



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

In re **Public Officer**, Public Agency,
State of Nevada,

Advisory Opinion No. 23-094A

Public Officer. /

ABSTRACT OPINION

I. STATEMENT OF THE CASE

Public Officer requested this confidential advisory opinion from the Nevada Commission on Ethics ("Commission") pursuant to NRS 281A.675, 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. Pursuant to NAC 281A.352, a quorum of the Commission considered this matter by submission, without holding an advisory opinion hearing.¹

The Commission considered the request for an advisory opinion, a list of proposed facts that were affirmed as true by Public Officer and publicly available information.

Public Officer sought an opinion from the Commission regarding applicable conflict of interest requirements under NRS 281A.420 pertaining to disclosure and abstention. After fully considering Public Officer's request and analyzing the facts and circumstances as presented by Public Officer, the Commission issues this abstract opinion.

The facts in this matter were obtained from documentary evidence provided by Public Officer. Although a full written opinion was properly served, this abstract opinion redacts certain findings of fact that were affirmed as true by Public Officer, provides a summary of issues, and removes other identifying information to protect the confidentiality of Public Officer. Facts and circumstances that differ from those presented to and relied

¹ The following Commissioners participated in this jurisdictional review: Chair Wallin, Vice-Chair Towler and Commissioners Duffrin, Gruenewald, Lowry, and Moran.

Commissioner Amanda Yen disclosed that Public Agency is a client of McDonald Carano ("Firm"). Commissioner Yen is a partner with the Firm and has both a pecuniary interest in her employment and a private commitment to the Firm, as her employer, and its clients under NRS 281A.065. Consequently, the independence of judgment of a reasonable person in Commissioner Yen's situation could be materially affected in voting upon matters related to this case. In order to avoid any appearance of impropriety and to comply with Nevada's Ethics in Government Law set forth in NRS Chapter 281A and Rule 2.11 of the Code of Judicial Conduct, Commissioner Yen disclosed her private interests and has abstained from participation in this case.

Commissioner Olsen disclosed that he has known Private Attorney professionally for more than 15 years. Olsen has worked with Private Attorney and opposed Private Attorney on various legislative issues and therefore discloses these facts and abstains as he believes the independence of judgment of a reasonable person in Commissioner Olsen's position could be materially affected in voting upon matters related to this case.

upon by the Commission in this opinion may result in different findings and conclusions than those expressed in this opinion.²

II. QUESTION PRESENTED

Public Officer seeks guidance regarding Public Officer's disclosure and abstention obligations under NRS 281A.420 if an agenda item regarding an ordinance comes before the Board again.

III. FINDINGS OF FACT

- A. Public Officer serves on the governing Board ("Board") for Public Agency.
- B. Public Officer has retained the legal services of Private Attorney in Public Officer's private capacity.
- C. During a meeting, the Board heard a matter regarding a proposed ordinance affecting individuals in the Public Agency.
- D. Private Attorney did not attend the Board meeting, nor did Private Attorney submit written material as public comment for the Board meeting nor did any of the staff materials indicate that Private Attorney had an interest or involvement in the agenda item.
- E. Recently Private Attorney has represented a group of individuals within Public Agency in contested matters with Public Agency.
- F. Private Attorney has indicated to Public Officer that Private Attorney's only interest in the proposed ordinance is in generally ensuring that it is prepared and adopted to provide clear information to individuals within Public Agency.
- G. According to Public Officer, Private Attorney's clients would not be impacted by the ordinance any more or less than any other affected persons.

IV. STATEMENT OF ISSUES AND RELEVANT STATUTES

A. OVERVIEW OF ISSUES

Private commitments can lead to conflict situations with public duties. Consequently, these conflict situations must be recognized and properly navigated to assure compliance with the Ethics Law, including following the policy of the State of Nevada to avoid conflicts and appearances of impropriety. NRS 281A.020. Public trust must be protected when a person has a commitment in a private capacity to the interests of others under NRS 281A.065. *In re Public Officer*, Comm'n Op. No. 23-006A (2023). The Ethics Law requires that public officers make appropriate disclosures and, in some cases, abstain from acting on matters when the officer has knowledge that their decision may be reasonably affected by a commitment in a private capacity.

