



BEFORE THE NEVADA COMMISSION ON ETHICS

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

Advisory Opinion No. 21-051A

_____ 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 anticipated future conduct as it relates to the Ethics in Government Law (“Ethics Law”) set forth in Chapter 281A of the Nevada Revised Statutes (“NRS”). 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 and a list of proposed facts that were affirmed as true by Public Officer.

Public Officer, a member of a Board for Public Entity, sought an opinion from the Ethics Commission regarding the compliance requirements of the Ethics Law, including Public Officer’s disclosure and abstention obligations under NRS 281A.420, when a certain agreement comes before the Board that involves a Private Business in which Public Officer’s relative (within the 3rd degree of consanguinity or affinity) serves on the Board of Directors.

After fully considering the request for advisory opinion and analyzing the facts, circumstances and documentation presented by Public Officer, the Commission now renders this abstract opinion confirming its 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 those facts Public Officer 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.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.

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

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).

II. QUESTION PRESENTED

Public Officer seeks guidance on the requirements of the Ethics Law when an agreement that will be presented for Board approval affects a Private Business on which Public Officer's relative serves on the Board of Directors. In particular, Public Officer requests direction on whether those public duties would preclude Public Officer from participating on the agreement because the value of the involved compensation to be paid under the agreement is low.

III. FINDINGS OF FACT

1. Public Officer is a member of the Board of Public Entity.
2. Public Officer's relative, who is related within the 3rd degree of consanguinity or affinity, serves as a member of a Board of Directors for a Private Business. In this capacity, the relative receives certain benefits, but otherwise serves without compensation.
3. Public Entity and Private Business desire to enter into an agreement, which paid compensation is of a low value; however, the other terms of the agreement benefit the interests of Private Business.

IV. STATEMENT OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

Public Officer seeks guidance on the requirements of the Ethics Law when an agreement will be considered by Public Entity that involves Private Business since the relative serves without compensation on Private Business's Board of Directors. The Ethics Law promotes the appropriate separation between public duties and private interests. Public Officer's responsibilities must be separated from the relative's private interests and commitments in order to preserve the public trust. In protecting the public trust in conflict situations, the Ethics Law requires compliance with the disclosure and abstention requirements of NRS 281A.420 and the Code of Ethical Standards set forth in NRS 281A.400.

The public trust must be protected when a person has a commitment in a private capacity to the interests of others under NRS 281A.065, which statute details a number of relationships deemed to be private commitments, including without limitation a relative related within the 3rd degree of consanguinity or affinity. For purposes of the application of the Ethics Law, the interests of persons to whom there are private commitments are imputed to be the interests of the public officer or employee for application of the Ethics Law because these types of relationships constitute relationships that would reasonably and materially affect public decisions. See *In re Romero*, Comm'n Op. No. 19-059A (2019); *In re Public Officer*, Comm'n Op. No. 19-049A (2019).

Private commitments can lead to conflict situations in performing public duties. Consequently, these conflict situations must be recognized and properly navigated to assure compliance with the Ethics Law, including the policy of the State of Nevada to avoid conflicts and appearances of impropriety, as set forth in 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) "Commitment in a private capacity" Defined

NRS 281A.065 provides, in relevant part:

"Commitment in a private capacity," with respect to the interests of another person, means a commitment, interest or relationship of a public officer or employee to a person:

- ...
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; . . .

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(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. COMMITMENTS IN A PRIVATE CAPACITY

The Legislature has determined that private pecuniary interests and certain private relationships listed in NRS 281A.065 form the foundation for conflicts of interest. Public Officer's relative is a relationship listed in NRS 281A.065 and serves as an unpaid Member of the Board of Directors for Private Business. Public Entity anticipates considering an agreement with the Private Business, which compensation is set at a low rate but provides other benefits to Private Business. Public Officer's relative has a fiduciary duty to Private Business, including duties associated with related financial matters, while serving on the Board of Directors.

