



**STATE OF NEVADA**

**BEFORE THE NEVADA COMMISSION ON ETHICS**

In the Matter of the First-Party Request for  
Advisory Opinion Concerning the Conduct  
of **Public Officer**, Member, Governing Body,  
Local Government Entity, State of Nevada,

Request for Opinion No. **13-71A**

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Public Officer. /

**ABSTRACT OPINION**

**I. STATEMENT OF THE CASE**

Public Officer, member of a Governing Body of a Local Government Entity, requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.440(1) 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"). A quorum<sup>1</sup> of the Commission heard this matter on October 16, 2013. Public Officer appeared in person and provided sworn testimony.

Public Officer sought an opinion from the Commission regarding Public Officer's disclosure and abstention obligations concerning matters expected to appear before the Governing Body affecting the interests of Public Officer's business partners and associates.

After fully considering Public Officer's request and analyzing the facts, circumstances and testimony presented by Public Officer, the Commission deliberated and orally advised Public Officer of its decision that Public Officer must disclose Public Officer's relationship with Public Officer's business partners and/or associates and any pecuniary interests in the business entity, and abstain from voting on matters involving Public Officer's business partners' clients. The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.<sup>2</sup>

Public Officer elected to retain confidentiality with respect to the Commission's proceedings. Therefore, the Commission publishes this abstract of the Opinion.

<sup>1</sup> The following Commissioners participated in this Opinion: Vice Chairman Gale (Presiding Officer) and Commissioners Carpenter, Cory, Groover, Lau, and Shaw. Chairman Lamboley and Commissioner Weaver were absent and did not participate in this Opinion.

<sup>2</sup> Any individual comment made by a commissioner during the hearing is not binding on the Commission's final decision.

The facts in this matter were obtained from documentary and testimonial 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.

## **II. QUESTION PRESENTED**

Public Officer questions whether business relationships with the partners and other business associates serving as independent contractors for Public Officer's private company constitute commitments in a private capacity to the interests of Public Officer's partners/associates and/or pecuniary interests which require abstention regarding matters involving the clients of those partners/associates before the Governing Body. In particular, Public Officer understands that Public Officer must disclose Public Officer's interests and relationships and abstain from voting regarding matters before the Governing Body involving the clients Public Officer represents. However, Public Officer questions whether abstention is required for clients represented by Public Officer's partners and/or business associates, particularly if Public Officer declines any pecuniary distributions from any business transactions by other partners/contractors.

## **III. STATEMENT AND DISCUSSION OF ISSUES AND RELEVANT STATUTES**

### **A. ISSUES**

As a public officer, Public Officer must commit to avoid actual and perceived conflicts of interest and must publicly disclose sufficient information concerning any private relationships and interests which would reasonably affect matters before the Governing Body served by Public Officer, including significant pecuniary interests and commitments to business partners and associates. Public Officer also must abstain from voting or otherwise acting on public matters in which private relationships and interests would clearly and materially affect the independence of judgment of a reasonable person in Public Officer's position.

Public Officer serves as a member of Governing Body of Local Government Entity, responsible for voting on and implementing various governmental projects and facilities, many of which involve various transactions related to Public Officer's private business. In Public Officer's private capacity, Public Officer serves as a partner in a business entity ("Firm"), which is owned and operated by several partners and business associates who serve as independent contractors. Public Officer generates approximately 70 percent of the business for the Firm, and the other partners and associates collectively generate the remaining business.

The Firm maintains commission-based percentage agreements between the partners/associates and the Firm for each business transaction. The partners only share in revenue if the Firm earns a profit after expenses. However, the Firm has not earned a

profit in any of its years of operation, and therefore, no profits have been distributed and Public Officer has not shared in the commissions earned by other partners or associates. However, the Firm's revenue structure does not preclude a possible profit.

Each partner in the Firm is entitled to an equal percentage of the net profits, if any are generated. No mechanism is available to separate any profits generated by the Firm by partner or associate. Therefore, any profit generated by the Firm is attributed to the whole partnership. Clients are retained as clients of the Firm, however, individual partners or associates represent the clients during specific transactions. Payments for transactions are made to the Firm and commissions are distributed from the Firm.

On occasion (between one and 5 times per year), the Governing Body considers matters involving transactions that affect clients of Public Officer's company. Public Officer believes that the organizational structure of Public Officer's company comprised of partners and associates who are all independent contractors and the structure for commission-based compensation establishes a sufficient distinction for purposes of disclosure and abstention between clients of the company who Public Officer represents versus clients represented by other partners and/or associates. Specifically, Public Officer questions whether Public Officer must abstain from voting on matters before the Governing Body involving clients of Public Officer's company who are represented by other partners or associates. Further, Public Officer questions the nature of Public Officer's pecuniary interests in such matters given the almost non-existent profit-sharing of the company.

