

NEVADA ETHICS IN GOVERNMENT MANUAL

for public officers and public employees



NEVADA COMMISSION ON ETHICS

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Nevada Commission on Ethics

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Dear Reader:

Welcome! This manual is prepared pursuant to NRS 281A.290¹ by the Nevada Commission on Ethics to assist Nevada's public servants in their efforts to preserve the public trust. The Nevada Legislature declared the following public policy in 1977 by adopting the Ethics in Government Laws:

- ◆ **A public office is a public trust and shall be held for the sole benefit of the people.**
- ◆ **A public officer or employee must commit himself to avoid conflicts between his private interests and those of the general public whom he serves.**

In the performance of their official duties, public officers and public employees serve the people of the State of Nevada. As they carry out their official duties, we expect public officers and employees to place a priority on their loyalty to the Constitution, laws and regulations of the United States and the State of Nevada and basic principles of ethics, rather than succumbing to the temptations of private gain. The public deserves and should expect no less.

We hope that this manual will provide an informative overview of ethics issues that frequently arise and a summary of Nevada laws and regulations relevant to those issues. It is not intended to replace a thorough understanding of the applicable statutes, opinions and regulations. It does not purport to provide answers to all of the ethics questions a public officer or employee is likely to confront in connection with his or her official duties, but a careful reading should help one to recognize questionable conduct and instances where further advice should be sought. This manual explains the types of opinions issued by the Commission, and provides information and resources to assist public officers and public employees to preserve the public trust.

Should any questions arise that this document does not address, the Commission staff stands ready to respond to questions or facilitate requests for opinion from the Commission. The public is invited to contact the Commission office with inquiries. In preserving the public trust, I am

Sincerely yours,

Caren Jenkins

Caren Jenkins, Esq.
Executive Director

¹ NRS 281A.290, subsection 6 provides that the Commission on Ethics shall publish a manual for the use of public officers and employees that contains:

- (a) Hypothetical opinions which are abstracted from opinions rendered pursuant to subsection 1 of [NRS 281A.440](#), for the future guidance of all persons concerned with ethical standards in government;
- (b) Abstracts of selected opinions rendered pursuant to subsection 2 of [NRS 281A.440](#); and
- (c) An abstract of the requirements of this chapter.
- (d)

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July 2010

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*Appointed By Governor **Appointed by Legislative Commission

Chapter 1

The Code of Ethical Standards

Nevada's Code of Ethical Standards is found in NRS 281A.400 to 281A.660.

***Nobody should be trying
to line their pockets by
serving in a public office.***

***~ Assemblyman Joseph E. Dini,
Jr., Sponsor of AB 450, at a joint
hearing of the Senate Gov't Affairs
and Assembly Elections
Committees, March 28, 1977***

Nevada's Code of Ethical Standards for Public Officers and Public Employees

NRS 281A.400 outlines the following specific prohibitions:

1. Accepting gifts, favors, employment or economic opportunities
2. Accessing unwarranted privileges
3. Contracting with government entities
4. Accepting private compensation for public duties
5. Using confidential information for personal gain
6. Suppressing information for pecuniary interests
7. Using government resources for personal use
8. Improperly influencing subordinates
9. Engaging in self-dealing
10. Using government publications for campaign purposes

Other similar provisions in the Ethics in Government Law include:

- Conflicts of interest, disclosure & abstention requirements
- Personal interest in public contracts
- Accepting honoraria
- Post-employment restrictions
- Required disclosures and other filings

***Always do right.
This will gratify some and
astonish the rest.***

~ Mark Twain, February 1901

Chapter 2

Conflicts of Interest

“Society’s demands for moral authority and character increase as the importance of the position increases.”

- John Adams, American Founding Father and second U.S. president (1735-1826)

Conflicts of Interest

Conflicts of interest can interfere with basic principles of fairness – everyone having the same burdens and benefits in our society. A public official may have many opportunities to take unfair advantage of his or her position or to gain a benefit at the expense of others. When public officers and employees ignore their conflicts of interest, the public trust becomes undermined. The public can lose faith in the integrity of government and the decision-making processes.

