



**STATE OF NEVADA**

**BEFORE THE NEVADA COMMISSION ON ETHICS**

**In the Matter of the Request for  
Advisory Opinion Concerning the  
Conduct of PUBLIC OFFICER,  
Member, Nevada State commission,  
State of Nevada.**

**Advisory Opinion No. 08-08A**

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**OPINION**

Pursuant NRS 281A.440.1, this request for a confidential advisory opinion by a member of a State of Nevada commission (Public Officer) came before a quorum<sup>1</sup> of the Nevada Commission on Ethics (Commission) for a hearing on September 11, 2008. Public Officer appeared in person and provided sworn testimony.

Public Officer sought a confidential opinion from the Commission on the propriety of his future conduct as it relates to the Ethics in Government Law (Ethics Law). Public Officer seeks guidance on whether he can represent his commission's licensees or those adverse to such licensees and whether other members in his law firm can represent such licensees or those adverse to such licensees.

After fully considering the request for advisory opinion and analyzing all of the facts and circumstances and testimony presented, the Commission deliberated and orally advised Public Officer of its decision in the matter. The Commission now renders this written Opinion.

**FINDINGS OF FACT**

1. In his private capacity, Public Officer is a lawyer licensed in Nevada. Public Officer is employed by a law firm.
2. In his public capacity, Public Officer is a member of a state commission.
3. The state commission issues licenses.
4. Any state commission licensee may come before the state commission at multiple times during the licensee's career.

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<sup>1</sup> The following Commissioners participated in this opinion: Vice Chairman Cashman and Commissioners Beyer, Keele, Lamboley, Moran and Shaw. Commissioner Hutchison abstained, pursuant to NRS.281A.420.

## **CONCLUSIONS OF LAW**

1. At all times relevant to the hearing of this matter, Public Officer was a public officer, as defined by NRS 281A.160.
2. The Commission has jurisdiction to render an advisory opinion in this matter, pursuant to NRS 281A.440.1 and NRS 281A.460.
3. If an individual or entity licensed by the state commission is seeking legal representation, Public Officer may not represent that licensee in matters either related to their license from the state commission or unrelated to such license.
4. Public Officer may not represent individuals or entities adverse to state commission licensees.
5. Other members in Public Officer's law firm may represent state commission licensees, or take matters adverse to such licensees, so long as when they come before the state commission, Public Officer discloses his relationship to the law firm and abstains from participating on the matter, pursuant to NRS 281A.420 and as this statute has been interpreted by the Commission in its *Woodbury*<sup>2</sup> opinion.

## **DISCUSSION**

All the facts in this matter were provided by Public Officer. Facts and circumstances that differ from those used by the Commission in this advisory opinion may result in an opinion different from this opinion.

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<sup>2</sup> *In re Woodbury*, Comm'n on Ethics Opinion No. 99-56 (1999).

The issues before the Commission are as follows:

1. If an individual or entity licensed by the state commission is seeking legal representation, may Public Officer represent that licensee in matters either related to their license from the state commission or unrelated to such license?
2. May Public Officer represent individuals or entities adverse to state commission licensees?
3. If Public Officer may not represent state commission licensees, or take matters adverse to such licensees, may other members in Public Officer's law firm do so?

As to question 1, Public Officer may not represent individuals or entities licensed by the state commission in matters either related to their license or unrelated to such license. Doing so would be contrary to the public policy of Nevada that a public office is a public trust and shall be held for the sole benefit of the people. NRS 281A.020. Additionally, it would go against the intent of the Ethics Law that a public officer must commit himself to avoid conflicts between his private interests and those of the general public whom he serves. Further, such representation would implicate prohibitions in the Ethics Law, including subsections 1, 2, 5 and 10 of NRS 281A.400 and NRS 281A.410.

Public Officer may not represent licensees in matters related to their license. Pursuant to NRS 281A.410.1, Public Officer is specifically prohibited from representing private persons for compensation on any issue pending before the state commission.

