

The attached document was submitted to the **Washoe County Board of Commissioners** during the meeting

held on August 8, 2017

by Chair Bob Lucey

for Agenda Item No. 8

and included here pursuant to NRS 241.020(7) as

amended by AB65 of the 2013 Legislative Session.



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August 8, 2017

Commissioner Bob Lucey
1001 E. 9th Street
Reno, Nevada 89512

Re: Approval of Coordinator Agreement

Dear Commissioner Lucey:

Through an agreement entitled "The Agreement for VOCA Grant Victim Services Coordinator" your wife, Megan Lucey, is to serve as an independent contractor providing consulting services to the Washoe County Social Services Department ("Coordinator Agreement"). The Coordinator Agreement is dated June 29, 2017. This letter is written to provide an analysis of some of the laws and authorities that guide the approval of contracts involving public officials.

In the course of our legal analysis we have also communicated with several county officials about the Coordinator Agreement and they are mentioned below. We have also reviewed:

- Washoe County Request for Proposal (RFP # 3023-17) (Release Date: May 10, 2017)
- Megan Lucey's Proposal Submitted in Response to RFP #3023-17 (May 24, 2017)
- The Agreement for VOCA Grant Victim Services Coordinator (June 29, 2017).
- An email notice to prospective bidders dated May 11, 2017 to persons registered with the State of Nevada Purchasing Division.

The Process for Seeking a Consultant for the Coordinator Agreement.

The Washoe County Purchasing Division regularly arranges the purchase of goods and services and engages independent contractors. The Washoe County Social Services Department sought to hire an independent contractor with specialization in advocacy for victims of crime focusing on senior exploitation, victims of child abuse and child welfare legislation. Using the usual processes the Purchasing Division issued a request for proposals (RFP) and noted that knowledge of law surrounding vulnerable populations to include children, adults and seniors is required. (Washoe County RFP # 3023-17). The Purchasing Division released the RFP on May 10, 2017 with sealed proposals due May 24, 2017. The County used an internet based system called Demandstar (www.demandstar.com) to solicit and collect proposals. Potential bidders on

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county contracts can register with Demandstar (for a fee) to receive notice of certain types of contracting opportunities or use Demandstar's website to link back to the county's website which contains posting of contracting opportunities. Washoe County can also add to Demandstar the addresses of specific bidders for certain releases. Washoe County also sometimes sends direct notifications to potential bidders. For the Coordinator Agreement RFP, Washoe County sent an email notice to prospective bidders dated May 11, 2017 to persons registered with the State of Nevada Purchasing Division.

Megan Lucey submitted the only proposal pursuant to RFP #3023-17. Ms. Lucey's 8-page proposal was evaluated by the Purchasing Division and determined to meet the requirements of the solicitation. The proposal included a disclosure by Megan Lucey that Bob Lucey is her husband. The Purchasing Division consulted with the Social Services Department on the results of the solicitation and the evaluation. Social Services directed Purchasing to engage Ms. Lucey's services by signing a standard Washoe County professional services agreement entitled Agreement for VOCA Grant Victim Services Coordinator. That agreement provides that Ms. Lucey is an independent contractor who will provide certain services. The 1-year agreement (with possible extensions) provides for payment of up to \$95,000 through the payment of monthly installments after billing by the contractor. The funding of the agreement for the Coordinator Agreement is not on-going and instead comes from a grant given to the Social Services Department through the State of Nevada. Importantly, because the contract involves less than \$100,000, county rules allow its approval by the Purchasing and Contracts Manager and not approval by the County Commission.

Through conversations with you and County Manager John Slaughter, I verified that the process described above for the hiring of a consultant to work with Social Services was done without any involvement of the you or the County Manager. Social Services Director Amber Howell in consultation with Assistant County Manager Kevin Schiller and the Purchasing Division worked to hire a consultant for the Social Services Department. Neither Ms. Howell nor Mr. Schiller had any communications with you about the creation of the scope of work, the Purchasing Division process, the evaluations of the proposals or the recommendation to hire Ms. Lucey's services.

The General Requirements of the Ethics Laws.

The Nevada Ethics in Government Law (Ethics Law) provides that a public office is a public trust and shall be held for the sole benefit of the people. NRS 281A.020. The legislative findings and declarations of that law provide (paraphrasing):

- Public officers must commit themselves to avoiding conflicts between their private interests and those of the general public whom they serve. The potential for conflicts of interest is enlarged by the increasing complexity of state and local government which is more and more closely related to private life and enterprise.

