



BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Public Officer**, Public Entity,
State of Nevada,

Advisory Opinion No.21-036A

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.675, regarding the propriety of Public Officer's conduct as it relates to the Ethics in Government Law ("Ethics Law") set forth in Chapter 281A of the Nevada Revised Statutes ("NRS"). Pursuant to NAC 281A.352, a quorum of the Commission considered this matter by submission, without holding an advisory-opinion hearing.¹ The Commission considered the request for an advisory opinion, a list of proposed facts that were affirmed as true by Public Officer and publicly available information.

The opinion sought from the Commission was whether Public Officer has a conflict of interest under the Ethics Law if Public Officer provides personal or individual comments or testimony, as an appointed member of Public Entity, to another agency ("Agency"), that is not a Nevada State or local agency, on certain public hearings. Further, Public Officer has a related pecuniary interest that may be affected by the policies and regulations of the Agency and certain ancillary matters associated therewith could be considered by Public Entity.

After fully considering Public Officer's request and analyzing the facts, circumstances and documentation, the Commission advises Public Officer about the affirmative duty to avoid conflicts of interests under NRS 281A.020 and to comply with the provisions of NRS 281A.400, the Code of Ethical Standards, and the disclosure and abstention requirements of NRS 281A.420 when private matters intersect with public duties.

Further, the Commission does not enforce Public Entity's personnel policies and regulations, and Public Officer is referred to Public Entity's legal counsel to ensure compliance therewith. Since Public Officer confirms that the comments or testimony anticipated to be provided to the Agency will be made in an individual capacity, this opinion generally identifies requirements of the Ethics Law so that proper separation can be maintained between Public Officer's private interests and public duties.

The Commission now renders this abstract opinion stating its formal findings of fact and conclusions of law. The facts in this matter were obtained from documentary evidence provided by Public Officer. For the purposes of the conclusions offered in this opinion, the Commission's findings of fact set forth below accept as true the facts, as 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

¹ The following Commissioners participated in this opinion: Chair Wallin, Vice-Chair Duffrin and Commissioners Gruenewald, Lowry, Oscarson, Sheets, Towler and Yen.

those expressed in this opinion.² Although a full written opinion was properly served, for confidentiality reasons, this abstract opinion redacts certain findings of fact, provides a summary of issues, and removes other identifying information to protect the confidentiality of the requester.

II. QUESTION PRESENTED

Public Officer seeks guidance on the application of the Ethics Law if Public Officer provides testimony, in an individual capacity, at hearings before Agency that could relate to Public Officer's pecuniary interests. Potentially, the determinations of Agency could be associated with a matter to be considered by Public Entity; however, the associated matter and its associated impacts, if any, are not identified at this time.

III. FINDINGS OF FACT (Redacted to protect the identity of the Requester)

1. Public Officer is a public officer for Public Entity.
2. Agency is not a Nevada State or local public agency, and it will be holding public hearings on certain matters that are potentially related to Public Officer's private pecuniary interests.
3. Public Officer would like to provide comment or testimony at the hearings held by Agency in an individual capacity.
4. Public Officer believes that there is a possibility the determinations of the Agency might affect a matter to be considered by Public Entity, which has a potential to affect Public Officer's pecuniary interests. However, the matter and any associated impacts, if any, are not identifiable at the time of this advisory opinion.
5. In addition to the requirements of the Ethics Law, Public Officer understands the responsibility to comply with Nevada statutes and regulations, as applicable to the circumstances. Public Officer will complete the associated due diligence and compliance requirements, which may include proactively seeking direction from Public Entity and/or legal advice from the official legal advisor for Public Entity.

IV. STATEMENT OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

Public Officer seeks guidance on the requirements of the Ethics Law associated with the performance of public duties and maintaining proper separation from private pecuniary interests relating to certain matters under the control of Agency, which have a potential to have ancillary impacts on matters under the authority of Public Entity. However, the impacts are not currently ascertainable, but are anticipated to be remote in nature.

