



# LEGISLATORS' VOTES NOT PROTECTED SPEECH: NEVADA GAINS SCOTUS CLARIFICATION OF ETHICS STATUTES AND THE FIRST AMENDMENT

BY CAREN CAFFERATA-JENKINS, ESQ.

In July 2011, a unanimous Supreme Court of the United States held that legislative voting and arguments made during legislative debate are not free speech protected by the First Amendment to the U.S. Constitution. In *Nevada Commission on Ethics v. Carrigan*,<sup>1</sup> Justice Antonin Scalia, writing on behalf of the court, noted that laws requiring public officers to abstain from voting on issues in which they have a private or personal interest have been in place in the U.S. since 1789. In 222 years, those restrictions never received a constitutional sanction. Yet, in that time, nearly every federal, state and local deliberative body adopted or subscribed to some type of abstention or recusal requirement to address conflicts of interest.

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This excerpt from the opinion sums up the issue:

The First Amendment prohibits laws “abridging the freedom of speech,” which, “as a general matter ... means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Ashcroft v. American Civil Liberties Union*, 535 U. S. 564, 573 (2002) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U. S. 60, 65 (1983)). But the Amendment has no application when what is restricted is not protected speech. See, e.g., *Roth v. United States*, 354 U. S. 476, 483 (1957) (obscenity not protected speech). The Nevada Supreme Court thought a legislator’s vote to be protected speech because voting “is a core legislative function.” 126 Nev., at \_\_\_, 236 P. 3d, at 621 (internal quotation marks omitted).

We disagree, for the same reason.

In the landmark *Carrigan* opinion, the court held that the acts of voting and debating in a legislative environment are not speech rights personal to the legislator. Rather, they belong to the people. Therefore, the court reasoned, the First Amendment does not impede restrictions on the right to vote in a legislative capacity. As a result, requirements like those in Nevada’s Ethics in Government Law are permissible not only to restrict a legislator’s vote by requiring abstention, but also to prohibit the legislator from advocating the passage or failure of a matter affecting the legislator’s personal interest or the interests of others to whom the legislator has a commitment in a private capacity.

The court noted that voting on issues in which a legislator has an interest may put a cloud on the legislator’s impartiality. That “cloud” can impede one of the core missions of the Nevada Commission on Ethics – to enhance the people’s faith in the integrity and impartiality of public officers and employees.<sup>2</sup> The Nevada Legislature declared that “a public office is a public trust and shall be held for the sole benefit of the people.”<sup>3</sup> Further, the statutes require public officers to commit to avoid conflicts between their private interests and those of the general public, whom they serve.<sup>4</sup>

To further this policy, Chapter 281A of the Nevada Revised Statutes (Ethics in Government) prohibits public officers from approving, disapproving, voting, abstaining from voting or otherwise acting upon a matter in which they have a conflict without first making the appropriate disclosures. A conflict exists if the independent judgment of a reasonable person in the public officer’s situation would be materially affected by their acceptance of a gift or loan, their pecuniary interest, or their commitment in a private capacity to the interest of others.<sup>5</sup>

NRS 281A.420(8)(a) is central to the *Carrigan* litigation.

8. As used in this section:

- (a) “Commitment in a private capacity to the interests of others” means a commitment to a person:
  - (1) Who is a member of the public officer’s or employee’s household;
  - (2) Who is related to the public officer or employee by blood, adoption or marriage within the third degree of consanguinity or affinity;
  - (3) Who employs the public officer or employee or a member of the public officer’s or employee’s household;
  - (4) With whom the public officer or employee has a substantial and continuing business relationship; or
  - (5) Any other commitment or relationship that is substantially similar to a commitment or relationship described in subparagraphs (1) to (4), inclusive, of this paragraph.

The first four relationships outlined in the statute seem intuitive, as the independence of judgment of a reasonable person would likely be materially affected by the interests of a household member, a member of the person’s extended nuclear family, his or her employer or a person with whom regular business is conducted. However, the fifth component includes those relationships substantially similar to the four enumerated categories, and, in many instances, they are just as intuitive.

For example, Nevada’s domestic partners are not legally related by blood or marriage, but are in relationships which, for purposes of conflicts of interest at the least, are substantially similar to a family relationship within the third degree. Seen in another light, registered domestic partners in Nevada may be more substantially similar to a substantial and continuing business relationship – having registered with the Secretary of State’s office and being processed in a manner similar to the formation of an LLC.