- Adequate ethical guidelines aid appropriate separation between the private and public roles of public officers and enhance the people's faith in the integrity and impartiality of public officers.

State law provides for the election of county commissioners and they are public officers for the purposes of the Nevada Ethics in Government Law. NRS 281.010. The Ethics Law applies to you as a member (and current chairman) of the Washoe County Board of County Commissioners ("County Commission"). Megan Lucey is not a public officer and not subject to the Ethics Law. Megan Lucey is a licensed Nevada lawyer with over 10 years of experience in family law, children's rights, non-profit organizations and large corporations. (Megan Lucey's Proposal Submitted in Response to RFP #3023-17, May 24, 2017).

Conflict of Interest, Disclosure and Abstention.

A marital or domestic partnership creates what the Ethic Law calls a "commitment in a private capacity." NRS 281A.065¹. When a public officer has a commitment in a private capacity, certain duties and limitations are imposed upon the public officer's actions and legal relationships. In general terms, a public officer cannot approve, disapprove, vote, abstain from voting or otherwise act upon a matter without disclosing certain information concerning the matter that is sufficient to inform the public of the potential effect of the public officer's actions with regard to the matter. NRS 281A.420(1). The disclosure requirement applies when the public officer has:

- accepted a gift or loan associated with the matter
- a significant pecuniary interest in the matter; or
- a commitment in a private capacity to the interests of another person involved in the matter.

If the independence of judgment of a reasonable person in a public officer's situation would be materially affected by those listed factors—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—a public officer must not only disclose a conflict of interest, but must abstain from voting or advocating about a matter.

Professional services contracts are not adapted to award by competitive bidding which is used for many local government contracts. NRS 332.115. Professional services contracts are

¹ 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.

awarded based on qualifications and not on the basis of price alone. The Coordinator Agreement was properly treated as a professional services agreement and not awarded to the lowest bidder pursuant to a strict competitive bidding process. Pursuant to the direction of the County Commission professional services contracts which involve the payment to the contractor of more than \$100,000 must be approved by the County Commission and contracts involving less than that amount can be approved by other officials including the Purchasing and Contracts Manager. The compensation to the contractor under the Coordinator Agreement does not exceed the \$100,000 threshold and did not require Commission approval. The Coordinator Agreement was signed for Washoe County by the Purchasing and Contracts Manager and by Ms. Lucey.

You were not in a position to approve (or disapprove) the Coordinator Agreement. Therefore, the statute which would usually require you, prior to voting, to disclose the Coordinator Agreement—a matter potentially involving your significant pecuniary interest and your commitment in the private capacity to the interests of your wife—was not triggered. Also, the statute requiring you to abstain from a matter involving your significant pecuniary interest or private commitments with respect to which your independence of judgment would be materially affected, was similarly not invoked. You did not make a decision (as defined in NRS 281A.080) regarding the Coordinator Agreement and were therefore not placed in a position of having a conflict of interest. If there is an Ethics Law issue with Ms. Lucey's contract with Washoe County it is a structural problem based solely on your public officer position and not your actions.

Contracts Between a Public Officer and a Public Agency.

Some of a public officer's ethical constraints arise merely because he or she holds a public office. One of the most restrictive is the statute that provides a public officer cannot enter into a contract with the public agency the public officer serves. NRS 281A.430(1) provides, with exceptions not applicable here: "a public officer or employee shall not bid on or enter into a contract between an agency and any business entity in which the public officer or employee has a significant pecuniary interest." The general prohibition of NRS 281A.430(1) would clearly bar a contract between you and Washoe County. Whether that statute bars Megan's Coordinator Agreement depends on whether that contract can be construed to be a contract between Washoe County and "any business entity in which [Commission Lucey] has a significant pecuniary interest."

There is a difference between the language of the general ethics laws and a statute that applies only to state officers. NRS 281.211 prohibits a state officer (who is not a legislator) from becoming a contractor for supplies or any other contract involving the state "or to be interested, directly or indirectly, as principal, in any kind of contract so authorized." (emphasis added.) The prohibited contracts provisions that apply to all public officers are not limited to contracts with the principals of private entities with whom the public officer has a relationship. The Legislature is presumed to know the meaning of the words it uses and under the rules of statutory construction, when the Legislature uses a term in one statute, but not another, the different word choice is presumed to be deliberate. That may mean that the prohibited contracts statutes that apply to all public officers (which we are analyzing here) prohibit more arrangements than the statute that applies uniquely to state officers. A Nevada Attorney General's opinion concluded that a principal

(under NRS 281.211) is more than just an employee or even a high-ranking employee, but is a person who has controlling authority or is in a leading position like a chief or head man or woman. A member of a state board was not a principal in a private company and held a very small ownership interest in the company proposing a contract with the State. 2010 Nev. Op. Att'y Gen. No. 19 (Nov. 18, 2010).