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² The Commission reserves its statutory authority should an ethics complaint be filed presenting contrary circumstances. See *In re Howard*, Comm'n Op. No. 01-36 (2002) (notwithstanding advisory opinion, a member of the public is not precluded from bringing ethics complaint); *In re Rock*, Comm'n Op. No. 94-53 (1995) (Commission reservation of right to review until time issue is raised).

B. RELEVANT STATUTES REGARDING DISCLOSURE AND ABSTENTION

1. Commitment in a Private Capacity Defined under NRS 281A.065

NRS 281A.065 provides in relevant part: “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: ... 5. With whom the public officer or employee has a substantial and continuing business relationship...”

2. Duty to avoid conflicts of interest under NRS 281A.020

NRS 281A.020 provides: “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.”

3. Disclosure Requirements under NRS 281A.420(1):

The ethics statutes provide standards on when to disclose. One example can be seen in NRS 281A.420(1) which provides in relevant part/portions: “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: ... (c) Which would reasonably be affected by the public officer's or employee's commitment in a private capacity to the interest of others,; ... without disclosing information concerning the ... 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 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...”.

4. Abstention Requirements – NRS 281A.420(3) and (4)

NRS 281A.420(3) and (4) detail the abstention requirements to be considered after a proper disclosure has been made by the public officer or employee. NRS 281A.420(3) mandates that a public officer shall not vote upon or otherwise participate on a matter when the independence of judgment of a reasonable person in the public officer's situation would be clearly and materially affected by the disclosed conflict. NRS 281A.420(4) (emphasis added).

V. COMMISSION DECISION

A. DISCLOSURE REQUIREMENTS – NRS 281A.420(1)

The disclosure requirements of NRS 281A.420(1) are raised every time a public officer's pecuniary interests or private commitments intersect with their public duties. NRS 281A.420(1) requires a proper disclosure when the public officer is carrying out their public duties to approve, disapprove, vote, abstain or otherwise act upon a matter: (a) regarding a gift or loan, (b) in which the public officer has a significant pecuniary interest, (c) which would reasonably be affected by the public officer's commitment in a private capacity to the interests of another person, or (d) which would be related to any

representation or counseling of a private person for compensation before another agency within the preceding year.

The Commission has held that the attorney-client relationship amounts to a substantial and continuing business relationship, which creates a disclosable commitment in a private capacity under NRS 281A.065(5). *In re Woodbury*, Comm'n Op. No. 16-40C (2016). In this case, Public Officer has a clear commitment in a private capacity to Public Officer's attorney, Private Attorney, and as such, Private Attorney's interests are imputed to Public Officer. See *In re Public Officer*, Comm'n Op. No. 13-71A (2014). Therefore, Public Officer is required to properly disclose Public Officer's commitment in a private capacity to Private Attorney each time Private Attorney represents a client on matters that come before the Board.

The Commission has also previously determined that a public officer's disclosure obligation extends to other attorneys within the same law firm as the attorney that represents the public officer in their private capacity. *In re Mack*, Comm'n Op. No. 03-40 (2004). Therefore, Public Officer has a commitment in a private capacity to Private Attorney's law firm and the Ethics Law requires Public Officer to make a disclosure when other attorneys from that law firm represent clients before the Board when actual knowledge exists.

Essential to this analysis is actual knowledge of the interest by the individual to which a public officer has a commitment in a private capacity. In the example of a substantial and continuing business relationship such as a lawyer or law firm, the public officer cannot be expected to know each and every client or attorney of their attorney's firm. In a situation such as Public Officer's, actual knowledge can be obtained in a variety of ways. Actual knowledge can occur if the lawyer presents specifically on an item, submits public comment on an item, or the public officer is otherwise informed by the lawyer or firm that they have an interest. The Commission has found that it was sufficient that a public officer's private firm client was listed in the materials to create actual knowledge triggering disclosure requirements. *In re Strickland*, Panel Determination, Case No. 20-018C (2022).

