



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 Body, State of
Nevada,

Request for Opinion No. **16-72A**
CONFIDENTIAL

Public Employee./

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public employee ("Public Employee") works for a Public Body in the State of Nevada and requested this advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to Chapter 281A of the Nevada Revised Statutes ("NRS") regarding the propriety of Public Employee's future conduct as it relates to the Ethics in Government Law ("Ethics Law"). NRS 281A.440(1). A quorum of the Commission heard this matter and Public Employee appeared in person and provided sworn testimony.¹

Public Employee sought an opinion from the Ethics Commission regarding applicable conflicts of interest between Public Employee's public employment and private business and employment interests ("secondary employment"). In Public Employee's secondary employment, Public Employee provides services to clients who may also be regulated by the Public Body.

After fully considering Public Employee's request and analyzing the facts, circumstances and testimony as presented by Public Employee, including that Public Employee's public employer has approved Public Employee's secondary employment, the Commission deliberated and issued a written opinion advising that Public Employee's private business services for clients who are not specifically regulated by the Public Body do not implicate the Ethics Law. Nonetheless, Public Employee was advised that the Ethics Law would be implicated if a private client becomes subject to regulation by the Public Body. Public Employee was further advised to consider these implications so Public Employee may avoid any appearance of impropriety, which advice includes: (1) refraining from utilizing Public Employee's governmental time, property or equipment to conduct any private business; (2) refraining from using Public Employee's public position and public title to market or attract clients to private business endeavors; and (3) properly disclosing the potential conflict as required by NRS 281A.420(1).

Public Employee elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this abstract of the opinion to provide guidance to public officers and employees who may be similarly situated.²

¹ The following Commissioners participated in this opinion: Chair Lau, Vice-Chair Weaver and Commissioners Duffrin, Gruenewald and Stewart. Any individual comment made by a Commissioner during the hearing is not binding on the Commission's final decision.

² Any individual comments made by commissioners during the hearing or deliberations are not binding on or part of the Commission's final decision and Opinion.

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 set forth below 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.

II. QUESTION PRESENTED

Public Employee questions whether the Ethics Law prohibits Public Employee from providing private services through Public Employee's secondary employment to clients who are regulated by the Public Body. Public Employee questions whether Public Employee may use Public Employee's official public title and public employment status to promote Public Employee's private business endeavors.

III. FINDINGS OF FACT

1. In Public Employee's public capacity, Public Employee serves in a compliance capacity for the Public Body.
2. The Public Body determines compliance matters subject to the regulatory authority of the Public Body.
3. Public Employee owns a private business and is employed by a private company (collectively "secondary employment entity"), for which Public Employee provides private services to clients who may be regulated by the Public Body in a separate capacity. Not all clients are regulated by the Public Body; however, there is potential for a regulated individual to seek private services from Public Employee's private secondary employment entity.
4. In marketing services to clients for Public Employee's secondary employment entity, Public Employee seeks guidance on what public sector job information would be appropriate to utilize.
5. Public Employee would not use the official website, letterhead, staff, equipment or other accouterments of Public Employee's public position with the Public Body to market Public Employee's private business interests.
6. Public Employee has disclosed Public Employee's secondary employment interests to the Public Body, which have been approved by the Public Body.

IV. STATEMENT OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

In Public Employee's private capacity, Public Employee provides certain services through Public Employee's secondary employment. Public Employee seeks guidance regarding the nature and scope of any conflicts of interest between Public Employee's official duties with the Public Body and Public Employee's private business interests associated with the secondary employment.

It is possible that a client seeking or obtaining private business services is contemporaneously the subject of regulation by the Public Body. In anticipation of a potential conflict, Public Employee questions whether it is a conflict of interest for Public Employee to provide private services to an individual who is regulated by the Public Body and seeks guidance on the disclosure and abstention requirements of the Ethics Law. In addition, Public Employee asks whether Public Employee may reference Public Employee's public position with the Public Body in marketing Public Employee's private business interests.

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 public duties that are improperly influenced by Public Employee's private activities or create unwarranted or improper private benefits through the use of Public Employee's public position. See *In re Stangle*, Comm'n Op. No. 12-05A (2012). Whether an improper conflict arises between Public Employee's public duties and Public Employee's private interests in Public Employee's secondary employment must be considered in light of the provisions set forth in the Ethics Law and interpretive opinions.

B. RELEVANT STATUTES

The following provisions of the Ethics law are relevant to this matter.

1) Duty to Avoid Conflicts of Interest

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) "Commitment in a private capacity" and "Pecuniary interest" 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:

- ...
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; . . .

NRS 281A.139 provides:

"Pecuniary interest" means any beneficial or detrimental interest in a matter that consists of or is measured in money or is otherwise related to money, including, without limitation:

1. Anything of economic value; and

2. Payments or other money which a person is owed or otherwise entitled to by virtue of any statute, regulation, code, ordinance or contract or other agreement.

3) Improper Use of Government Position

NRS 281A.400(1) provides:

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.

NRS 281A.400(2) provides:

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.