## **B. RELEVANT STATUTES**

### **1) Public Policy**

**NRS 281A.020(1) provides:**

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) Disclosure and Abstention**

**NRS 281A.420(1), (3) and (4) provide:**

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.

4. In interpreting and applying the provisions of subsection 3:

(a) It must be presumed that the independence of judgment of a reasonable person in the public officer's situation would not be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person where the resulting benefit or detriment accruing to the public officer, or if the public officer has a commitment in a private capacity to the interests of another person, accruing to the other person, is not greater than that accruing to any other member of any general business, profession, occupation or group that is affected by the matter. The presumption set forth in this paragraph does not affect the applicability of the requirements set forth in subsection 1 relating to the disclosure of the acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

(b) The Commission must give appropriate weight and proper deference 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 elected or appointed and to vote or otherwise act upon a matter, provided the public officer has properly disclosed the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person in the manner required by subsection 1. Because abstention by a public officer disrupts the normal course of representative government and deprives the public and the public officer's constituents of a voice in governmental affairs, the provisions of this section are intended to require abstention only in clear cases where the independence of judgment of a reasonable person in the public officer's situation would be materially affected by the public officer's acceptance of a gift or loan, significant pecuniary interest or commitment in a private capacity to the interests of another person.

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### 3) “Commitment in a private capacity” defined.

#### **NRS 281A.065**

“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:

1. Who is the spouse or domestic partner of the public officer or employee;
2. Who is a member of the household of the public officer or employee;
3. Who is related to the public officer or employee, or to the spouse or domestic partner of the public officer or employee, by blood, adoption or marriage or domestic partnership within the third degree of consanguinity or affinity;
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; or
6. With whom the public officer or employee has any other commitment, interest or relationship that is substantially similar to a commitment, interest or relationship described in subparagraphs 1 to 5, inclusive.

#### **IV. COMMISSION OPINION**

##### **A. OVERVIEW**

The disclosure, participation and abstention standards of the Ethics Law apply to Public Officer. NRS 281A.420(1) requires Public Officer, as a member of the Governing Body, to carefully consider any private interests and commitments that may affect Public Officer’s decision in a Governing Body matter and disclose sufficient information concerning those private interests and commitments to inform the public of the potential effect of Public Officer’s action. Public Officer must also refrain from advocating the passage or failure of the matter and abstain from voting if the independence of judgment of a reasonable person in Public Officer’s situation would, under the circumstances presented in the particular matter, be materially affected by those private interests and commitments.

Under the circumstances presented on this record, Public Officer must disclose and abstain from voting on any public matters involving the interests of Public Officer’s clients and those of Public Officer’s business partners and associates. Likewise, Public Officer must disclose and abstain from voting on matters related to Public Officer’s pecuniary interests in the company.

##### **B. COMMITMENT IN A PRIVATE CAPACITY**

Public Officer questions whether Public Officer has a commitment in a private capacity to the other partners and associates of the Firm based upon the independent contractor status of the partners and associates and the fact that the partners and associates do not share commissions unless there is a profit at the end of the year. The Commission has broadly interpreted “independent contractor” status in the context of

employment relationships under the “cooling off” provisions of the Ethics Law. Although that opinion related to a different Ethics Law statute and a different relationship than those applicable in this case, a similar analysis applies to the facts presented and their relation to overall conflicts of interest.

In *In re Public Officer*, Comm’n Opinion 13-09 (2013), the Public Officer asked the Commission to construe the terms “employed by” and “employment from” as used in NRS 281A.550(1), (2) and (3) to exclude an independent contractor relationship with a regulated entity. (See *id.*) The Commission declined to accept the Public Officer’s narrow, distinct interpretation of the relationship intended to be encompassed by the “cooling-off” provisions set forth in NRS 281A.550(1), (2) and (3). (See *id.*) Instead, the Commission concluded that the status of the technical form, character or limiting term of the relationship is irrelevant, but rather the nature, scope and content of the engagement are determinative. (See *id.*) Therefore, the Commission held “‘the terms ‘employed by’ and ‘employment from’ as used in NRS 281A.550(1), (2) and (3) are intended to have plain meaning and be construed as ‘to make use of’, ‘to use or engage the services of’, ‘to work for’ or ‘to work,’ in any form of service or agency on behalf of another for a purpose which implies a request and contract for compensation in the ordinary affairs of business or personal life. Were it otherwise, it would exalt form over substance for the purpose of implementing the Ethics Law.’” (See *id.*)

The status as independent contractors does not negate the business relationship shared between business partners and associates. The independent contractor status is subsumed in the substantial and continuous business relationship, for if it was not, then form over substance would prevail for the purposes of the Ethics Law. See NRS 281A.065(5) and *In re Public Officer*, Comm’n Opinion 13-09 (2013). If the status as an independent contractor, which usually establishes legal independence in an employment context, does not diminish the conflicts of interest at stake in an employment relationship, it should not diminish conflicts of interest in the broader business relationship context.