As a result of Public Officer's private commitment to the relative under NRS 281A.065(1), the interests of the relative are statutorily attributed to Public Officer, which interests/commitments can form a conflict of interest when they intersect with public duties. In *In re Brown*, Comm'n Op. No. 13-28A (2013), the Commission explained: "[t]he 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 p. 9. This means that the interests of the person to whom there is a private commitment, such as an employer, business affiliate or client, or similar relationships 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).

In determining the extent of the interests of the relative to Private Business and Private Business's interests in obtaining approval of the agreement, the Commission discerns that these interests and commitments are not insignificant. The measure of a person's interests is not always in terms of money or salary. Here, the relative receives no salary, but does receive other benefits for serving on the Board of Directors, and the Board of Directors is interested in securing the agreement. Of importance is the relationship and commitment the relative has to Private Business as a member of its Board of Directors.

The Commission in many opinions has recognized that service as an officer to a business organization (or corporation) is a fiduciary role establishing a commitment to the interests of the entity. In *In re Bagwell*, Comm'n Op. No. 17-47A (2017), (citing *In re Mills*, Comm'n Op. No. 14-78A (2015)), the Commission reaffirmed that the service as a member of its board constitutes a continuing business relationship and even "people who volunteer their time as a board member to a nonprofit organization are interested in and committed to the goals of the organization, serve as a fiduciary to the organization, and have a commitment in a private capacity to the interest of the organization and its members." *Id.* at p. 7.

In this case, the interests, and commitments of the relative to the Private Business are imputed to Public Officer, as a matter of law. The Commission does not discern any difference between the interests of a public officer or public employee serving on the board of either a nonprofit or profit corporation, and the legal commitments to an employer or to persons with whom there is a continuing business relationship, based upon application of the substantially similar provisions of NRS 281A.065(6).³ The interests are

³ NRS 281A.065(6) confirms that persons with whom a public officer or employee has any other commitment, interest or relationship that is substantially similar to the commitment, interest or relationship described in sections 1 to 5, of NRS 281A.065 constitute private commitments. NRS 281A.065(5)

alike if not identical, and the interests of the relative are required to be imputed to the public officer or public employee to comply with the Ethics Law.

When pecuniary interests and private commitments relate to public duties, public officers and employees must comply with 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 are reasonably affected. 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 public officer's/employee's 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.

When any significant pecuniary interest of a public officer/employee or any of the identified relationships set forth in NRS 281A.065 intersect with 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 (including profit and nonprofit organizations) to whom there is a private commitment. See *In re Romero*, Comm'n Op. No. 19-059A (2019), at p. 6; *In re Public Officer*, Comm'n Op. No. 15-74A (2018).

Under the presented circumstances, the Commission confirms that Public Officer has a private commitment to the relative under NRS 281A.065, and the relative's interests include the continuing business relationship with the Private Business. This means Public Officer must properly disclose and then conduct the abstention analysis to determine whether a reasonable person in this situation would be clearly and materially affected by the associated interests and commitments in performing public duties.⁴ Public officers who are members of a body that makes decisions shall make the required disclosure to the public each and every time a matter is considered which has an associated disclosable conflict.

Public Officer is reminded 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 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)).

establishes private commitments to any person the public officer or employee has a substantial and continuing business relationship, which includes employers.

⁴ The jurisdiction of the Ethics Commission does not extend to directing private businesses on their policies and operations. The Ethics Law governs public officers and employees in properly fulfilling their public duties when a conflict situation is present including maintaining proper separation between the public duties and private interests and commitments, and this opinion is so limited.

At a minimum, a disclosure should identify Public Officer's private commitment to the relative, and the involved interests and relationship with Private Business, including Private Business's interests in securing the agreement. Although, the Commission does not perceive the relative's interests to be remote under the circumstances, it reminds Public Officer that a proper disclosure is important even where the conflict is remote in some respects. 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.