Megan Lucey is a licensed Nevada lawyer and has a contract with Washoe County as Megan Lucey, Esq. In her proposal to Washoe County, Ms. Lucey is the only person named and is the principal. You are not a principal of Ms. Lucey's business entity and cannot be a partner with or member of a company or corporation through which Ms. Lucey practices law and therefore you does not have a direct ownership interest in your wife's business. But that is not the end of the inquiry because the statute's prohibitions are broader. It also applies if, despite the absence of a direct ownership interest, you have a pecuniary interest in the contract. It is probable that the fees your wife earns under the Coordinator Agreement constitute a pecuniary interest the contract. An examination of the statute defining pecuniary interest and some opinions interpreting ethical standards is required.

NRS 281A.139 provides:

"Pecuniary interest" means any beneficial or detrimental interest in a matter that consists of or is measured in money or is otherwise related to money, including, without limitation:

1. Anything of economic value; and
2. Payments or other money which a person is owed or otherwise entitled to by virtue of any statute, regulation, code, ordinance or contract or other agreement.

In a community property state, like Nevada, the earnings of a married person are presumptively community property. NRS 123.220. Megan Lucey's compensation under the Coordinator Agreement provides something of economic value to you. As such, that compensation is likely to be viewed by the Nevada Commission on Ethics or a Nevada court as a pecuniary interest of for you. Below is a digest of other state court decisions considering whether a public officer has an ethical problem stemming from a contract involving the public officer's spouse.

- Contracts Prohibited

- Elected member of a state commission and his wife were subject to a community property law, and payments from state contractor to a subcontractor in which member's wife held a significant ownership interest violated codes prohibiting payments to public servants or entities in which they own an interest. *Louisiana Bd. of Ethic in re Great Southern Dredging, Inc.*, 195 So.3d 631 (La. Ct of Ap, 1st Cir.) (2016).
- Award of state printing contract to firm owned by spouse of legislator is barred by constitutional provision prohibiting state legislators and officers from having any interest in legislative printing contracts. *Jarrett Printing Co. v. Riley*, 188 W. Va. 393, 394, 424 S.E.2d 738, 739 (1992).

- Elected county commissioners were removed from office for voting on a county budget that included salary increases for their wives who were county employees in violation of state law which barred county commissioners from becoming pecuniarily interested, directly or indirectly, in a contract over which he may have influence or control. *Serge v. Matney*, 165 W. Va. 801, 803, 273 S.E.2d 818, 819 (1980).
- Spouse of school board superintendent's executive secretary was statutorily prohibited from entering into contract with school board for installation of fuel storage tanks even though he was lowest sealed competitive bidder and the lowest priced contract would have benefited the district. *Gravois v. State, Through Dept. of State Civil Serv., Comm'n on Ethics for Pub. Employees*, 517 So. 2d 423, 427 (La. Ct. App. 1987), writ denied, 88-C-0168, 1988 WL 13729 (La. 1988).
- Contracts Not Prohibited
 - Interest of public officer's wife in contract is not necessarily the officer's interest so as to disqualify officer from executing contract in his official capacity, providing contract is not mere subterfuge for officer's own pecuniary interest and the disqualifying interest must be certain, definable, pecuniary, or proprietary. *People v. Simpkins*, 359 N.E.2d 828, 829 (Ill. Ct Ap, 5th Dist.) (1977).
 - State senator who voted for appropriations of public money to buy supplies and who also owned janitorial supply business in partnership with his wife did not violate state laws by contracting to supply state with products having submitted a low bid in competition with other bidders resulting in an arm's length transaction and when the state's purchasing decision was not influenced nor governed by senator's public office. *Brockbank v. Rampton*, 22 Utah 2d 19, 20, 447 P.2d 376, 377 (1968).
 - An assistant school nurse and wife of school board member is not barred from employment because indirect benefit received by school board member from his wife's employment did not constitute pecuniary interest and was not violative of statute prohibiting board member from participating in making of contract with person as teacher or instructor in public school in any matter in which he is pecuniarily interested. *Scherer v. Rock Hill Local School Dist. Bd. of Edn.*, 63 Ohio App.3d 555 (Ohio Ct of Appeals, 4th Dist) (1990).