The partners and associates of the Firm have a substantial and continuous business relationship with each other sufficient to create private commitments to the interests of each other under NRS 281A.065. See *In re Derbidge*, Comm’n Opinion 13-68C (2013). The Commission has noted that “the nature, scope and content of the engagement are determinative” not the relationship titles that have different meanings in other areas of law. See *In re Public Officer*, Comm’n Opinion 13-09 (2013). Specifically in this matter, the Firm has been in business for a significant period of time, creating a substantial and continuous relationship between the partners and associates, despite the compensations structure or independent contractor status of the partners and/or associates. They each contribute to common, shared operating functions and costs, including office staff and space, advertising and related overhead.

Furthermore, the substantial and continuous business commitment in this instance extends to the formation of the Firm itself. All of the partners and associates work under the same Firm designation and split their commissions with the Firm. Payments from all transactions are made to the Firm and later distributed to the partners and associates

based on their respective fee structures. Any and all profit generated from business transactions belongs to the Firm and the profits and/or distributions are available to the partners pursuant to a distribution structure. All partners potentially benefit from each transaction engaged in by the other partners and associates, which therefore establishes a substantial and continuous business connection between all of the partners and associates. The Firm operates as a business unit, sharing profits and expenses, and as such there are substantial and continuous business relations that trigger the Ethics Law.

Additionally, even if there was no profit sharing arrangement, the partners/associates still have a commitment in a private capacity as business associates. See *In re Derbidge*, Comm'n Opinion 13-68C (2013), public officer Derbidge had a commitment in a private capacity to his business partner, and therefore must abstain on all matters brought forth by his business partner before Derbidge's governmental entity, even those unrelated to their business. The key aspect in cases involving substantial and continuous business relationships is not the actual or potential pecuniary interests, but rather the relationship itself. The interests of the business partner are statutorily attributed to the public officer based on the presumption that a person lacks independent judgment toward the interests of a person with whom Public Officer shares such an important personal and private business relationship. The relationship creates the ethical conflict that necessitates disclosure and abstention. See *In re Public Officer*, Comm'n Opinion No. 08-08A (2008), members of a public officer's law firm may appear in a representative capacity before the State commission on which the public officer serves if the public officer makes appropriate disclosures under NRS 281A.420 and abstains from acting on the matter.

Public Officer has a commitment in a private capacity to each partner/associate of the Firm based upon their substantial and continuous business relationship. NRS 281A.065(5). The independent contractor status and compensation structure do not change the business relationship under the Ethics Law. The Commission has already determined that independent contractors have a commitment in a private capacity to those who hire them as independent contractors. *In re Public Officer*, Comm'n Opinion No. 11-54A (2011). The same analogy applies to independent contractors who are partners and/or business associates in a company.

Based on the clear business relationship at issue, any matter before the Governing Body affecting a client of the Firm would reasonably and materially be affected by Public Officer's private relationship and interests related to the Firm and its partners and associates. Accordingly, pursuant to NRS 281A.420(1) and (3), Public Officer must disclose these relationships and interests and otherwise abstain from voting on any matter before the Governing Body which involves any client of the Firm.

### **C. PECUNIARY INTEREST**

Based on the record provided, including the minimal scope of work by other partners and associates and the independent, commission-based revenue structure, Public Officer does not appear to have any actual or realized significant pecuniary

interests in the business transactions conducted by Public Officer's business partners and associates in the Firm. However, an ethical conflict may arise even for remote pecuniary interests. In such circumstances, a public officer's disclosure is important even where the conflict is remote in some aspects. In *In re Weber*, Comm'n Opinion 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.

Although Public Officer testified that the structure of the Firm generally precludes profit-earning and any pecuniary interest Public Officer might have in the business transactions conducted by Public Officer's partners and associates would be very unlikely and had not occurred to date in all of its years of operation, Public Officer nevertheless noted that profit-sharing was a possibility. In fact, each partner is entitled to an equal percentage of any profit. Likewise, Public Officer noted that all transactions are paid directly to the Firm and the Firm shares all expenses attributable to the transaction.

While history has established that profits are unlikely, the legal right to such profits establishes a remote, yet significant, pecuniary interest in those transactions and expenses, and an appearance of impropriety if Public Officer votes on an agenda item whereby Public Officer's fellow partners and/or associates are receiving approval from the Governing Body, potentially resulting in commissions to the tune of multiple thousands of dollars. Therefore, although the nexus between Public Officer's pecuniary interests is attenuated based upon the Firm's financial structure, the disclosure and abstention provisions of the Ethics Law still apply. It is the avoidance of conflict and appearance of impropriety, even though actual impropriety is lacking, that the Ethics Law prohibits. See *In re Collins*, Comm'n Opinion No. 11-78A (2012).