The Commission indicates that under the circumstances, the Ethics Law does not regulate whether Public Officer, in an individual capacity, may provide individual comment during hearings before the Agency. If these comments are provided and they result in

² The Commission reserves its statutory authority should an ethics complaint be filed presenting contrary circumstances. See *In re Howard*, Comm'n Op. No. 01-36 (2002) (notwithstanding an advisory opinion, public is not precluded from bringing ethics complaint) and *In re Rock*, Comm'n Op. No. 94-53 (1995) (Commission reservation of right to review until time issue is raised).

obtaining a benefit or detriment to Public Officer's own pecuniary interests, and thereafter Public Entity has authority over such matters, the requirements of the Ethics Law are implicated. If this series of events occurs, the Commission recommends that proper separation be maintained between Public Officer's public duties and private interests by compliance with the Code of Ethical Standards set forth in NRS 281A.400 and the disclosure and abstention requirements of NRS 281A.420.

The Commission has not been provided any specific agenda item or other matter that Public Entity would be considering in this regard. Accordingly, its advice is general in nature and not in particular context to a particular matter. The purpose of the Commission's guidance is to assure recognition of potential conflict situations, and secure compliance with the requirements of the Ethics Law including the policy of the State of Nevada, including avoiding conflicts and appearances of impropriety, as required by NRS 281A.020.

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 provides in relevant part:

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) "Pecuniary interest" Defined

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(9) provides:

A public officer or employee shall not attempt to benefit a significant personal or pecuniary interest of the public officer or employee or any person to whom the public officer or employee has a commitment in a private capacity through the influence of a subordinate.

4) Disclosure and Abstention

NRS 281A.420(1) and (3) provide, in relevant part:

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.

V. COMMISSION DECISION

A. PECUNIARY INTERESTS

The Legislature has determined that private pecuniary interests and certain private relationships form the foundation for conflicts of interest. The conflict in this matter is premised upon a conflict relating to a significant pecuniary interest pursuant to NRS 281A.139. The descriptive terms of "significant" and "personal" interest are defined by their plain meaning to be a personal interest that is important rather than incidental, trivial or de minimus. See Merriam-Webster's Collegiate Dictionary (11th ed. 2003), p. 1159, Black's Law Dictionary (10th ed. 2014), p. 1325, and supportive legislative history found at Exhibit C, Hearing on Senate Bill 228, Assembly Legislative Operations & Elections Comm., 77th Leg. (Nev. May 14, 2013); *In re Public Officer*, Comm'n Op. No. 19-124A (2020).

Clearly, if Public Officer is able to effect changes to Agency regulations that serve to provide a benefit associated with a significant pecuniary interest, and provided that Public Entity considers a related matter, compliance with the requirements of the Ethics Law is required. However, given that the associated facts and impacts to the pecuniary

interest will be formulated in the future and are not detailed at this time, this opinion provides general guidance about the applicable provisions of the Ethics Law so that Public Officer may maintain the appropriate separation and properly apply the provisions of the Ethics Law to the circumstances.

In doing so, the Commission takes this opportunity to clarify that the Ethics Law would not alter Public Officer's First Amendment rights to express a personal or individual opinion or position on Agency regulations under the circumstances presented. See *In re Public Officer*, Comm'n Op. No. 19-124A (2020). The Ethics Law applies to the performance of public duties and serves to prevent the improper use of a public position to secure or grant unwarranted privileges or advantages. When pecuniary interests and private commitments relate to public duties, public officers and employees must comply the disclosure and abstention requirements of NRS 281A.420 and the Code of Ethical Standards (NRS 281A.400), as more particularly detailed below.

B. DISCLOSURE REQUIREMENTS – NRS 281A.420(1)

The disclosure requirements of NRS 281A.420(1) apply every time Public Officer's pecuniary interests (or private commitments)³ relate to the performance of public duties. NRS 281A.420(1) requires a proper disclosure when the public officer or employee is carrying out public duties to approve, disapprove, vote, abstain or otherwise act upon a matter: (a) regarding a gift or loan, (b) in which there is a significant pecuniary interest, (c) which would reasonably be affected by a commitment in a private capacity to the interests of another person, or (d) which would be related to any representation or counseling of a private person for compensation before another agency within the preceding year.

Therefore, when Public Officer's pecuniary interests intersect with the performance of public duties, there must be a proper disclose, and then the abstention analysis is conducted to determine whether a reasonable person in Public Officer's situation would be materially affected by the associated interests and commitments in performing public duties including voting on the matter. Public officers who are appointed to serve on a governmental body that makes decisions are required to make a proper disclose to inform the public about the full effect that each disclosable conflict has on the matter to be considered, which disclosure must be made before the public officer participates on the matter given the requirements of NRS 281A.420(1).

