

Opinion No. 92-07

BEFORE THE NEVADA COMMISSION ON ETHICS

In The Matter of the Opinion Requests of
DOYLE-McKENNA-BAYER-BROWN, ART-TO-GO and COMMON CAUSE
concerning the INTERIM FINANCE COMMITTEE of the Nevada State Legislature

MEMORANDUM OF DECISION OF PROBABLE CAUSE HEARING

The Nevada Commission on Ethics (hereinafter "Commission") received third party requests for an opinion from DOYLE-McKENNA-BAYER-BROWN, ART-TO-GO and COMMON CAUSE, which suggested that the action of voting by certain members of the Interim Finance Committee of the Nevada State Legislature (hereinafter the "IFC.") in approving the funding of a proposed contract between JOYCE ADVERTISING, INC. and the State of Nevada violated Nevada statutory ethical standards. The Commission, on June 10, 1992, conducted a hearing to receive evidence and to determine if just and sufficient cause existed to render an opinion as requested by the third parties. The Commission also met in deliberations on June 10, 1992. The hearing was conducted pursuant to the provisions of NRS 281.511(2).

The hearing was attended by all third party requestors of this opinion. Also present were JIM JOYCE and JOYCE ADVERTISING, INC., both represented by legal counsel, I. R. Ashleman, II, Esq. The I.F.C. and its members were represented by the Legislative Counsel, Lorne J. Malkiewich, Esq. None of the members were personally present. Staff members of the Department of Industrial Relations (hereinafter "DIR") also attended the hearing.

FINDINGS OF FACT

After hearing the evidence, the Commission made the following findings of fact preliminary to making a decision based thereon, of whether just and sufficient cause existed to render an opinion, and whether it desired to take jurisdiction of the matter:

1. The Nevada Legislature mandated in its 1991 session that the DIR invite competitive proposals and bids for the development of a public/business preventative safety program. The Legislature also appropriated the sum of \$500,000.00 to fund the selected program, subject only to the review and approval of the program funding level by the IFC.
2. The DIR was solely responsible for selecting the contracting advertising agency to carry out the safety program, and it did this by inviting proposals and cost bids from which to select pursuant to competitive evaluation.
3. The IFC was responsible, pursuant to legislative mandate, for funding the program "prior to the awarding of any grants or contracts."
4. The IFC had authority to fund the program at any level up to \$500,000.00.
5. The DIR established a selection committee composed of public officers and/or employees which invited proposals and bids from qualified advertising agencies throughout the state. Thereafter, the selection committee, on January 29, 1992, chose the proposal submitted by JOYCE ADVERTISING, INC. and recommended the approval of a \$500,000.00 budget to fund the selected program for the subsequent submittal to the IFC.
6. Thereafter, the IFC approved \$500,000.00 to fund the program selected by the DIR. The IFC was not involved in

the selection of JOYCE ADVERTISING, INC., although it was known that JOYCE ADVERTISING, INC. had been selected.

7. The IFC is composed of members of the Senate Finance Committee and the Assembly Ways and Means Committee of the 1991 Session of the Nevada State Legislature. The members are legislators; therefore, they are public officers subject to the Nevada statutory ethical standards.

8. JAMES JOYCE, a principal of JOYCE ADVERTISING, INC., is not a public employee. He was registered as a lobbyist at the 1991 Session of the Nevada State Legislature and earlier sessions.

9. Clients of Mr. JOYCE or JOYCE ADVERTISING, INC. and/or members of the Nevada Resort Association, which is a client, have contributed to the political campaigns of some of the legislators who are members of the IFC when it made its decision to fund the contract in question.

10. Information was requested at the hearing which was subsequently submitted by the Legislative Counsel on behalf of the members of the IFC which disclosed that during the campaign period in 1990, but prior to the 1991 legislative session, Mr. JOYCE or JOYCE ADVERTISING, INC. had contracted with or performed services for compensation in the form of either advertising or consulting services for some members of the IFC. However, there was no evidence that any member of the IFC had such a relationship or agreement with JOYCE or JOYCE ADVERTISING, INC. after the 1991 legislative session or during that period of time when the IFC acted to fund the selected safety program.