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 clearly and 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 there is 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 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 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 noted that the presumption would not permit Public Officer to participate on the agreement with Private Business based upon the involved interests and commitments. No facts are presented establishing that the interests of a particular group or collective of similarly situated persons are affected by the approval of the subject

agreement. Further, consideration is provided to the relative's fiduciary duties to Private Business.

Accordingly, the Commission focuses its review on whether the independence of judgment of a reasonable person in Public Officer's situation would be clearly and materially affected by the private interests or commitments to require abstention. The Commission has confirmed that the Ethics Law requires abstention on matters materially affecting a relative or the interests of a private business and any business affiliates or clients, which would include the interests of a relative or the associated fiduciary duties to a private business. See *In re Public Officer*, Comm'n Op. No. 16-14A (2016) (*per se* commitment in a private capacity to interests of a person to whom there is a private commitment established by NRS 281A.065); *In re Derbidge*, Comm'n Op. No. 13-05C (2013) and *In re Rapson*, Comm'n Op. Nos. 16-11C and 16-20C (commitment in a private capacity to business affiliates/clients is established in NRS 281A.065(4), (5), or (6)). Relationships with both profit and nonprofit organizations are comparable to business associations, and its members are comparable to affiliates and clients. See *In re Public Officer*, Comm'n Op. No. 15-74A (2018).

With regard to Public Officer performing the public duties relating to the agreement, the Commission advises that abstention would be required given the nature of the involved interests and private commitments, and that a reasonable person in Public Officer's situation would be materially affected by such matters. Public Officer's disclosure and abstention should be reflected in the minutes of each public meeting at which the involved item is considered. Further, it is advised that abstention means that Public Officer shall not in any way participate on the item, including having private discussions with Public Entity's staff, which duties are detailed below in the discussion of the Code of Ethical Standards.

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

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

- NRS 281A.400(1) – Public Officer's public duties will intersect with private commitments when the agreement is considered. To avoid this conflict, Public Officer must not seek or accept economic opportunities that affect the involved commitments and interests, including promoting, participating, or voting to approve the agreement.
- NRS 281A.400(2) – As a Member of Public Entity's Board, Public Officer is placed in a position to create an unwarranted benefit to private interests and commitments if a public position is utilized to benefit or promote approval of the agreement including addressing any concerns or issues of other members or staff about the associated agenda item. Therefore, Public Officer must be vigilant and refrain from promoting or in any way participating in the Board's consideration of the agreement with Private Business.

- NRS 281A.400(9) – Public Officer is advised that influencing a subordinate in an attempt to benefit a private interest or commitment is precluded under the Ethics Law.

The Commission commends Public Officer for recognizing and proactively seeking this opinion on whether the involved conflicts implicate the Ethics Law. Conflicts stem from the statutory private commitments and preclude Public Officer from utilizing the public position to benefit the interests of the relative or Private Business. Therefore, Public Officer must continue to be proactive and diligent to maintain a proper separation between the public duties and private interests by not engaging in conduct that creates unwarranted or improper private benefits for Public Officer, the relative or Private Business 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 these personal circumstances.

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 commitment in a private capacity to the interests of the relative including the relative's service and duties for Private Business under NRS 281A.065. Accordingly, Public Officer must comply with the Code of Ethical Standards set forth in NRS 281A.400, which are referenced in this opinion.
4. Pursuant to NRS 281A.420(1), prior to acting on a matter affecting the interests of the relative including the Private Business agreement, Public Officer should properly disclose to the public the full impact on the interests of persons to whom there is a private commitment, which are affected by the 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 obtaining legal advice from the Public Entity's official legal counsel in compliance with NRS 281A.790(5) to assist with preparing Public Officer's disclosure and abstention remarks that inform the public about the identified conflict, which could serve to provide Public Officer certain safe harbor protections under NRS 281A.790(5).

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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 September, 2021.

THE NEVADA COMMISSION ON 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.
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By: /s/ Thoran Towler
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