The Commission issues a reminder that the Ethics Law does not recognize a continuing disclosure or a disclosure by reference. The purpose of disclosure is to provide sufficient information regarding the conflict of interest to inform the public of the nature and extent of the conflict and the potential effect of the action or abstention on the public officer's private interests and commitments. Silence based upon a prior disclosure fails to inform the public or supervisory head of the organization about the nature and extent of the conflict. See *In re Buck*, Comm'n Op. No. 11-63C (2011) (holding that incorporation

³ In addition to pecuniary interests such as those involved here, when any significant pecuniary interest of a public officer/employee or any of the identified relationships set forth in NRS 281A.065 intersect with and/or are reasonably affected by public duties, the nature of these interests and relationships requires a proper disclosure, which may be extended to the business endeavors and other clients of a business affiliate to whom there is a private commitment. See *In re Romero*, Comm'n Op. No. 19-059A (2019), at p. 6. The interests of the person to whom there is a private commitment, such as an employer, business affiliate or client, are statutorily attributed to the public officer based on the presumption that a person lacks independent judgment toward the interests of those persons to whom the public officer has such commitments. See *In re Public Officer*, Comm'n Op. No. 13-71A (2014).

by reference of a prior disclosure, even though based upon the advice of counsel, did not satisfy the disclosure requirements of NRS 281A.420(1)).

Moreover, a proper disclosure is important even where the conflict is remote in some respects, as is anticipated in this situation. In *In re Weber*, Comm'n Op. No. 09-47C (2009), the Commission held:

In keeping with the public trust, a public officer's disclosure is paramount to transparency and openness in government. The public policy favoring disclosure promotes accountability and scrutiny of the conduct of government officials. ...Such disclosures dispel any question concerning conflicts of interest and may very well ward off complaints against the public officer based on failure to disclose.

Accordingly, Public Officer must be diligent and review each item or matter before Public Entity that relates to Public Officer's private interests to determine whether there is a reasonable connection to the performance of public duties. The Commission advises about the requirement to make a proper disclosure under NRS 281A.420 on any private interests that have any potential to reasonably affect Public Officer's public duties, and then conduct the required abstention analysis to ascertain whether a reasonable person in this situation would be required to abstain under NRS 281A.420(3) and (4), as detailed below. If Public Officer has a question on whether disclosure is required under NRS 281A.420(1) for a particular matter, consultation with the Public Entity's official legal counsel or seeking an advisory opinion from the Commission under NRS 281A.675 based upon the particular circumstances, is recommended.

C. ABSTENTION REQUIREMENTS – NRS 281A.420(3) AND (4)

NRS 281A.420(3) and (4) detail the abstention requirements to be considered after a proper disclosure has been made by the public officer/employee. NRS 281A.420(3) mandates that a public officer shall not participate on a matter when the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the disclosed conflict. NRS 281A.420(4) creates a presumption against abstention and authorizes participation in limited circumstances. After a proper disclosure, the presumption permits the public officer to participate if the matter would not result in any form of benefit or detriment accruing to the public officer (or persons/entities to whom Public Officer has a private commitment) that is greater or less than that accruing to any other member of the general business profession, occupation or group that is affected by the matter.

For example, if the public officer is voting upon a general business license increase and a public officer's business would be subject to the increase and pay the same amount as other businesses similarly situated, public officer may make a proper disclosure and explain to the public why the legal presumption permits public officer's participation. As the Commission explained:

...[W]ithout a public disclosure, the Commission is hindered from application of the presumption, and the Public Officer is left without the benefit of the public policy presumption set forth in NRS 281A.420(3) and (4). A proper disclosure acts as a condition precedent to recognition of the public policy attributes of NRS 281A.420(3) and (4), which instruct that appropriate weight and proper deference be given to the public policy of this State, which favors the right of a public officer to perform the duties for which the public officer was appointed and to otherwise act upon a matter,

provided the public officer has properly disclosed the public officer's commitment in a private capacity to the interests of another person in the manner required, and the independence of judgment of a reasonable person would not be clearly and materially affected by the private interests.

In re Public Officer, Comm'n Op. No 15-74A (2018), at pgs. 9-10.