11. No member of the DIR selection committee had a private association with JOYCE or JOYCE ADVERTISING, INC. or any private interest in the award of the safety program contract.

CONCLUSIONS OF LAW AND DECISION

The Commission is justified in rendering an opinion concerning the conduct of public officers or employees based upon a third party request only after it makes a preliminary determination that "it desires to take jurisdiction over the matter" and that "just and sufficient cause exists to render an opinion " as to whether a public officer or employee had violated the code of ethical standards pursuant to NRS 281.511 (2)(b) and (c). The Commission has no jurisdiction over private parties, the activities of or the relationships between legislators and lobbyists, or matters involving campaign practices. JIM JOYCE and JOYCE ADVERTISING, INC. are private parties and not public officers or employees.

In this case there was no evidence presented that any member of the DIR selection committee acted in any other way than in an official capacity and for the State of Nevada or had any personal pecuniary interest in the matter or any commitment in a private capacity to the interest of another in the matter of the selection process in which JOYCE ADVERTISING, INC. was selected to be a contractor with the State of Nevada.

There also has been no suggestion that any IFC member had any financial interest in the matter or had received a gift or loan from any person interested in the matter. NRS 281.501 (2)(a) and (b), which would require disclosure or a determination of whether to abstain from voting. Therefore, the Commission concluded there was not just and sufficient cause to assume jurisdiction or render an opinion with respect to any of the DIR selection committee members.

The members of the IFC are legislators; therefore, they are public officers who are subject to the code of ethical standards which the Commission is charged with interpreting and applying. The evidence that was presented, however one may choose to view it, did not tend to support the conclusion that just and sufficient cause exists to render an opinion on whether any member of the IFC had violated the specific ethical standards established in NRS

281.481.

The only question before the Commission in determining whether it was appropriate to take jurisdiction in this matter was whether certain individual members" of the IFC had the duty to disclose a private relationship with JIM JOYCE or JOYCE ADVERTISING, INC. and determine whether to abstain from voting because of the provisions of NRS 281.501 (2).

The issue appears to limited to whether a legislator's private relationship to Mr. JOYCE or JOYCE ADVERTISING, INC., whether as campaign consultant, fund raiser, or other, created a "commitment in a private capacity to the interest of others" which may materially affect "the independence of judgment of a reasonable person in this situation, " which would require disclosure and abstention from voting if, in fact, such independence of judgment of the matter (funding the DIR program and JOYCE proposal) would be materially affected. (NRS 281.501(2)(c)).

Mr. JOYCE or JOYCE ADVERTISING, INC. had performed services for certain members of the IFC during previous campaigns which gave rise to the question of whether a member of the IFC who had previously used the services of JOYCE or JOYCE ADVERTISING, INC. or received campaign contributions from JOYCE or JOYCE ADVERTISING, INC. or its clients had a commitment in his or her private capacity to JOYCE or JOYCE ADVERTISING, INC. when the IFC acted. The prior association between the particular members of the IFC and JOYCE or JOYCE ADVERTISING, INC., if anything, goes to the issue of campaign practices, but does not amount to a "commitment" within the meaning of the statutes. Therefore, the Commission determined that it was not justified in assuming jurisdiction over the matter nor did it have just and sufficient cause to render an opinion.

DATED: November 17, 1992.

NEVADA COMMISSION ON ETHICS

By: /s/ WILLIAM R. MORSE, Vice Chairman

DISSENT

In the interest of clarity, some of the third party requestors of an opinion comment-ed on the propriety of whether a campaign manager, consultant, advisor, or fund raiser could also be a legislative lobbyist or qualify for contracts funded by the legislature.

Those subjects are not at issue here. They are not within the Commission's jurisdiction, nor was there a suggestion that those subjects involve a violation of any statute, rule or policy of government generally or the legislature in particular.