Although Public Officer has a potential significant pecuniary interest in transactions conducted by the Firm, Public Officer testified that Public Officer would decline the distribution of any income otherwise owed to Public Officer as a partner for any income derived from transactions involving clients who are represented by other partners/associates if those transactions involve matters before the Governing Body. However, declining income and/or other pecuniary interests does not otherwise change the conflict of interest created by Public Officer's commitment in a private capacity to the interests of Public Officer's partners and associates, and the appearance of pecuniary impropriety.

Finally, the materiality required by NRS 281A.420(3) to impose abstention requirements does not diminish if Public Officer elects to decline all profits from the Firm. Any matter involving the Firm's clients before the Governing Body is material and necessary to the transaction, and the interests of the partners, associates and company would be materially affected by the actions of Public Officer on the Governing Body. It is



difficult to imagine any circumstance involving a client of the Firm before the Governing Body that would not materially affect the interests of Public Officer's partners and Public Officer's company. Regardless of whether Public Officer declines to accept any distribution of income for the transaction, Public Officer's company and business partners continue to benefit. The ability to vote is key and triggers the disclosure and abstention provisions of NRS 281A.420(1) and (3).

As a member of the Governing Body, Public Officer's ability to vote on matters affecting Public Officer's clients that potentially benefit the Firm's interests creates a conflict of interest requiring disclosure and abstention pursuant to NRS 281A.420(1) and (3). See *In re Ross*, Comm'n Opinion No. 09-10C (2010) (holding that when Ross voted for the financing resolution regarding the city hall project, Public Officer's vote would have been reasonably affected by Public Officer's commitment in a private capacity to the interest of the union members, even though it was not certain when or if the city hall project would be confirmed.) While there is no direct and immediate significant pecuniary interest to Public Officer on transactions conducted by other partners/associates of the Firm, the possibility of trickledown economics remains at play through the structure of the Firm, and the appearance of impropriety that necessitate disclosure and abstention.

Therefore, if another member of Public Officer's firm appears before the Governing Body on an agenda item, Public Officer must disclose and abstain. Although the requirement for disclosure and abstention derives primarily from Public Officer's commitment in a private capacity to the interests of the other members of Public Officer's firm, even though they are partners and/or independent contractors, Public Officer maintains a possibility of significant pecuniary returns from any transaction by another member of Public Officer's firm, despite a lack of any direct pecuniary interest in the matter before the Governing Body. Therefore, disclosure and abstention obligations are likewise encouraged on the basis of the significant pecuniary interest, albeit remote.

## **V. 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. Pursuant to NRS 281A.440(1), the Commission has jurisdiction to render an advisory opinion in this matter.
3. Pursuant to NRS 281A.065, Public Officer has a commitment in a private capacity with respect to the interests of Public Officer's business partners and associates in the Firm as persons with whom Public Officer shares a substantial and continuing business relationship. The status of Public Officer's business partners and/or associates as independent contractors does not diminish the nature of Public Officer's substantial and continuing business relationship. The private interests of Public Officer's business partners and associates would reasonably and materially affect Public Officer's independence of judgment on matters before the Governing Body involving the Firm's clients.

4. Public Officer also has a significant pecuniary interest in the Firm as a partner. Despite the fact that all partners are independent contractors and do not share commissions, the Firm has established a profit-sharing structure for any profits, albeit remote, and the Firm shares all expenses, advertising and overhead.
5. Pursuant to NRS 281A.420(1), Public Officer should disclose the nature and extent of Public Officer's business relationships with Public Officer's partners and/or associates in the Firm and any pecuniary interests in the Firm when any client of the Firm appears before the Governing Body, including when the client is represented by Public Officer or Public Officer's partners and/or associates. Under NRS 281A.420(3) and (4), Public Officer should also abstain from participating or voting on such matters.

Any Finding of Fact hereafter construed to constitute a Conclusion of Law, or any Conclusion of Law hereafter construed to constitute a Finding of Fact, is hereby adopted and incorporated as such to the same extent as if originally so designated.

The Following Commissioners Participated in this Opinion:

Dated this 31st day of July, 2014.

NEVADA COMMISSION ON ETHICS

By: ABSENT  
Paul H. Lamboley  
Chairman

By: /s/ Gregory J. Gale  
Gregory J. Gale  
Vice-Chairman

By: /s/ John C. Carpenter  
John C. Carpenter  
Commissioner

By: /s/ Magdalena Groover  
Magdalena Groover  
Commissioner

By: /s/ Timothy Cory  
Timothy Cory  
Commissioner

By: /s/ Cheryl A. Lau  
Cheryl A. Lau  
Commissioner

By: /s/ James M. Shaw  
James M. Shaw  
Commissioner

By: ABSENT  
Keith A. Weaver  
Commissioner