Public Officer's obligation to disclose under NRS 281A.420(1) regarding other clients or attorneys of Private Attorney's law firm is triggered in two instances:

- (1) where Public Officer has actual knowledge that Private Attorney's law firm represents an individual, entity or matter that comes before the Board, or
- (2) where Private Attorney or another attorney from Private Attorney's law firm appears before the Board on an item and Public Officer had actual knowledge the attorney is part of Private Attorney's firm. Public Officer is expected to know the name of Private Attorney's law firm.

Based on the facts presented in this opinion, Public Officer did not have actual knowledge of Private Attorney's interests in the proposed ordinance at the Board meeting at which it was initially considered and therefore, no disclosure or abstention obligations were triggered. However, Public Officer now does have actual knowledge of Private Attorney's interest in the matter and must conduct the appropriate disclosure and abstention analysis if the ordinance comes before the Board at another meeting.

Therefore, based upon NRS 281A.420 and previous holdings of this Commission, if Private Attorney or any other member of Private Attorney's firm appears

before the Board regarding the ordinance or any other matter, and Public Officer has actual knowledge the attorney is a member of the firm, Public Officer should make a disclosure. Public Officer should additionally disclose any time a client of Private Attorney appears in front of the Board if Public Officer has actual knowledge they are a client of Private Attorney or Private Attorney's firm.

Such disclosure is required even where the conflict is remote in some respects. In *In re Weber*, Comm'n Op. No. 09-47C (2012), 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.

In remote situations, abstention may not be required under the Ethics Law based upon application of the reasonable person standard to the situation and determination of materiality. However, the best course of action is for Public Officer to provide a sufficient disclosure as required by NRS 281A.420(1), and then ascertain the extent of the involved interests. See *In re Romero*, Comm'n Op. No. 19-059A (2019); *In re Weber*, Comm'n Op. No. 09-47C (2012). Importantly, the basic abstention standard under the Ethics Law is not whether Public Officer can be personally impartial, but whether the judgment of a reasonable person in a similar situation would be clearly and materially affected by the involved private interests or commitments.

Accordingly, if the same ordinance comes before the Board again, but neither Private Attorney nor a member of Private Attorney's firm appears before the Board regarding the ordinance, Public Officer should still provide a disclosure because Public Officer has actual knowledge that Private Attorney represents clients with an interest in the ordinance. A sufficient disclosure must at least identify that Public Officer has retained Private Attorney in Public Officer's private capacity, that Public Officer has a commitment in a private capacity to Private Attorney, that Private Attorney represents a group of individuals in negotiations with the Public Agency and that the group of individuals has an interest in the ordinance.

Public Officer is reminded that the Ethics Law does not recognize a continuing disclosure or a disclosure by reference. Public Officer is required to disclose Public Officer's commitment in a private capacity each time the Board is considering matters which may affect the interests of Private Attorney or Private Attorney's law firm. See *In re Public Officer*, Comm'n Op. No. 22-049A (2022), at p. 10. The purpose of disclosure is to provide sufficient information regarding the conflict of interest to inform the public of the nature and extent of the conflict and the potential effect of the action or abstention on the public officer's private interests and commitments. At a minimum, a disclosure should identify personal interests and private commitments, and the public should be informed whether an official matter has potential to be materially affected by these conflicts.

After making a sufficient disclosure, Public Officer must conduct the abstention analysis for the public, as required by the Ethics Law.