The Nevada Commission on Ethics has rendered opinions on ethical matters involving family members of public officers. These opinions all involve the conflict of interest statute and not the prohibited contracts statutes. Nonetheless, they are helpful in guiding ethical decisions when a family member of a public officer is involved in a matter.

- A state employee and member of a state commission wanted to serve for no compensation on an advisory board which advised a private company in which the public officer's spouse and children owned stock. That family relationship required disclosure and abstention from votes as a public officer. CEO 99-20 (11-30-1999).
- The son of a county commissioner was an employee of a law firm that appeared in front of county commission. Before those appearances, the county commissioner had to disclose the relationship and sufficient information about his commitment to his son to inform the public about the potential effect of his action as a public officer. In re Woodbury, CEO 99-56 (12-22-1999).
- A public officer's family members and others with whom the public officer has a private commitment must accept hardships that result from the public officer's duty to follow ethical requirements. Hardships on family and others do not outweigh the public officer's duties under law. In re Woodbury, CEO 99-56 (12-22-1999).
- A commissioner must disclose his relationship with and decide case-by-case whether to abstain from voting on matters involving organizations that he has assisted and for which his wife has served as an officer when those organizations have matters in front of the commission. CEO 99-60 (2-25-2000).
- The brother of a state regulatory commissioner was employee of a parent company of a business that regularly has matters in front of the commission. The commissioner was required to disclose the relationship and sufficient information about his commitment to brother to inform the public about the potential effect of his action as a public officer and decide case-by-case whether to abstain. CEO 99-63 (2-25-2000).
- The former wife of a state commissioner was employed in the administrative division of an agency that appeared in front of the commission. The commissioner did not have a pecuniary interest or private commitment related to his former wife whom he divorced 15 years prior to service on the commission when they had no on-going financial interests or obligations to each other. In re Hoefler, CEO 03-05 (7-1-2003).
- A school board trustee was required to disclose and abstain from voting on a collective bargaining agreement of a bargaining unit that included the trustee's wife. In re Louritt & Roman, CEO 03-43 & 03-44 (1-22-2004).
- The member of a town board should disclose and abstain from voting on contract of firefighter association of which her husband was a member and who also served on the negotiating team. The town board member should also not participate in confidential labor meetings involving her husband's employee association. In re Murray, CEO 06-03 (10-20-2006).

A challenge under the Nevada Ethics Law to the actions of a member of the Sparks City Council reached the U.S. Supreme Court on issues involving First Amendment protected speech. *Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 131 S.Ct. 2343, 180 L.Ed.2d 150 (2011). The councilman was challenging the application of Nevada's conflict of interest statute (NRS 281A.420) to his vote on a Sparks casino project represented by a paid lobbyist who was also serving as the manager of the councilman's election campaign. The U.S. Supreme Court decided the Nevada conflict of interest statute was valid and not overbroad. The case was returned to the Nevada Supreme Court which had to consider different challenges to the conflict of interest statute, and ultimately concluded the conflict of interest statute required the councilman's recusal because of the relationship to his campaign manager. In dicta, the Nevada Supreme Court noted: "If Carrigan's wife were a lawyer whom the Lazy 8 hired for \$10,000 per month to advocate for it before the Sparks City Council, Carrigan would have had to recuse." "His 'commitment in a private capacity' to her private, pecuniary interests would be disqualifying." *Carrigan*, 129 Nev. Adv. Op. 95, 313 P.3d 880, 887 (2013). The conflict of interest statute at issue in the Carrigan case is not implicated in the Coordinator Agreement matter. However, the court's observation that Carrigan's wife would have a disqualifying pecuniary interest if she were the casino's lawyer may foreshadow how the court would come down on the question whether Bob Lucey has a pecuniary interest in Megan Lucey's contract.

The opinions and court decisions addressing contractual relationships between a public agency and a close family member of a public officer are mixed. But when considered together those authorities appear to say that the closer the familial relationship and the greater the public officer's economic benefit from the contract, the more likely that the contract is prohibited. Application of cases and opinion to circumstances surrounding the Coordinator Agreement point to a potential bar. The compensation under the Coordinator Agreement is contributing up to \$95,000 a year to the commissioner's household income. Those facts appear to be more in line with the opinions and decisions that find a prohibited contract.