Initially, it is likely that the presumption would not permit Public Officer to participate on matters singularly affecting one's own pecuniary interests. However, since the Commission does not have the details of a future matter that could be considered by Public Entity to ascertain what would be the potential impacts to the pecuniary interests, the Commission is unable to provide specific direction. Accordingly, the guidance provided by the Commission is general in nature instead of specific as to a particular matter.

D. CODE OF ETHICAL STANDARDS – NRS 281A.400

Public Officer has a duty to protect the public trust and separate public responsibilities from private pecuniary interests. Therefore, a government position may not be used to seek or gain an economic opportunity which would tend to influence a reasonable person in similar circumstances to depart from the impartial discharge of public duties. The provisions of NRS 281A.400 serve to assist with maintaining a proper separation between private interests and public duties. For each referenced section of NRS 281A.400, Public Officer must be mindful of the following implications:

- NRS 281A.400(1) – Proper separation of private interests from public duties must be maintained including not representing that the personal interests of Public Officer carrying the weight and authority of the body in interactions with other agencies. To avoid this conflict, consultation with legal counsel for Public Entity, who should have familiarity about the associated issues, is recommended to assure the disclaimer is appropriate and does not transition into somehow seeking an economic opportunity that would cause a departure from the faithful discharge of public duties.
- NRS 281A.400(2) – The public position held places Public Officer in a position to create an unwarranted benefit impacting private interests if the public position and related authority is improperly utilized.
- NRS 281A.400(7) – Public duties must fully separate from private interests and it is not permissible to use government time, property, or equipment for purposes to benefit private pecuniary interests or commitments. Work on personal matters should be conducted on personal time, without improperly using public time, equipment, property, resources, or facilities.
- NRS 281A.400(9) – Conduct that influence a subordinate in an attempt to benefit a private interest or commitment is precluded under the Ethics Law.

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The Commission commends Public Officer for the recognition and leadership in proactively seeking this opinion on whether the private interest conflicts implicate the Ethics Law. Conflicts could stem from a private pecuniary interests and Public Officer must maintain a proper separation between the private interest and by not engaging in conduct that creates unwarranted or improper private benefits through the use of a public position. The Commission advises about the statutory requirements of NRS 281A.400 and associated opinion precedent issued by the Commission, so Public Officer may apply the requirements of the Ethics Law to the circumstances. The Commission further invites contacting the Commission's Executive Director to obtain Ethics Law training.

VI. CONCLUSIONS OF LAW

1. Public Officer is a public officer as defined by NRS 281A.160.
2. Pursuant to NRS 281A.675, the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to the public officer or employee under NRS 281A.665.
3. Public Officer has a pecuniary interest which has a potential to intersect with public duties. Accordingly, there is a duty to avoid using a public position to obtain any unwarranted preferences or advantages. To maintaining the proper separation between private interests and public duties, there must be compliance with the Code of Ethical Standards set forth in NRS 281A.400, which provisions are referenced in this opinion.
4. Pursuant to NRS 281A.420(1), prior to acting on a matter on behalf of the Public Entity that is affected by a pecuniary interest or private commitment, Public Officer should properly disclose the full impact of the associated private interests that have potential to effect public duties and comply with the abstention requirements of NRS 281A.420(3) and (4), as instructed in this opinion.
5. Pursuant to NRS 281A.020, the Commission further advises Public Officer to take affirmative steps to avoid potential conflicts, which steps favor promptly seeking legal advice from the Public Entity's legal counsel and could serve to provide safe harbor provisions of NRS 281A.790(5); and/or to utilize the Commission's advisory opinion process.

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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.

Dated this 16th day of August, 2021.

THE NEVADA COMMISSION ETHICS

By: /s/ Kim Wallin
Kim Wallin, CPA, CMA, CFM
Chair

By: /s/ James Oscarson
James Oscarson
Commissioner

By: /s/ Brian Duffrin
Brian Duffrin
Vice-Chair

By: /s/ Damian R. Sheets
Damian R. Sheets, Esq.
Commissioner

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

By: /s/ Thoran Towler
Thoran Towler
Commissioner

By: /s/ Teresa Lowry
Teresa Lowry, Esq.
Commissioner

By: /s/ Amanda Yen
Amanda Yen, Esq.
Commissioner