



**STATE OF NEVADA
COMMISSION ON ETHICS**

BEFORE THE NEVADA COMMISSION ON ETHICS

**IN THE MATTER OF THE REQUEST
FOR AN ADVISORY OPINION OF
BRET O. WHIPPLE, Chair, System of Higher Education
Board of Regents**

Advisory Opinion No. 06-09

This matter came before the Nevada Commission on Ethics (hereinafter the "Commission") for a hearing on April 12, 2006, on the request for an advisory opinion filed with the Commission pursuant to NRS 281.511(1) by Bret O. Whipple, Chair of the Nevada System of Higher Education Board of Regents (hereinafter "Board of Regents").

The matter was properly noticed as a confidential matter and the hearing was closed pursuant to NRS 281.511(5). Mr. Whipple appeared in person, was sworn, and presented testimony. After the hearing, Mr. Whipple waived confidentiality with regard to this matter.

Mr. Whipple sought an opinion from the Commission determining whether his contractual relationship with Lincoln County/City of Caliente Joint Nuclear Oversight Program, Joint City County Impact Alleviation Committee (hereinafter "Lincoln County/City of Caliente") poses a conflict in his role as Chair of the Board of Regents.

After full consideration of the request for an advisory opinion and considering all of the facts and circumstances presented, the Commission deliberated and orally advised Mr. Whipple of its decision in the matter. The Commission incorporates its oral decision into the following findings and issues this opinion.

FINDINGS OF FACT

1. Mr. Whipple is the Chair of the Board of Regents. The Board of Regents is responsible for the oversight of all departments within Nevada's System of Higher Education.
2. Mr. Whipple is a Nevada licensed attorney in private practice and is also a Certified Public Accountant.
3. Mr. Whipple entered into a contract to provide his professional services to Lincoln County/City of Caliente.
4. The scope of services under Mr. Whipple's contract with Lincoln County/City of Caliente includes: providing research; legal counseling; document preparation and review; program expenditure/budget tracking; and program management.
5. Lincoln County/City of Caliente is considered an "affected unit of local government" under the Yucca Mountain Repository Project. As such, it receives a percentage of the funds dispersed annually through congressional appropriation to fund oversight work at Yucca Mountain. These funds provide the source of payment for Mr. Whipple's contracted services.
6. Lincoln County/City of Caliente, as part of its oversight work, commissions researchers, technical institutions, and consulting firms to undertake independent studies of the impact of a repository at Yucca Mountain.

7. The Board of Regents oversees several departments (including the Desert Research Institute; University of Nevada Las Vegas' Harry Reid Center; Nevada Seismological Laboratory; and Great Basin College) that provide testing and research funded by the Department of Energy at Yucca Mountain.

CONCLUSIONS OF LAW

1. At the time of his hearing, Mr. Whipple was a public officer as defined in NRS 281.4365.
2. The Commission has jurisdiction over this matter pursuant to NRS 281.511(1) and NRS 281.521.

WHEREFORE, on motion duly made, seconded, and approved unanimously, the Commission renders the following Opinion:

OPINION

The issue in this opinion is whether Mr. Whipple's contractual relationship with Lincoln County/City of Caliente poses a conflict of interest with his role as Chair of the Board of Regents.

The Nevada Legislature declared the public policy of this state to be that a "public office is a public trust and shall be held for the sole benefit of the people" and that a "public officer or

employee must conduct himself to avoid conflicts between his private interests and those of the general public whom he serves.”¹

Public officers must be mindful of these legislative declarations when performing their public duties. Additionally, public officers must adequately disclose private interests, and where appropriate, abstain from acting on a matter pursuant to NRS 281.501 (“the disclosure and abstention provisions”).

NRS 281.501, Subsection 2, provides:

...in addition to the requirements of the code of ethical standards, 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 his situation would be materially affected by:

(a) His acceptance of a gift or loan;

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.²

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

NRS 281.501, Subsection 4, provides:

A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

¹ See, NRS 281.421.

² NRS 281.501(8) defines “commitment in a private capacity to the interest of others” as a commitment to a person: (a) who is a member of his household; (b) who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity; (c) who employs him or a member of his household; (d) with whom he has a substantial and continuing business relationship; or (e) any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

- (a) Regarding which he has accepted a gift or loan;
 - (b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or
 - (c) In which he has a pecuniary interest,
- without disclosing sufficient information concerning the gift, loan, commitment or interest to inform the public of the potential effect of the action or abstention upon the person who provided the gift or loan, upon the person to whom he has a commitment, or upon his interest. Except as otherwise provided in subsection 6, such a disclosure must be made at the time the matter is considered. If the officer or employee is a member of a body which makes decisions, he shall make the disclosure in public to the Chairman and other members of the body. If the officer or employee is not a member of such a body and holds an appointive office, he shall make the disclosure to the supervisory head of his organization or, if he holds an elective office, to the general public in the area from which he is elected. This subsection does not require a public officer to disclose any campaign contributions that the public officer reported pursuant to NRS 294A.120 or 294A.125 in a timely manner.