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B. ABSTENTION REQUIREMENTS – NRS 281A.420(3) and (4)

NRS 281A.420(3) and (4) detail the abstention requirements to be considered after a proper disclosure has been made by the public officer. NRS 281A.420(3) mandates that a public officer shall not vote upon or advocate the passage or failure of a matter with respect to which the independence of judgment of a reasonable person in the public officer's situation would be clearly and materially affected by the disclosed conflict.

NRS 281A.420(4)(a) creates a presumption against abstention in certain limited circumstances. After a proper disclosure is placed in the public record, the presumptions of participation become available to the public officer. The first presumption permits the public officer to participate if the matter would not result in any form of benefit or detriment accruing to the public officer, or persons/entities to whom the public officer has a private commitment, that is greater or less than that accruing to any other member of the general business profession, occupation or group that is affected by the matter. *In re Public Officer*, Comm'n Op. No. 23-006A (2023). Common examples of this concept include city council members voting on business license fees when they themselves own a business, but the action treats all businesses equally. *In re Public Officer*, Comm'n Op. No. 20-003A (2020).

This presumption permits Public Officer to participate if the item before the Board has no greater or lesser benefit or detriment to Public Officer or Private Attorney's clients than the general group so long as Public Officer has first properly made a complete disclosure.

In addition, if a public officer has properly disclosed pursuant to NRS 281A.420(1), the Commission is required to give appropriate weight and proper deference to the public policy which favors the right of a public officer to perform the duties for which the public officer was elected. NRS 281A.420(4)(b) notes the abstention requirements 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 their pecuniary interest or a commitment in a private capacity.

Under the facts and circumstances presented, the abstention statute would allow Public Officer's participation on an item pertaining to the ordinance after Public Officer made a proper disclosure pursuant to NRS 281A.420(1). Agenda items regarding the ordinance would not result in any form of benefit or detriment accruing to Private Attorney's clients that is greater or less than that accruing to any other Private Agency employees. See *In re Stork*, Comm'n Op. No. 17-01A (2017).

VI. CONCLUSIONS OF LAW

The public judges its government by the way public officers and employees conduct themselves in the posts to which they are elected or appointed. The people have a right to expect that every public officer and employee will conduct themselves in a manner that will preserve public confidence in and respect for the government they represent.

- A. Public Officer is a public officer as defined by NRS 281A.160.
- B. Pursuant to NRS 281A.675, the Commission has jurisdiction to render an advisory opinion in this matter and such opinion may include guidance from the Commission to Public Officer under NRS 281A.665.
- C. Public Officer has a commitment in a private capacity to Private Attorney, who

Public Officer has retained as an attorney in Public Officer's private capacity, pursuant to NRS 281A.065(5).

- D. Public Officer did not have actual knowledge of Private Attorney's interest in the ordinance at issue at the Board meeting and therefore no disclosure was required under NRS 281A.420(1).
- E. Now that Public Officer has actual knowledge of Private Attorney's interest in the ordinance, Public Officer is required under NRS 281A.420(1) to provide a proper disclosure and complete an abstention analysis under NRS 281A.420(3) and (4) at future meetings where this ordinance may be discussed.
- F. Pursuant to NRS 281A.420(1), prior to acting on a matter involving a client of Private Attorney or any attorney in Private Attorney's law firm, Public Officer should properly disclose the conflict as instructed in this opinion.
- G. Pursuant to NRS 281A.020, the Commission further advises Public Officer to take affirmative steps to avoid potential conflicts, which steps favor obtaining legal advice from the Board's official legal counsel in compliance with NRS 281A.790(5) to assist with preparing Public Officer's disclosure and abstention remarks that inform the public about the identified conflict, which could serve to provide Public Officer certain safe harbor protections under NRS 281A.790(5).

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.

Dated this 31st day of October, 2023.

NEVADA COMMISSION ON ETHICS

By: /s/ Kim Wallin
Kim Wallin, CPA, CMA, CFM
Chair

By: /s/ Teresa Lowry
Teresa Lowry, Esq.
Commissioner

By: /s/Thoran Towler
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