Black’s Law Dictionary defines a conflict of interest as **“a real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.”**

The three key elements in this definition are:

- **Private Interest.** Often, this factor appears as a personal financial interest, but it also includes other sorts of interests. Examples include gaining a special advantage for a friend, spouse or child, or exacting revenge against or providing a favor to a person or entity for personal reasons.
- **Public Duty.** The problem arises when a private interest comes into conflict with the second feature of the definition, public or fiduciary duty – the duty of a public officer/employee when acting in an official capacity.
- **Incompatibility.** Private or personal interests that either interfere with or appear likely to interfere with one's objectivity are a matter of legitimate concern to those who rely on public officers/employees.

Government is a trust, and the officers of the government are trustees; and both the trust and the trustees are created for the benefit of the people.

*~ Henry Clay
1777-1852*

It is important for public officers and public employees to avoid **apparent** as well as **actual** conflicts of interest at every opportunity. An actual conflict is a situation where the public officer/employee knows that his/her judgment is likely to be compromised, whereas an apparent conflict is one where a reasonable person might think that the public officer/employee's judgment is likely to be compromised.

While a conflict of interest, in and of itself, may not always interfere with one's judgment or objectivity, it may create an 'appearance of impropriety.'

Appearance of Impropriety

An appearance of impropriety arises with an interest (private, personal or pecuniary) sufficient to create in a reasonable person's mind a perception that the ability to carry out one's responsibilities with integrity, impartiality, and competence is impaired. This definition does not appear in statute regarding ethics Laws, rather, it is modeled after the U.S. Rules of Practice for U.S. Judges.

At times, a public officer/employee may know that a situation could compromise his/her judgment. Nevertheless, when the perception of a conflict exists, one must be mindful that a reasonable person may think that the public officer/employee's judgment could be compromised. This does not necessarily mean that the public officer/employee's judgment will be impaired, it just means there is a perception it could be impaired—thus creating an appearance of impropriety. Any interests, actions, or conduct which would create a perception or appearance of impropriety need to be addressed.

Assume that no one knows anything about you and be sure to disclose all information regarding the actual or apparent conflict and then analyze aloud whether the conflict would materially affect the independence of judgment of a reasonable person in your circumstance. All too often, public officers and public employees assume that everyone in town knows all of his or her private affiliations.

WHO IS THIS "REASONABLE PERSON"?

According to Black's Law Dictionary, Eighth Edition, the "reasonable person" is a hypothetical person used as a legal standard, especially to determine whether someone acted with negligence; specifically, a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others interests. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions.

The reasonable man connotes a person whose notions and standards of behavior and responsibility correspond with those generally obtained among ordinary people in our society at the present time, who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equitable.

He is not necessarily the same as the average man - a term which implies an amalgamation of counter-balancing extremes.

- R.F.V. Heuston, *Salmond on the Law of Torts* 56 (17th ed. 1977).

AVOIDING THE APPEARANCE OF IMPROPRIETY

It may take some skill and good judgment to recognize a conflict of interest, because private and personal interests can cloud your objectivity. But, once you uncover a conflict, to avoid ethics traps, the best course of action is to DISCLOSE, DISCLOSE, DISCLOSE.

By disclosing private interests up front, others can make informed decisions based on that knowledge rather than being caught unaware. When a public officer has a private interest that conflicts with his or her professional duties, the public officer might consult with legal counsel to determine whether abstention is required.

The reasonable person test must be applied, and a determination made whether abstention is necessary, but a public officer should always abstain from voting when his or her independence of judgment IS influenced by private interests.

Disclosing a relationship or pecuniary interest, especially one that someone (reasonable person) might think would affect a vote on a matter is important, regardless whether the public officer intends to abstain.

Repetitive disclosure does not violate state law; voting without proper disclosure may.

Public employees should disclose such interests to their supervisors as certain conflicts might necessitate their abstention from a particular project or decision-making process.

VOTING, DISCLOSING, & ABSTAINING

Voting is permissible (and conversely, abstention is not appropriate) if the value which the public officer would accrue as a result of voting is no greater than the value which accrues to anyone else.