NRS 281A.400(7) provides:

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.

NRS 281A.400(10) provides:

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.

4) 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.

* * *

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.

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V. COMMISSION DECISION

A. PECUNIARY INTERESTS AND COMMITMENTS IN A PRIVATE CAPACITY RELATED TO SECONDARY EMPLOYMENT

The Legislature has deemed specific relationships to implicate conflicts of interest, such as relationships with private businesses or employers and those with whom a public officer or employee shares significant and continuous business relationships. In this case, the Commission evaluates whether the private relationship status of Public Employee's secondary employment entity constitutes a commitment in a private capacity to the interests of the secondary employment entity. Further, Public Employee's secondary employment relationship creates a pecuniary interest in matters affecting the secondary employment entity. See NRS 281A.065(4) and (5), NRS 281A.139 and *In re Spiegel*, Comm'n Op. No. 15-25A (2015).

As a result of Public Employee's secondary employment entity relationship, the private interests of Public Employee are statutorily attributed to Public Employee to determine whether there is a conflict between Public Employee's private interests and public duties. *In re Brown*, Comm'n Op. No. 13-28A (2013). As explained in *Brown*, "The Ethics Law recognizes various conflicts or perceived conflicts between public duties and a person with whom public officers and employees have employment commitments." *Id.* at 9. Accordingly, Public Employee must consider the implications of the secondary employment entity relationship in addressing implications under the standards of conduct governing the use of Public Employee's public position as set forth in various sections of NRS 281A.400 and with regard to the disclosure and abstention requirements of NRS 281A.420.

B. IMPROPER USE OF GOVERNMENT POSITION – APPLICABILITY OF NRS 281A.400(1), (2), (7) AND (10)

The Ethics Law does not prohibit Public Employee from engaging in secondary employment while Public Employee serves as a public employee and it does not prohibit Public Employee, without reference to Public Employee's public position/title, from referencing Public Employee's general experience in a regulated industry, the number of years that Public Employee served the public or the associated private and public certifications/licenses Public Employee holds.³ However, Public Employee has a duty to protect the public trust and separate Public Employee's public responsibilities from Public Employee's private interests. Specifically, Public Employee may not use Public Employee's position in government to seek or gain an economic opportunity which would tend to influence a reasonable person in Public Employee's position to depart from the impartial discharge of Public Employee's public duties.⁴ NRS 281A.400(1). Additionally, Public Employee may not use Public Employee's public position to secure or grant unwarranted privileges, preferences or advantages for himself or herself, or any person to whom Public Employee has a private commitment (NRS 281A.400(2)), or to seek

³ See *In re Hales*, Comm'n Op. No. 07-13A (2008). *In re Hales* indicates that the use of certain experience gained without direct emphasis on the public position held may be permitted. However, the Commission determines that since its opinions are based upon the specific circumstances presented, a broad application of this concept is not appropriate given the expressed qualification stated in *Hales*, that she could not market her public office as a selling point to provide private services, and other opinions issued by the Commission, some of which are cited in this opinion. Accordingly, the Commission advises to properly avoid the conflict of interest under NRS 281A.020 and to limit public experience references as indicated.

⁴ The Public Body requires its employees to receive approval for Secondary Employment. Public Employee complied with this requirement and received the proper approval.

employment and/or contracts (NRS 281A.400(10)). Finally, Public Employee may not use government resources for purposes related to Public Employee's secondary employment. (NRS 281A.400(7)).

In prior Commission opinions, the Commission has reviewed the circumstances on a case-by-case basis to determine whether there has been an improper use of a public position to seek or gain a business opportunity or private employment. For example, the use of a public position to seek or gain a business opportunity or employment was found to be improper when a public officer/employee used his position to appoint himself or ask a subordinate to assist with obtaining private employment for the public officer. *In re Evenson*, Comm'n Op. No. 10-05C (2011) and *In re Maurizio*, Comm'n Op. No. 09-40C (2010). In this case, the Commission is concerned with the potential for Public Employee to: 1) take advantage of Public Employee's public position to access a target customer base and seek out potential private business clients who may be regulated by the Public Body; and 2) use Public Employee's public position to market private services or use information not readily available to the general public to further Public Employee's private business interests.

Public Employee confirmed in testimony that Public Employee will not purposefully market private services to any individuals regulated by the Public Body. However, Public Employee must remain diligent to maintain a proper separation between Public Employee's public duties and private interests by not engaging in conduct that creates unwarranted or improper private benefits through the use of Public Employee's public position. The provisions of NRS 281A.400 serve to assist Public Employee in maintaining a proper separation. For each referenced section of NRS 281A.400, Public Employee must be mindful of the following implications:

- NRS 281A.400(1) – It is possible that the faithful discharge of Public Employee's public duties could be impacted by Public Employee's interaction with regulated individuals who desire private services from Public Employee's secondary employment entity. This interaction places Public Employee in a position to accept employment which would tend to improperly influence a reasonable person in Public Employee's position to depart from the impartial discharge of Public Employee's public duties. To avoid this conflict, Public Employee must properly disclose the circumstances to the supervisory head of the Public Body under the requirements of NRS 281A.420(1). The Public Employee and supervisor then may consider whether it is appropriate for another staff member to handle the matter, or whether to utilize the Commission's First-Party advisory opinion process to provide guidance.
- NRS 281A.400(2) – Public Employee's public duties place Public Employee in a position to accept an unwarranted benefit associated with Public Employee's private interests because the position provides the opportunity to access a target customer base of individuals who may be interested in the private services offered by Public Employee's secondary employment entity. Therefore, Public Employee must be vigilant to maintain proper separation between public duties and private interests including, without limitation to refrain from using Public Employee's public service or position title as a selling point for purposes of advertising Public Employee's secondary employment entity's interests.

- NRS 281A.400(7) – Public Employee should refrain from using government time, property or equipment for purposes related to a private interest, unless specifically permitted otherwise by provisions of law. Public Employee is advised to continue to comply with the provisions of the Ethics Law and to work on matters related to Public Employee’s private employment on Public Employee’s own time and without using government time, equipment, property or facilities.
- NRS 281A.400(10) – Public Employee is advised that referencing Public Employee’s public position in marketing communications also implicates this statutory prohibition because there is a use of a public position to acquire private employment.

C. DISCLOSURE AND ABSTENTION REQUIREMENTS

NRS 281A.420(1) prohibits a public employee from acting on a matter in which the public employee has a significant private pecuniary interest, or which would reasonably be affected by the public employee’s commitment in a private capacity to the interests of another, without first disclosing the nature and extent of the interest to the supervisory head of the organization. See *In re Public Employee*, Comm’n Op. No. 13-78A (2014) (disclosure should include the public employee’s actions/involvement regarding the matter to date).

A public officer/employee has an obligation to preserve the public trust and commit himself to avoid conflicts between Public Employee’s private interests and public duties. Where these conflicts arise in the context and consideration of public matters, the public officer/employee may, under certain circumstances, honor Public Employee’s obligations through appropriate disclosures and abstentions.

Id., at 9-10.

The Ethics Law does not prohibit Public Employee from providing private services to individuals regulated by the Public Body who learn about the private services through communication or marketing efforts that are unrelated to Public Employee’s public position. However, a conflict exists when Public Employee works on a matter in Public Employee’s public capacity involving a regulated individual who seeks or obtains private services from Public Employee’s secondary employment entity. Because Public Employee has a pecuniary interest in and a commitment in a private capacity to the interests of Public Employee’s secondary employment entity under NRS 281A.065(4), Public Employee has an ongoing duty to disclose Public Employee’s pecuniary and private interests associated with Public Employee’s secondary employment entity.

Pursuant to the requirements of NRS 281A.420(1)(c), the Commission advises Public Employee that Public Employee should properly disclose the full nature of any private conflicts associated with the secondary employment entity prior to acting on any such matter on behalf of the Public Body. The disclosure will permit Public Employee and the supervisory head of the Public Body to determine whether the matter should be assigned to another staff member thus ensuring there is proper separation between Public Employee’s public duties and private interests. As indicated previously, should there be any question about what action is appropriate to assure compliance with the Ethics Law, the Commission’s First-Party advisory opinion process is available to provide guidance.

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. Pursuant to NRS 281A.065 and NRS 281A.139, Public Employee has a significant pecuniary interest in and a commitment in a private capacity to the interests of Public Employee's secondary employment entity.
4. Public Employee does not violate the provisions of NRS 281A.020 and NRS 281A.400(1) and (2) by providing private services as presented in this Opinion to individuals while employed with the Public Body; however, Public Employee must commit to avoid using Public Employee's public position to obtain any unwarranted preferences or advantages for Public Employee and/or for the secondary employment entity.
5. Pursuant to NRS 281A.400(7), Public Employee may not use government time, property or equipment to conduct business for Public Employee's secondary employment entity.
6. Pursuant to NRS 281A.400(10), Public Employee may not market services for Public Employee's secondary employment entity by using Public Employee's title or status as a public employee.
7. Pursuant to NRS 281A.420(1), prior to acting on a matter on behalf of the Public Body, Public Employee should properly disclose to the supervisory head of the Public Body any secondary employment entity conflict circumstances associated with an individual to whom Public Employee is to provide services.
8. A proper disclosure under NRS 281A.420(1) will permit Public Employee and the supervisory head of the Public Body the ability to assign the matter to another staff member, thus promoting proper separation between Public Employee's public duties and private interests.

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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:⁵

Dated this 28th day of June, 2017.

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

By: /s/ Barbara Gruenewald
Barbara Gruenewald, Esq.
Commissioner

By: /s/ Keith A. Weaver
Keith A. Weaver, Esq.
Vice-Chair

By: /s/ Dan Stewart
Dan Stewart
Commissioner

By: /s/ Brian Duffrin
Brian Duffrin
Commissioner

⁵ Commissioner Stewart did not hold the position of Commissioner at the time of issuance of this Abstract Opinion.