The majority opinion correctly observes that the activity of a private party (James Joyce or Joyce Advertising, Inc. herein " Joyce") is not at issue, nor is the nature of the relationship between the legislator and the lobbyist, or whether the latter functioned as a campaign manager, consultant, advisor, or fund raiser. Whether or not a subject of legislative policy, it is not within the jurisdiction of this Commission.

The sole issue under the Nevada Code of Ethical Standards involves only the public officer, the legislator, and is correctly stated above:

The issue appears to be limited to whether a legislator's private relationship to Mr. JOYCE or JOYCE ADVERTISING, INC., whether as campaign consultant, fund

raiser, or other, created a "commitment in a private capacity to the interest of others" which may materially affect "the independence of judgment of a reasonable person in his situation, " which would require disclosure and/or abstention from voting if, in fact, such independence of judgment of the matter (funding the DIR program and JOYCE proposal) would be materially affected. (NRS 281.501(2)(c)).

The issue here is only a preliminary and procedural one, which is raised by the fact that third parties, not the public officer (legislator), made the request for an opinion. Under these circumstances, if the requestor "submits all related evidence deemed necessary by the commission" as requested, NRS 281.511 (2)(b) and (c) requires that before hearing evidence and rendering an opinion on the merits, the Commission must first "make a preliminary determination of whether it desires to take jurisdiction over the matter , " and "determine that just and sufficient cause exists to render an opinion" at a proceeding, of which the public officer is given no less than two weeks notice to appear and be represented by counsel and to respond and present evidence on his or her own behalf. NRS 281.511 (2)(c) and (5).

The issue is whether the Commission desires to take jurisdiction and whether there is just and sufficient cause to render an opinion.

The evidence presented by legislative counsel on behalf of the members of the IFC was that in 1990, during the campaign period preceding the 1991 legislative session, JOYCE provided services in the political campaigns to some legislators who were members of the IFC in 1991-92. It also appears that regular commercial rates were charged and paid for any services provided. The specific question is whether those circumstances amount to just and sufficient cause to render an opinion on the merits of whether they constituted a "commitment in ones private capacity to the interests of others" (JOYCE), in order for the Commission to take jurisdiction over the matter. NRS 281.511 (2)(b) and (c).

The question raises a number of issues:

- What is a commitment in one's private capacity to the interest of others ? Is it an agreement, or is it an existing relationship which is more than friendship and is likely to create a sense of obligation, as opposed to only a bias or friendship ?
- What in fact was the relationship between a political consultant, advisor, or fund raiser and the political candidate who then serves as a legislator and IFC member?
- Did that relationship in fact create a degree of obligation or loyalty which amounts to a commitment to the interest of another, namely JOYCE, requiring disclosure?
- Did the commitment, if it in fact existed, follow the candidate as a legislator into the legislative session or the IFC?
- Would that commitment be such as to materially affect the independence of judgment of the reasonable person in these circumstances, thereby requiring abstention from voting on the IFC to fund the program at a given level?

The answers to such questions would resolve the issue on its merits. I recognize that one may conclude, as does the majority, that because JOYCE was selected by the DIR, not the IFC, and that the IFC approved only the level of funding, not the selection of JOYCE, that the prior involvement of JOYCE in the political campaigns is too remote from the IFC's decision to amount to "just and sufficient cause".

Because the circumstances do raise the foregoing questions concerning the effect of such a relationship, however, I would suggest that the circumstances amount to "just and sufficient cause" to hear the merits.

This is not to suggest that a determination of the merits, as distinct from this proceeding, would be any different. The argument that the circumstances are too attenuated from the later decision to fund the program, as distinct from hiring JOYCE, to constitute a private commitment to the interests of JOYCE, is likely to be conclusive on a hearing of the merits, absent other evidence.

In my view, however, as a matter of procedure the circumstances are sufficient cause to get to the merits and resolve them.

DATED: November 18, 1992.

By: /s/ THOMAS R.C. WILSON, II, Chairman