Public disclosure of a conflict of interest must be made at the time the measure is considered, and is **mandatory** for any interest created by:

- 1. A gift or loan,**
- 2. A pecuniary interest, or**
- 3. A commitment in a private capacity to the interests of others.**

A public officer may not advocate or vote for the passage or failure of a matter, but otherwise may actively participate in a matter if the independent judgment of a reasonable person would be affected by a gift or loan, a pecuniary interest or a commitment in a private capacity to the interests of others*

Abstaining without disclosing a conflict of interest does not fulfill the statutory requirements. The act of abstaining is an official action. The law requires disclosure before action is taken.

Commitment in a Private Capacity to the Interests of Others

This “term of art” is defined in statute. A commitment in a private capacity to the interest of others is a commitment to a person who:

- ◆ Is a member of the public officer’s household;
- ◆ Is related to the public officer within the 3rd degree of consanguinity;
- ◆ Employs the public officer or a household member; or
- ◆ With whom the public officer has a substantial or continuing business relationship.
- ◆ OR, other similar relationships.

Other similar relationships might include domestic partnerships, volunteer service, roommates and the like. Such relationships might create such influence over a person’s ability to be objective that the Legislature required any such relationships to be disclosed in every instance.

*Wherever government controls a business,
it becomes inevitable that the business
should try to control the government.*

Paul H. Douglas, Former U.S. Senator
“Ethics in Government” (Harvard Univ. Press 1952)

AVOIDING PROBLEMS WITH DISCLOSURE & ABSTENTION

1. Before the meeting, if possible, thoroughly review all meeting materials to identify any matters which may involve any of the following:

- ◆ the interests of any persons or entities from whom you may have accepted a gift or loan.
- ◆ reasonably being affected by your commitment in a private capacity to the interest of others.
- ◆ any pecuniary interest you may have, regardless of the amount.

2. Consider, and seek advice from your counsel if desired, whether the disclosed conflict requires abstention.

3. Make a public disclosure that sufficiently informs the public of the nature of the conflict and the potential effect of your action or abstention on the person or entity identified above or upon you.

4. Disclosure must be made at the time the matter is considered. If it is a recurring or ongoing matter, disclosure must be made every time the matter is considered.

5. The record should reflect in detail your disclosure and your decision and rationale whether to abstain.

All disclosures & abstentions should be explained so the public can understand the nature of the conflict of interest presented and the public officer's rationale, applying the "reasonable person standard," for deciding to vote or abstain from voting.

TIMING & LOCATION OF DISCLOSURES

- ◆ If you are a member of a public body, other than a member of the Nevada Legislature, your disclosure must be made on the public record to the chair and other members of the public body.
- ◆ If you are a public officer or employee and hold an appointive office, your disclosure must be made to the supervisory head of your organization, preferably in writing.
- ◆ If you hold an elective office, your disclosure must be made to the general public in the area from which you are elected.

BENCHMARK COMMISSION OPINIONS **REGARDING** **DISCLOSURE & ABSTENTION**

HOW MUCH NEEDS TO BE DISCLOSED?

Woodbury 99-56 (updated 2010)

- ◆ Disclose sufficient information to inform the public of the potential effect of the action or abstention upon yourself and/or private commitments
 - ◆ Apply reasonable person standard
 - ◆ Abstain when private commitments would materially affect a reasonable person's independence of judgment
 - ◆ Abstention should not be a safe harbor

DOES A FORMER SPOUSE HAVE AN INTEREST?

Hoefer 03-05

The Commission determined that a former martial relationship, where the couple had been divorced more than 15 years and had two grown children who were independent, did not create a “commitment in a private capacity to the interest of another” that would disqualify one from performing duties as a member of a board while the other is an administrator under the same department.

WHEN TO DISCLOSE AND WHEN TO ABSTAIN

Boggs-McDonald 03-34

With regard to matters subject to an appearance of a conflict between her private commitments and interests as a member of the Board of Directors for Station Casinos and her public duties as an elected member of the Las Vegas City Council:

1. When the nexus between a matter before the Las Vegas City Council and Station Casinos is clear to Councilwoman Boggs McDonald, she must disclose sufficient information concerning her private commitments to and interests in Station Casinos to inform the public of the potential effect of her action as required by NRS 281.501(4); and, after making such proper disclosure, she must refrain from advocating the passage or failure of the matter and abstain from voting upon the matter, all in accord with NRS 281.501(2).

