



## 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**, Appointed Attorney,  
Government Entity, State of Nevada,

Request for Opinion No. **13-77A**

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Public Officer. /

#### **ABSTRACT OPINION**

#### **I. STATEMENT OF THE CASE**

Public Officer, the appointed attorney (“Attorney”) of a Government Entity (“Government Entity”) in the State of Nevada, 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 NRS Chapter 281A of the Nevada Revised Statutes (“NRS”). A quorum<sup>1</sup> of the Commission heard this matter and Public Officer appeared in person and provided sworn testimony.

Public Officer sought an opinion from the Commission concerning the implications of the Ethics Law for representing the Government Entity in a legal matter that also affects the private interests of the Public Officer’s employers, the members of the Governing Body of the Governmental Entity.

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 does not have a conflict of interest under the circumstances presented as the appointed Attorney representing the interests of the Government Entity in a legal matter that also affects the individual private interests of the members of the Governing Body.<sup>2</sup> The Commission now renders this final written Opinion stating its formal findings of fact and conclusions of law.

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

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.

<sup>1</sup> The following Commissioners participated in this opinion: Chairman Lamboley, Vice Chairman Gale and Commissioners Carpenter, Cory, Groover, Lau, Shaw, and Weaver.

<sup>2</sup> Chairman Lamboley and Commissioners Carpenter and Groover voted against the majority decision.

## **II. QUESTION PRESENTED**

Public Officer questions whether it is a conflict of interest to represent the legal interests of the Government Entity in a matter that also affects the private interests of Public Officer's employers, the members of the Governing Body.

## **III. STATEMENT OF ISSUES AND RELEVANT STATUTES; COMMISSION DECISION**

### **A. ISSUES**

Public Officer is the appointed public attorney ("Attorney") for the Government Entity and its Governing Body. As the Attorney, Public Officer contemplates representing the Government Entity in a legal matter which simultaneously may affect the private interests of the appointing Governing Body members. Public Officer has identified several legitimate legal interests of the Government Entity in the matter. However, the potential private interests of the Governing Body members, Public Officer's employers, may also be affected and therefore trigger potential conflicts of interest between Public Officer's official duties and private employment interests and relationships.

Public Officer is concerned about significant legal, political and fiscal implications for the Government Entity with regard to the specific legal matter. However, advocacy on behalf of the Government Entity's interests in the matter may simultaneously benefit and/or promote the private interests of members of the Governing Body. Accordingly, Public Officer questions whether using government time, resources and facilities of Public Officer's office to participate in the legal matter on behalf of the Government Entity, which also potentially benefits the private interests of Public Officer's employers would constitute: 1) the use of government resources to benefit Public Officer's personal pecuniary interests in maintaining Public Officer's current employment position pursuant to NRS 281A.400(7); or 2) the use of Public Officer's official position to secure or grant unwarranted privileges to Public Officer's employers, persons to whom Public Officer has a commitment in a private capacity, pursuant to NRS 281A.400(2).

### **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.

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## **2. Employment Relationship Establishes Private Interests/Conflicts**

### **NRS 281A.065 provides:**

“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, 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 subsections 1 to 5, inclusive.

## **3. Using Governmental Time, Property, Equipment, Facility to Benefit Significant Pecuniary Interest**

### **NRS 281A.400(7) provides:**

7. Except for State Legislators who are subject to the restrictions set forth in subsection 8, a public officer or employee shall not use governmental time, property, equipment or other facility to benefit a significant personal or pecuniary interest of the public officer or employee. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer or employee who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of the public officer’s or employee’s public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

(b) The use of mailing lists, computer data or other information lawfully obtained from a governmental agency which is available to members of the general public for nongovernmental purposes; or

(c) The use of telephones or other means of communication if there is not a special charge for that use.

→ If a governmental agency incurs a cost as a result of a use that is authorized pursuant to this subsection or would ordinarily charge a member of the general public for the use, the public officer or employee shall promptly reimburse the cost or pay the charge to the governmental agency.

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#### **4. Using Public Position to Secure/Grant Unwarranted Benefits**

**NRS 281A.400(2) provides, in relevant part:**

2. 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.