Mr. Whipple is subject to the disclosure and abstention laws, and must consider their application to activities undertaken in his private capacity. The Commission advises Mr. Whipple to consult with legal counsel³ and be guided by the disclosure and abstention standards of NRS 281.501 as interpreted by the Nevada Commission on Ethics in Opinion 99-56 (the “Woodbury Opinion”) when making disclosure and abstention decisions.

In *Woodbury*, the Commission set out the steps that a public officer must take whenever a matter that may affect his independence of judgment comes before the public body in which he sits: first, disclosure is required whenever a public officer’s actions would “*reasonably* be affected by his private commitment”; and second, before abstention is also required, a reasonable

³ NRS 281.551(5) provides: “An action taken by a public officer or employee or former public officer or employee relating to NRS 281.481, 281.491, 281.501 or 281.505 is not a willful violation of a provision of those sections if the public officer or employee establishes by sufficient evidence that he satisfied all of the following requirements: (a) He relied in good faith upon the advice of the legal counsel retained by the public body which the public officer represents or by the employer of the public employee or upon the manual published by the Commission pursuant to NRS 281.471; (b) He was unable, through no fault of his own, to obtain an opinion from the Commission before the action was taken; and (c) He took action that was not contrary to a prior published opinion issued by the Commission.

person's independence of judgment "must be *materially* affected" by that private commitment. The Commission, in *Woodbury*, further addressed the dangers of using abstention as a safe harbor:

"Abstention deprives the public and that official's constituents of a voice in governmental affairs. And, public officers and employees should have the opportunity to perform the duties for which they were elected or appointed, except where private commitments would materially affect one's independence of judgment."⁴

The facts presented in this matter established that Mr. Whipple is the Chair of the Board of Regents, and that body oversees several higher education departments involved with the Yucca Mountain Repository Project. These departments receive funding for their involvement with Yucca Mountain from the federal Department of Energy. Similarly, Lincoln County/City of Caliente receives monies from the federal government to fund oversight work for the Yucca Mountain Repository Project.

In the course of Mr. Whipple's dual duties, in his public capacity as a member of the Board of Regents, and in his private capacity as counsel and accountant to Lincoln County/City of Caliente, the need to disclose his private commitment may arise. In that instance, he would also need to determine whether his abstention on the matter is warranted. If his abstention is deemed warranted, he must also refrain from advocating the passage or failure of the matter.

Therefore, the Commission finds that Mr. Whipple's contractual relationship with Lincoln County/City of Caliente alone does not pose a conflict of interest with his role as Chair of the Board of Regents. However, the Commission cautions that whenever any business related to the Yucca Mountain Repository Project comes before the Board of Regents, Mr. Whipple must consider the provisions of the Nevada Ethics in Government Law, including the guidance

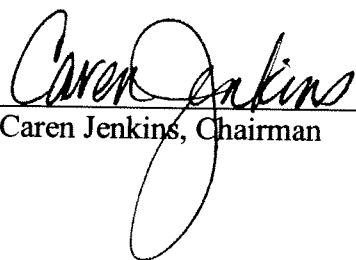
⁴ *In re Woodbury*, CEO 99-56 (12-22-99).

found in the *Woodbury* opinion, and assess the need to disclose his conflict and potentially to abstain from the process.

NOTE: THE FOREGOING OPINION APPLIES ONLY TO THE SPECIFIC FACTS AND CIRCUMSTANCES DEFINED HEREIN. FACTS AND CIRCUMSTANCES THAT DIFFER FROM THOSE IN THIS OPINION MAY RESULT IN AN OPINION CONTRARY TO THIS OPINION. NO INFERENCES REGARDING THE PROVISIONS OF NEVADA REVISED STATUTES QUOTED AND DISCUSSED IN THIS OPINION MAY BE DRAWN TO APPLY GENERALLY TO ANY OTHER FACTS AND CIRCUMSTANCES.

DATED: September 28, 2006.

NEVADA COMMISSION ON ETHICS

By: 
Caren Jenkins, Chairman