2. When Councilwoman Boggs McDonald believes a nexus between a matter before the Las Vegas City Council and Station Casinos would not materially affect the independence of judgment of a reasonable person in her situation under the circumstances presented in the particular matter and, therefore, her abstention in the matter is not required pursuant to NRS 281.501(2), in addition to disclosing sufficient information concerning her private commitments to and interests in Station Casinos to inform the public of the potential effect of her action as required by NRS 281.501(4), she must also disclose the reason she believes that the independence of judgment of a reasonable person in her situation would not be materially affected under the circumstances and why, therefore, her abstention is not required.

INTERESTS IN SPOUSE'S EMPLOYMENT

Louritt & Roman 03-43 & 03-44

Mr. Louritt and Mr. Roman each requested the Commission's advisory opinion addressing the same issue: Do the provisions of NRS 281.501 require him to abstain from participating in deliberations and voting on collective bargaining agreements merely because his spouse is a member of the collective bargaining unit being discussed and/or voted upon?

Pursuant to the requirements of NRS 281.501(2), when a collective bargaining agreement that affects Mr. Louritt's spouse (who is as a classified employee of the Douglas County School District) and/or Mr. Roman's spouse (who is employed as a certified teacher for the Douglas County School District) comes before the Douglas County School Board, Mr. Louritt or Mr. Roman, as the case may be, must, after making a proper disclosure pursuant to NRS 281.501(4) and the Commission's published opinions interpreting those disclosure standards, (a) refrain from advocating the passage or failure of the matter and (b) abstain from voting on the matter.

ADVOCACY OR INFORMATION?

Kubicheck 97-07

"...the line dividing allowable factual testimony and prohibited advocacy is razor thin. Statements that begin, "in my opinion...", "I think...", "I believe...", or "I would hope...", would be signals that the statement might be more advocate than informative...A statement of advocacy is prohibited, even if factual, because the intent of advocacy is to get the hearer to believe the same as the speaker, and where the speaker has special influence and power because of her position, the hearer might be influenced to act not because of the merits of the speaker's argument but because of the speaker's position itself. On the other hand, a statement of fact, without any overtones of advocacy, is allowed because the intent."

Chapter 3

Disclosures Required of Public Officers

AM I A PUBLIC OFFICER?

NRS 281A.160 defines a public officer as a person:

- elected or appointed
- to a position which is established by the constitution of the State of Nevada, a statute of this state or an ordinance of any of its counties or incorporated cities, and
- which involves the exercise of a public power, trust or duty.

The “exercise of a public power, trust or duty” is defined as:

- Actions taken in an official capacity which involve a substantial and material exercise of administrative discretion in the formulation of public policy;
- The expenditure of public money; and
- The administration of laws and rules of the state, a county or a city.

Nevada Commission on Ethics

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Statute defines “the exercise of a public power, trust or duty” as:

- (a) Actions taken in an official capacity which involve a substantial and material exercise of administrative discretion in the formulation of public policy;
- (b) The expenditure of public money; and
- (c) The administration of laws and rules of the state, a county or a city.

These criteria are conjunctive, meaning all three must be met in order to meet the definition of a public officer.

A “Public officer” does not include:

- (a) Any justice, judge or other officer of the court system;
- (b) Any member of a board, commission or other body whose function is advisory;
- (c) Any member of a board of trustees for a general improvement district or special district whose official duties do not include the formulation of a budget for the district or the authorization of the expenditure of the district’s money; or
- (d) A county health officer appointed pursuant to NRS 439.290 (by a county commission).

Examples of those who may not be public officers: planning commissions, neighborhood advisory boards, parks & recreation boards,

Financial Disclosure Statement (FDS)

A public officer who is entitled to receive annual compensation of \$6,000 or more must file a Financial Disclosure Statement annually on or before January 15th. NRS 281A.600 and 281A.610.