#### **C. COMMISSION DECISION**

##### **1. Background – Duty to Preserve Public Trust**

In this case, the Commission considers whether the responsibilities of Public Officer who was appointed by the Governing Body to represent the legal interests of the Government Entity, including the interests of the Governing Body and its members in their official capacity, conflict with the Public Officer's personal and pecuniary commitments to the appointing employers and interests in maintaining employment status. Accordingly, the Commission determines whether Public Officer may carry out his/her public duties as the appointed Attorney and represent the interests of the Government Entity in a legal matter which also affects the private interests of the Public Officer's employers, the members of the Governing Body. If the Government Entity fronts the costs and governmental resources for legal representation in the legal matter, the members will not have to retain independent, private legal counsel at their own expense to represent their private interests in the matter.

Public Officer was appointed as Attorney by the Governing Body, and has specific employment conditions that govern Public Officer's position and establish Public Officer's independence regarding legal strategy for the Government Entity. As the Government Entity's legal advisor, Public Officer represents the Government Entity and its officers in their official capacities, and Public Officer has determined that the Government Entity has several legitimate concerns in the legal matter. However, the Government Entity's representation in the legal matter would also benefit the private interests of the members, and thereby benefit Public Officer's own private interests, or perceived private interests in preserving Public Officer's employment status as the appointed Attorney. Because the Government Entity's participation in the matter may benefit Public Officer's private commitments and interests, Public Officer is concerned that the use of governmental resources to engage in the legal matter could violate various provisions of NRS 281A.

The private interests of Public Officer's employers are statutorily attributed to Public Officer, and Public Officer has separate pecuniary interests in maintaining the appointed position. Public Officer, and any other appointed public officer or employee, could not reasonably deny that decisions regarding public actions may be influenced by circumstances that affect the private interests of the appointing employers or supervisors. Public actions which benefit the employer's private interests may be perceived as an attempt to curry favor with employers to preserve or enhance employment status. Accordingly, Public Officer's private interests identified herein may establish conflicts with Public Officer's public duties under the Ethics Law.

The legislatively declared public policy in support of the Ethics Law requires public officers and employees to preserve the public trust and commit to avoid conflicts between their public duties and private interests. NRS 281A.020. Under the rules of statutory construction, the Commission interprets the provisions of the Ethics Law consistent with this recognized and declared public policy. See *Colello v. Administration of Real Estate Div.*, 100 Nev. 344, 347, 683 P.2d 15 (1984) (“Where the purpose of the legislation is expressly stated, that purpose is a factor to be considered in interpreting a given statute.”) (Citing *Alper v. State ex rel. Dep’t Hwys.*, 96 Nev. 925, 621 P.2d 492 (1980) and *Sheriff, Washoe County v. Smith*, 91 Nev. 729, 542 P.2d 440 (1975)); see also, *Hotel Employees & Restaurant Employees Int’l Union v. State*, 103 Nev. 588 (1987) (Reversed in part or other grounds, 984 F.2d 1507 (9<sup>th</sup> Cir. 1993)). Public Officer perceives a potential conflict of interest between carrying out Public Officer’s official duties as the Attorney to represent the Government Entity’s interests in the legal matter, which Public Officer believes to be in the best interests of the public, and simultaneously benefitting the private interests of Public Officer’s employers and, thereby, the private interests of Public Officer.

Even as a public officer/employee charged with carrying out *public* duties, Public Officer has a commitment in a *private* capacity to the interests of Public Officer’s public employers. See NRS 281A.065 and *In re Cadwallader*, Comm’n Opinion No. 09-04 (2009) (public employee had private commitment to public employer; although the source of duties and income is public, the interest in career advancement, wages and benefits for the employee is private). For purposes of the Ethics Law, relationships with certain persons, including employers, establish personal and/or pecuniary interests for the public officer.

The Ethics Law deems relationships with certain persons to be so close or connected, personally or financially, that the personal/private interests of those persons are statutorily attributed to the public officer or employee. The relationship alone triggers questions concerning the independence of judgment by the public officer or employee in carrying out public duties which may be affected by those interests. Employers of public officers and employees are included among the statutorily recognized relationships regarding which the Ethics Law establishes per se conflicts because of the obvious and tangible interests in maintaining employment for professional and pecuniary reasons.

In this case, Public Officer has a personal and pecuniary interest in maintaining Public Officer’s job; i.e., job security. By using public resources on a matter which benefits, or may be perceived to benefit, Public Officer’s commitments to the members of the Governing Body (employers), Public Officer recognizes the potential conflict of interest and questions Public Officer’s ability to properly avoid the conflict or remedy the conflict within the scope of the Ethics Law. Public Officer must properly balance official duties and professional responsibilities as the Government Entity’s legal counsel with Public Officer’s private commitments and interests in job security. However, Public Officer’s proposed legal representation is intended to protect the best interests of the public.