The Nevada Commission on Ethics found that Carrigan violated the Ethics law in 2006 by failing to abstain from voting on an issue that his long-time friend, political advisor and campaign manager had been hired to advocate.

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The commission held, inter alia, that Carrigan's relationship to that individual was similar to a substantial and continuing business relationship, and that he had failed to adhere to the statutory abstention requirement.<sup>6</sup> However, because he had sought the assistance of the city attorney and followed that attorney's advice, among other reasons, the commission found the violation to be non-willful, and imposed no financial sanction.

The Commission on Ethics makes a variety of resources available to public officers and public employees seeking guidance on complying with NRS 281A. The commission offers its formal process for seeking a confidential first-party opinion. Former commission opinions are searchable, free of charge, on the commission's website: [www.ethics.nv.gov](http://www.ethics.nv.gov) and on the Official Nevada Law Library CD, by subscription, available through the Legislative Counsel Bureau's Legal Division. The commission's office fields calls daily regarding aspects of NRS Chapter 281A, and although the staff will not provide legal advice or forecast the outcome of the

commission's advice on a matter, the agency often is able to direct the requester to one or more relevant commission opinions or sections of statute that may be instructive. Training classes, manuals, brochures and other commission outreach efforts further the commission's desire to assist and support elected and appointed public officers who often serve their communities without substantial compensation, guidance or resources to foresee pitfalls related to the Ethics in Government Laws. But ignorance of the law is no excuse, and pursuing a bit of education and asking for help can steer a public officer clear of many potential violations.

The *Carrigan* case is instructive for public lawyers and others who work with, serve on or appear before public bodies. First, the U.S. Supreme Court decision clarified the protected status, or lack thereof, of a legislator's vote and gave constitutional approval to the imposition of conflicts-

based abstention requirements. Additionally, it illuminated the so-called "safe harbor" provision of Nevada's Ethics in Government Law found in NRS 281A.480(5).<sup>7</sup> If a public officer is unable to obtain the Ethics Commission's advice in advance of undertaking conduct or participating in a vote,<sup>8</sup> in certain narrow circumstances when that person seeks and follows the advice of counsel – even erroneous advice – the public officer is shielded from having any resulting ethics violation deemed willful. Finally, *Carrigan* illustrates that a matter is never over until it is over.

The high court remanded *Carrigan* to the Nevada Supreme Court for entry of a determination not inconsistent with the U.S. Supreme Court's holding. The parties offered additional briefing and delivered oral argument on March 5, 2012, in Carson City. They now await the Nevada Supreme Court's opinion on the remaining outstanding issues.

The Supreme Court of the United States' First Amendment clarification will live on among Nevada's contributions to the application and interpretation of the Constitution of



the United States. And we may all add that to the list of things that make us proud to live and work in the great state of Nevada. ■



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- 1 *Nevada Commission on Ethics v. Carrigan*, 131 S.Ct. 2243, 180 L.Ed. 2d 150 (2011).
- 2 See NRS 281A.020(2)(a).
- 3 NRS 281A.020(1)(a).
- 4 NRS 281A.020(1)(b).
- 5 NRS 281A.420(1) and (3).
- 6 The statute in effect at that time was amended to require abstention only in a clear case where the independence of judgment of a reasonable person would be materially affected by the conflict. See NRS 281A.420(1) and (3).
- 7 NRS 281A.480(5) provides: An action taken by a public officer or employee or former public officer or employee relating to this chapter is not a willful violation of a provision of those sections if the public officer or employee establishes by sufficient evidence that the public officer or employee satisfied all of the following requirements:
  - (a) The public officer or employee relied in good faith upon the advice of the legal counsel retained by the public body which the public officer represents or by the employer of the public employee or upon the manual published by the Commission pursuant to NRS 281A.290;
  - (b) The public officer or employee was unable, through no fault of the public officer or employee, to obtain an opinion from the Commission before the action was taken; and
  - (c) The public officer or employee took action that was not contrary to a prior published opinion issued by the Commission.
- 8 NRS 281A.440 and NRS 281A.460 provide that any public officer or public employee may seek binding confidential advice from the Commission regarding his or her past, present or future conduct.