Approval of Sole Source Contracts with County Commissioners.

A relatively recent amendment to the prohibited contracts statute may allow for the approval of the Coordinator Agreement. In 2013 a new paragraph was added that applies uniquely to county commissioners and members of city councils. A member of a local legislative body (like a board of county commissioners) "shall not, either individually or through any business entity in which the member has a significant pecuniary interest, sell goods or services to the local agency governed by his or her local legislative body" unless four conditions are all satisfied. NRS 281A.430(5). The conditions are:

- (a) The member, or the business entity in which the member has a significant pecuniary interest, offers the *sole source of supply of the goods or services* within the territorial jurisdiction of the local agency governed by his or her local legislative body;
- (b) The local legislative body includes in the public notice and agenda for the meeting at which it will consider the purchase of such goods or services a *clear and conspicuous statement that it is considering purchasing such goods or services from one*

of its members, or from a business entity in which the member has a significant pecuniary interest;

(c) At the meeting, *the member discloses his or her significant pecuniary interest* in the purchase of such goods or services and *does not vote upon or advocate the approval* of the matter pursuant to the requirements of NRS 281A.420; and

(d) The *local legislative body approves* the purchase of such goods or services in accordance with all other applicable provisions of law.

(emphasis added.) The Coordinator Agreement was not presented to the Board of County Commissioners for approval because its value is within the range authorized to be approved by the Purchasing and Contracts Manager. However, NRS 281A.420(5) allows contracts for the provision of services by a county commissioner or a business in which the commissioner has a significant pecuniary interest to be approved by a county commission without imposing any limit on the value of the contract. If the County Commission considered and approved the Coordinator Agreement by satisfying the 4 conditions above, it would be within the law.

Two other statutes² which provide that it is unlawful for any county officer, directly or indirectly, to be interested in any contract made by the county officer in the discharge of his or her official duties contain specific exceptions for NRS 281A.430. If the NRS 281A.430(5) process results in the approval of the Coordinator Agreement, those 2 statutes would not apply.

Conclusion.

The prohibited contracts statute appears to apply to the Coordinator Agreement because of the likelihood that you have a pecuniary interest in it. The Coordinator Agreement would not be barred if the County Commission approves it under NRS 281A.430(5) without your participation and if the Commission finds Ms. Lucey is the sole source for the agreement. In my opinion, a reasonable person serving as a county commissioner and who was in a position to act on the

² NRS 245.075 County officer not to be interested in certain contracts or purchases; penalties.

1. Except as otherwise provided in NRS 281.230, 281A.430 and 332.800, it is unlawful for any county officer, directly or indirectly, to be interested in any contract made by the county officer or to be a purchaser or interested in any purchase of a sale made by the county officer in the discharge of his or her official duties.

2. Any contract made in violation of this section may be declared void at the instance of the county interested or of any other person interested in the contract except the officer prohibited from making or being interested in the contract.

3. Any person who violates this section is guilty of a gross misdemeanor and shall forfeit his or her office.

NRS 332.800 Interest of member of governing body or evaluator in contract prohibited; exception; penalty.

1. Except as otherwise provided in NRS 281.230 and 281A.430, a member of the governing body may not be interested, directly or indirectly, in any contract entered into by the governing body, but the governing body may purchase supplies, not to exceed \$1,500 in the aggregate in any 1 calendar month, from a member of such governing body when not to do so would be of great inconvenience due to a lack of any other local source.

2. An evaluator may not be interested, directly or indirectly, in any contract awarded by such governing body or its authorized representative.

3. A member of a governing body who furnishes supplies in the manner permitted by subsection 1 may not vote on the allowance of the claim for such supplies.

4. A person who violates this section is guilty of a misdemeanor and, in the case of a member of a governing body, a violation is cause for removal from office.

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Coordinator Agreement matter would be affected by personal relationships you have with your wife and the pecuniary interest you have in her earnings. I advise you that under NRS 281A.420 you must disclose your interests and abstain from voting or advocating for or against the approval of the Coordinator Agreement.

Sincerely,

CHRISTOPHER J. HICKS
WASHOE COUNTY DISTRICT ATTORNEY

By 
PAUL A. LIPPARELLI
ASSISTANT DISTRICT ATTORNEY