Any official legal matters that affect the Governing Body as an entity also have the potential to impact the personal interests of the members of the Governing Body who appoint Public Officer to the position of Attorney, and thereby affect Public Officer’s personal and pecuniary interests in the job. By engaging in activity that benefits the private interests of Public Officer’s employers, Public Officer’s actions may be perceived to be an effort to use public funds and resources to support the private interests of Public Officer’s employers and Public Officer’s personal employment status. However, Public Officer testified that representation of the Government Entity’s interests in the legal matter

may be critical for the Government Entity. Public Officer further stated that although Public Officer is appointed by the Governing Body, the Governing Body has specifically delegated all legal strategy regarding the Government Entity to Public Officer in his capacity as Attorney. Accordingly, Public Officer has discretion and independence regarding legal decisions that affect the Government Entity. The Governing Body has not directed any action with regard to this matter, and Public Officer does not feel any pressure to act in any particular manner to preserve employment status.

As a result of the Government Entity's legitimate interests in the legal matter, as represented by Public Officer as the appointed legal advisor, the Commission finds that Public Officer has sufficiently committed to avoid conflicts by placing the Government Entity's interests above those which may run simultaneously to the private interests of Public Officer and Public Officer's employers. The conflict represented by this RFO is inherent in the nature of the appointed status by the Governing Body. Had Public Officer testified to the contrary or other evidence reasonably supported a finding that Public Officer would be inclined to act in a manner to benefit or preserve the private interests of Public Officer or Public Officer's employers, or otherwise prioritize those interests over those of the Government Entity, the Commission's decision would be different.

## **2. Avoiding Conflicts of Interest; Applicability of NRS 281A.400(2) and (7)**

Although Public Officer's appointment status brings inherent conflicts between Public Officer's public duties and private employment interests, the Commission is confident that Public Officer has appropriately avoided conflicts in this instance. Specifically, the record in this case supports a finding that Public Officer's proposed activity regarding the legal representation would not constitute the use of Public Officer's official position to grant *unwarranted* privileges to Public Officer or Public Officer's employers (NRS 281A.400(2)) or the improper use of government resources (staff time, facilities, property) to benefit Public Officer's significant pecuniary interests (NRS 281A.400(7)). Instead, the Commission finds that the legal representation supports the best interests of the Governmental Entity and Public Officer's proposed conduct would not be improper.

Public Officer has identified the importance of the legal interests of the Government Entity. The governmental entity has legitimate needs for legal representation in a matter which could have a significant impact on the Government Entity. Public Officer has evaluated the matter with regard to the effects on the Government Entity and determined that representation in the matter may be critical. In fact, Public Officer provided the Commission with an example of a similar legal issue impacting a different governmental entity in which the governmental entity suffered great consequences from the Court's decision in that matter. Albeit different legal issues, Public Officer is concerned that the Government Entity may be subject to binding consequences if it does not participate effectively in the legal matter.

Public Officer, the appointed Attorney, has identified what Public Officer believes to be important and necessary legal interests of the Government Entity in the legal matter, and the Commission offers no view on the legal strategy and decisions for the Government Entity. Rather, the Commission accepts Public Officer's representations regarding the legitimate interests of the Government Entity. As a result of the Government Entity's identified and necessary interests, the Commission finds that Public Officer would not be improperly using government resources to secure unwarranted privileges for Public Officer's employers or to otherwise preserve job security. Accordingly, Public

Officer would not violate the provisions of NRS 281A.400(2) or (7) by representing the Government Entity.

This case differs from the Commission's opinion in *In re McDonald*, Comm'n Opinion No. 00-41 (2000). In *McDonald*, the Commission determined that Las Vegas City Councilman McDonald impermissibly advocated on behalf of a matter which benefitted his employer in an attempt to curry favor with his employer to protect his primary source of income. (See *id.*) In that case, McDonald's employer had an ownership interest in a facility which was encountering financial hardship. (See *id.*) The City of Las Vegas considered acquiring the facility, and McDonald ultimately disclosed his conflict and abstained regarding the decision to acquire the facility. (See *id.*) However, McDonald provided information relating to the facility to other members of the City Council and to the City Manager. (See *id.*)