Acknowledgment of Statutory Ethical Standards (ACK)

Every public officer must acknowledge in writing that he or she has received, read and understands the statutory ethical standards. Public officers elected or appointed to a definite term must file this form at the beginning of the term. Persons appointed to an indefinite term must re-file this form by January 15 of each even-numbered year. NRS 281A.500.1

Agency Representation Disclosure (ARD)

Any public officer who has represented or counseled a private person for compensation before a state agency of the Executive Branch shall make a disclosure of each such representation on a form prescribed by the Commission not later than January 15th of each year for the preceding calendar year in which such representation took place. NRS 281A.410.3

The Commission has created forms for each of these required disclosures and filings via the regulatory process. The forms may be found on the Commission's website at www.ethics.nv.gov.

Chapter 4

Types of Requests for Opinion

It would be impossible to draft an ethics legislation that would cover every possible case, but the saving grace of this legislation is that the individual in a “twilight” area can request an opinion before taking an action.

~ Senator Richard Bryan, Sponsor of SB 351 in the 1977 Session of the Nevada Legislature in a joint hearing of the Senate Gov’t Affairs and Assembly Elections Committees, March 28, 1977

CONFIDENTIAL FIRST-PARTY ADVISORY OPINIONS (NRS 281A.440.1)

Any public officer or public employee with questions regarding his or her own past, present or future conduct and how it relates to the Ethics in Government Law can request advisory opinions.

If a public officer or public employee is trying to determine whether a situation might conflict with the Ethics in Government Law, he may request advice from the Commission. Consideration of these advisory opinions has been statutorily exempted from the open meeting law. The fact of the request and the materials and opinion related thereto are all completely confidential. The requester holds the confidence, and it can be waived expressly or impliedly. Unless confidentiality is waived, the ultimate opinion will be published in an abstract format.

Advisory opinion requests can be processed in a much shorter period and need not be held in conjunction with the Commission's regularly scheduled meetings. These opinions are binding on the requester; therefore, if the public officer or employee acts contrary to the opinion rendered, the Commission may file a complaint on its own motion against that public officer or employee.

Advisory opinions are excellent tools to have in a public officer or employee's "Ethics Toolbox." They can provide guidance on your specific situation. The process of obtaining an advisory opinion can be very enlightening and educational for the requester and the Commission, and the resulting abstracted opinion can be very helpful guidance for public officers and employees in similar situations.

Upon written request from a public officer or public employee, which must be filed with the Commission's First Party Opinion Request form, the Executive Director and Commission Counsel review the request for jurisdictional purposes.

Thereafter, the Commission Counsel researches the statutes and cases the Commission has already addressed, and prepares a memorandum outlining the issues for Commissioners. It is imperative that the requester provide all of the relevant facts for the Commission to provide meaningful advice. These first party opinions are only as helpful as the facts provided.

A closed session hearing is scheduled and posted as a meeting of the Commission, although the anonymity of the requester is carefully preserved. The Commission may wish to ask questions and supplement the facts at the closed session hearing it holds, so the requester should arrive with any additional information that may assist the Commission to provide guidance. Typically, an oral opinion is rendered in the form of a motion at the initial hearing on the matter. However, occasionally, the commission will table its opinion pending additional information. The burden lies on the requester to provide the

Commission the information it requires.

A formal written opinion follows the hearing. Commission staff “sanitizes” the opinion for publication on the Commission’s website, removing references to the requester’s name, location and position in government. The publication of this abstract is offered in the hope that it will provide helpful guidance to others similarly situated.

THIRD-PARTY ETHICS COMPLAINTS (NRS 281A.440.2)

The Commission has authority to render an opinion interpreting the Ethics in Government Law and apply the standards to a given set of facts and circumstances upon the request from a person, a specialized or local ethics committee; and upon the Commission’s own motion.

Requests for opinion received under this provision have been defined by the Commission as “ethics complaints” and are most commonly filed by third parties against a public officer or public employee.

The Commission has adopted procedural regulations that outline how these complaints are processed. Those regulations appear in chapter 281A of Nevada Administrative Code.

