grants not exceeding \$150,000 each in value,

if the gifts or grants are used for purposes which do not involve the hiring of new employees and if the agency has the specific approval of the Governor or, if the Governor delegates this power of approval to the Chief of the Budget Division of the Department of Administration, the specific approval of the Chief.

6. This section does not apply to:

(a) The Nevada System of Higher Education;

(b) The Department of Health and Human Services while acting as the state health planning and development agency pursuant to paragraph (d) of subsection 2 of NRS 439A.081 or for donations, gifts or grants to be disbursed pursuant to NRS 433.395 or 435.490; or

(c) Artifacts donated to the Department of Tourism and Cultural Affairs.

<sup>6</sup> Affected NRS Chapters include, without limitation, NRS Chapter 218H and NRS 281; however, at the time of issuance of this opinion formal codification was not available for citation purposes.

the Ethics Law, which NRS 281A.400(2) defines as “without justification or adequate reason.”

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 Participated in this Opinion:

Dated this 10<sup>th</sup> day of May, 2016.

NEVADA COMMISSION ON ETHICS

By: /s/ Cheryl A. Lau  
Cheryl A. Lau, Esq.  
Chair

By: /s/ Barbara Gruenewald  
Barbara Gruenewald  
Commissioner

By: /s/ Keith A. Weaver  
John C. Carpenter  
Vice-Chair

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

By: /s/ Dan H. Stewart  
Dan H. Stewart  
Commissioner