McDonald was found to have used his official position to secure advantages for his employer in violation of NRS 281.482(2)(cf. NRS 281A.400), despite the lack of evidence that: 1) Public Officer was promised additional compensation by his employer to advocate in his official capacity for the acquisition of the facility; 2) his employment was explicitly dependent on such assistance; or 3) Public Officer acted with the intent to profit personally. (See *id.*) The Commission noted that McDonald's loyalty to his employer motivated him to assist his employer by using his access to government staff and other members of the City Council, which an ordinary member of the public would not have, to lobby their action on a matter which would benefit his employer, and therefore himself as an employee, and which did not appear to be a good economic deal for the City or in the public's interest. (See *id.*)

While the *McDonald* matter was decided upon different facts and additional Ethics Law statutes than those presented in this case, the aspect of performing one's duties for the benefit of continued employment is relevant to Public Officer's matter. However, based upon the facts presented in this matter, Public Officer has confirmed that any decision to represent the Government Entity's interests in the legal matter would be based on the benefit to the Government Entity rather than any consideration regarding Public Officer's own job security. Further, the potential ancillary implications of the representation would ultimately benefit the Government Entity.

**a) Use of Government Position to Secure Unwarranted Benefits to Employer (NRS 281A.400(2))**

Public Officer testified that neither the Governing Body nor any of its members directed Public Officer to act in any specific manner with regard to the Government Entity's interests in the legal matter. If Public Officer does decide to represent the Government Entity, Public Officer has articulated reasons for doing so in the Government Entity's best interests. Public Officer also acknowledged that no Governing Body member had placed any pressure on Public Officer to take any action.

Instead, Public Officer has public responsibilities to represent the interests of the Governing Body and its members in their official capacities. The Government Entity has a legitimate interest in the official actions of its Governing Body. The Commission finds it unreasonable and unnecessary to issue a determination that the Government Entity's appointed Attorney may not use government resources to defend official interests simply because the representation may simultaneously benefit the members' private interests. In particular, the facts presented in this matter do not support any finding that Public Officer was directed or influenced to participate in the matter by Public Officer's

employers. Public Officer's legal representation and the use of Public Officer's official position would not provide *unwarranted* privileges to the private interests of the Governing Body members where the identified public interests include the official actions by the Governing Body.

Public Officer believes it is in the best interests of the citizens of the Government Entity to have its Governing Body's actions defended. The fact that the legal representation potentially benefits the members' private interests does not create "unwarranted" privileges, preferences, exemptions or advantages. In *McDonald*, the public officer used his official position to favor his employer and to disfavor the city. In Public Officer's situation the Government Entity clearly benefits through its legal representation.

**b) Use of Government Resources to Benefit Significant Pecuniary Interest in Employment (NRS 281A.400(7))**

Public Officer also identified various reasons why representation of the Government Entity in the legal matter would not be an improper use of government resources to benefit Public Officer's personal pecuniary interests in Public Officer's employment. Public Officer testified that the Governing Body delegated all legal strategy regarding the Government Entity to Public Officer and Public Officer had confidence in Public Officer's job security and independence in determining such strategy for the Government Entity. Although no member can decide the fate of Public Officer's employment without a majority vote, Public Officer does not feel any pressure or concern that the decisions Public Officer makes with regard to this matter would affect the Governing Body's perception of job performance, even if Public Officer's actions did not support the private interests of various members.

While participation in the legal matter may be perceived as an attempt to curry favor from Public Officer's employers by supporting their private interests, and thereby promote Public Officer's personal employment status, the impetus for participation is for legal, fiscal and political stability and not to benefit Public Officer's pecuniary interest as the appointed Attorney. Although the Commission has not before held that the personal pecuniary interest at stake in NRS 281A.400(7) involves the performance of job duties that may impact pecuniary interests in maintaining employment, participating in the legal matter would be directed at benefitting the governmental entity, not its elected officials. Contrary to *McDonald*, no facts support any contention that Public Officer's loyalty to Public Officer's employers has influenced the interests of the governmental entity.

**IV. 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 and a public employee as defined by NRS 281A.150.
2. Pursuant to NRS 281A.440(1), the Commission has jurisdiction to render an advisory opinion in this matter.
3. Public Officer may represent the Government Entity in the legal matter without violating NRS 281A.020, NRS 281A.400(2) or NRS 281A.400(7). The representation benefits significant legal interests of the Government Entity and does not provide unwarranted benefits to Public Officer's employers, the members of the Governing Body, or constitute the use of government resources to benefit Public Officer's private pecuniary interests.



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: /s/ Paul H. Lamboley  
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: /s/ Keith A. Weaver  
Keith A. Weaver  
Commissioner