Additionally, Public Officer may not represent licensees in matters unrelated to

their license. At first blush, Public Officer's representation of a state commission licensee on matters unrelated to their license appears harmless. However, upon closer scrutiny, such conduct would place Public Officer at risk of a myriad of accusations and complaints. For example, if a licensee, in an unrelated matter, retained Public Officer, a member of the state commission, it may appear that, by retaining him, the licensee intended to curry favor for the next time that the licensee comes before the state commission for action on a matter.

Therefore, as long as Public Officer is a member of the state commission, he may not represent state commission licensees, regardless of the nature of the representation.

As to question 2, Public Officer may not represent individuals or entities adverse to state commission licensees. Public Officer testified that licensees may appear before the state commission multiple times during their careers. If Public Officer were to represent someone adverse to a licensee, he would likely find himself in an untenable situation. For instance, he may be asked to make a determination, in his capacity as member of the state commission, on the same individual that his client is suing in an unrelated matter. The independence of judgment of a reasonable person in Public Officer's position would be materially affected by his private commitment to his client who is adverse to the licensee. Thus, Public Officer would be prohibited from acting on the licensee's matter before the state commission. Constant abstention by Public Officer due to these kinds of conflicts would cumulatively adversely affect the discharge of his public duties for which he was appointed.

Finally, as to question 3, other members in Public Officer's law firm may represent state commission licensees, or take matters adverse to such a licensee, so long as Public Officer makes detailed disclosures that satisfy the requirements of NRS 281A.420.4. Public Officer must make such disclosures whenever his law firm appears in a representative capacity before the state commission.

NRS 281A.420.4 provides in relevant part:

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

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others;<sup>3</sup> or

(c) In which he has a pecuniary interest, without disclosing sufficient information concerning the ...commitment or interest to inform the public of the potential effect of the action or abstention upon the person...to whom he has a commitment, or upon his interest. [S]uch 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

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<sup>3</sup> "Commitment in a private capacity to the interests of others" means 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. NRS 281A.420.8.

the Chairman and other members of the body.

Because there is no doubt that some benefit would flow from the law firm's representations to Public Officer whenever a member of Public Officer's law firm comes before the state commission in a representative capacity on a matter for action, Public Officer's actions would reasonably be affected by his pecuniary interest and his commitment in a private capacity to the interest of his employer. Therefore, in such case, Public Officer's disclosure would be required. Additionally, Public Officer would need to abstain from acting on the matter.

NRS 281A.420.2 provides in relevant part:

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:

(b) His pecuniary interest; or

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

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 Commission advises Public Officer that, before he acts on any matter related to the issues discussed herein, he should review the Ethics Law and the Commission's interpretation of subsections 2 and 4 of NRS 281A.420 in its *Woodbury* opinion and then seek the advice of counsel for the state commission.

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." Second, before abstention is also required, a reasonable person's independence of judgment "must be *materially* affected" by that private commitment.

At the hearing, the question was raised whether Public Officer's conflicts of interest may be imputed to other members in his law firm. The Commission advises Public Officer to seek the advice of the Nevada State Bar counsel and the Nevada Rules of Professional Conduct, since the Commission lacks jurisdiction on this issue.

### CONCLUSION

Therefore, by a unanimous vote<sup>4</sup> the Commission concluded that: (1) Public Officer may not represent state commission licensees in matters either related to their license from the state commission or unrelated to such license; (2) Public Officer may not represent individuals or entities adverse to state commission licensees; (3) other members of Public Officer's law firm may represent state commission licensees,

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<sup>4</sup> Commissioner Moran was not present at the time of the vote.

or take matters adverse to such licensees, so long as, whenever a member of Public Officer's law firm comes before the state commission in a representative capacity on a matter for action, Public Officer must disclose his private commitment and also abstain from voting on such matters.

DATED: 12/2/08

NEVADA COMMISSION ON ETHICS

By: Tim Cashman  
Tim Cashman, Vice Chairman