Initial Review

The Commission exercises very limited jurisdiction. Each complaint is first reviewed by the Commission’s Executive Director and Commission Counsel to determine whether the complaint will be accepted. To be accepted by the Commission, a complaint must contain (1) an allegation of a violation of chapter 281A of Nevada Revised Statutes; (2) the subject of the complaint must be a specific public officer or a public employee; and (3) some form of credible evidence supporting the allegations made must accompany the complaint.

Very often the Commission lacks jurisdiction over complaints it receives because either the subject of the complaint is not a public officer or employee of the State or the complaint’s allegation are not related to a violation of chapter 281A of NRS. The Commission has no ability to address criminal matters, although if during the course of an investigation the Commission uncovers criminal activity a referral may be made to the appropriate authority. On March 29, 2005, U.S. District Court Judge Lloyd George entered an order which enjoined the Nevada Commission on Ethics from enforcing the provisions of NRS which provide for the filing of campaign practices complaints. Those statutes were repealed in 2005. Therefore, the Commission is not able to accept complaints regarding campaign practices.

The Executive Director and Commission Counsel initially review all complaints received by the Commission for jurisdiction and sufficiency. If a complaint fails to meet either of these tests, the complaint is rejected. To pass this initial review, a complaint must allege a violation of NRS 281A by a particular public officer or public employee (jurisdiction) and provide some credible evidence to support the allegations, other than a newspaper account (sufficiency). The filed complaint must also include the proper form and the required number of copies.

Once the initial review is passed, the requester and the subject of the complaint receive notice, and the subject is permitted time to respond to the allegations. Once the response is filed, the Commission's full-time investigator takes the matter, under the direction of the Executive Director, and a thorough investigation of the allegations is undertaken.

Investigatory Panel

When the investigation is completed, staff presents the Investigator's Report and Executive Director's Recommendations to two members of the Commission. These two members form an "Investigatory Panel" and review all of the facts and evidence collected to determine whether just and sufficient cause exists to forward each of the allegations in the complaint to the full commission for a hearing.

If both Commissioners agree that just and sufficient cause exists, the matter is forwarded to the full Commission. If only one of the panelists believes that just and sufficient cause exists, the matter goes to the full commission. Only if both panel members agree that just and sufficient cause does NOT exist, is the matter dismissed. The investigatory panel addresses each of the allegations in the complaint. If more than one allegation is presented, the investigatory panel can forward all, some or none of them to the Commission.

Confidentiality and Public Disclosure

ONLY AFTER the panel has made its determination is the fact of the complaint made public. Before that event, the Commission and its staff are prohibited from confirming or denying the receipt of a complaint. But the Panel Determination is posted on the Commission's website shortly after the panel meets, and the file is made available to the public.

If the Investigatory Panel finds that just and sufficient cause exists to forward any or all of the allegations in a complaint to the full Commission for hearing, a Notice of Hearing and Scheduling Order are issued to the subject of the complaint, and deadlines are selected for the preparation for the public hearing.

Public Hearing

All Commission hearings on these requests for opinion are conducted in open public sessions. Witnesses are subpoenaed, evidence and testimony are considered, and the Commission typically deliberates to a conclusion at the hearing whether the subject's conduct violated some provision of NRS 281A. Rarely will the Commission take a matter under advisement and issue its determination later. However, occasionally the Commission will continue a hearing to allow an opportunity to gather more evidence or to accommodate a witness.

If the Commission finds that the subject has violated NRS 281A, the next determination to be made is whether the violation was willful; i.e., knowing and intentional. Should the Commission find that the violation was willful, it is empowered to impose financial and other sanctions of up to \$25,000 and even refer a public officer or employee for removal from office. With or without such sanctions, the stigma of having been found to have violated the Ethics in Government Laws can be quite damaging to a public officer or public employee's career and image.

Of course, any subject found to have violated the Ethics in Government Laws may appeal the Commission's decisions to the District Court via the judicial review process. Several such appeals have been taken which provide important guidance to public officers, public employees, the Nevada Legislature and the Commission itself.

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