STATE OF NEVADA

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January 7, 2014

OPINION NO. 2014-01

NEVADA JUNIOR LIVESTOCK SHOW BOARD; SCHOLARSHIPS; INVESTMENT: The Nevada Junior Livestock Show Board may encourage donations to a private nonprofit entity, such as Nevada Agricultural Foundation, for administration and investment.

Matt McKinney, President
Nevada Junior Livestock Show Board
P.O. Box 8026
Reno, Nevada 89507

Dear Mr. McKinney:

You have requested an opinion from the Office of the Attorney General concerning the authority of the Nevada Junior Livestock Show Board (NJLSB) to transfer, to the Nevada Agricultural Foundation (NAF), funds donated to NJLSB for scholarships or other educational assistance to show participants. Funds so transferred would be treated by NAF as a donation to be held by NAF as a conditional endowment. NAF would invest and administer such funds, but NJLSB would continue to select scholarship recipients, and indicate amounts and duration of the awards. NJLSB may also encourage future donations be made to NAF or other similar nonprofit entities for scholarships in support of the Livestock Show.

QUESTION ONE

May NJLSB transfer funds donated to it for scholarships and other educational assistance to NAF for administration and investment?

ANALYSIS

NJLSB is created within the Nevada Department of Agriculture and tasked to "have possession and care of all property of the Nevada Junior Livestock Show and the Nevada Youth Livestock and Dairy Show and . . . [is] entrusted with the direction of the entire business and financial affairs of these exhibitions." NRS 563.010 and 563.080.

NJLSB has received donations and currently holds funds in excess of $200,000 exclusively for educational scholarships for persons who exhibit livestock at the annual show (the Livestock Show). Although NJLSB's statute does not expressly authorize it to receive scholarship donations, it is considered an essential and established function of the Livestock Show. Accounts set up to hold such donations have been managed by NJLSB outside the state's accounting system, a fact which was the subject of testimony before a committee of the 2011 Nevada State Legislature. *Hearing on A.B. 515 Before the Assembly Committee on Ways and Means*, 2011 Leg., 76th Sess. 10-11 (April 22, 2011).

Insofar as NJLSB has been entrusted with scholarship funds, NJLSB is subject to the Uniform Prudent Management of Institutional Funds Act (UPMIFA), NRS 164.640–.680. UPMIFA applies to a government agency "to the extent that it holds funds exclusively for a charitable purpose." NRS 164.653(2). With certain exceptions not applicable here, a fund held by an institution exclusively for a charitable purpose is an "institutional fund." NRS 164.655. "A charitable purpose" includes educational advancement. NRS 164.645.

Under the foregoing, NJLSB's management and investment of its institutional fund is subject to UPMIFA. Specifically, UPMIFA sets certain standards for management and investment (NRS 164.665). Further, NRS 164.670 sets forth the authority for the NJLSB to delegate to another entity the management and investment of the investment fund:

> 1. Subject to any specific limitation set forth in a gift instrument or in law other than NRS 164.640 to 164.680, inclusive, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with

> the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:
> (a) Selecting an agent;
> (b) Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and
> (c) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.
> 2. In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.
> 3. An institution that complies with subsection 1 is not liable for the decisions or actions of an agent to which the function was delegated.
> 4. By accepting delegation of a management or investment function from an institution that is subject to the laws of this State, an agent submits to the jurisdiction of the courts of this State in all proceedings arising from or related to the delegation or the performance of the delegated function.
> 5. An institution may delegate management and investment functions to its committees, officers or employees as authorized by law of this State other than NRS 164.640 to 164.680, inclusive.

NJLSB, a state agency, has only such powers as are authorized by the State Legislature. *Clark Cnty Sch. Dist. v. Clark Cnty Classroom Teachers Ass'n*, 115 Nev. 98, 103, 977 P.2d 1008, 1011 (1999). A legislative grant of authority to an agency may be either express or implicit. *State, Dept. of Commerce, Div. of Ins. v. Interocean Risk Sys. Inc.*, 109 Nev. 710, 713, 857 P.2d 3, 5 (1993). "Any enlargement of express powers by implication must be fairly drawn and fairly evident from agency objectives and powers expressly given by the legislature." *Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada ex rel. Cnty of Clark*, 120 Nev. 948, 956, 102 P.3d 578, 584 (2004).

In adopting the UPMIFA, which, as noted above, applies to government agencies to the extent they hold charitable funds, the legislature has expressly granted authority for Nevada government agencies to transfer and invest charitable funds as allowed by NRS 164.670. Thus, NJLSB, an entity holding charitable funds, may transfer such funds to NAF or a similar entity for management and investment.

CONCLUSION

Subject to specific limitations in the gifts themselves, NJLSB may delegate to an external agent the management and investment of funds donated to it to the extent that NJLSB could prudently delegate under the circumstances. NJLSB shall act in good faith, with the care that an ordinarily prudent person would exercise under similar circumstances, and subject to the other particular requirements set forth in NRS 164.670.

QUESTION TWO

If a nonprofit entity, such as NAF, establishes its own scholarship fund for receiving future donations from third parties for the benefit of the Livestock Show, may NJLSB encourage future donations to that scholarship fund?

ANALYSIS

As discussed above, NJLSB currently holds funds donated by third parties for the Livestock Show and may choose to delegate management and investment of those funds. Further, NJLSB would like to explore the option of encouraging future donations to be made directly to a separate nonprofit institution, with the Livestock Show as the named beneficiary.

As noted in response to question one, NJLSB, a state agency, has only such powers as are authorized by the State Legislature. The authority to receive donations of scholarship funds in support of the Livestock Show is not expressly stated in NJLSB's statutes, but rather comes within the general grant of authority found in NRS 563.080(1), which states, "The Board shall have possession and care of all property of the Nevada Junior Livestock Show and the Nevada Youth Livestock and Dairy Show and shall be entrusted with the direction of the entire business and financial affairs of these exhibitions."

The broad authority of NJLSB under NRS 563.080(1), which entrusts it with the "direction of the entire business and financial affairs of the shows," would also allow it to encourage private support for the shows through the vehicle of donations to a private nonprofit entity for the benefit of the show, through scholarships.

Support for this authority is further found in the legislative history of Assembly Bill 515 (2011):

> ASSEMBLY BILL 515 (1st Reprint): Revises certain provisions governing the Nevada Junior Livestock Show

> Board. (BDR 50-1208)
>
> JIM R. BARBEE (Acting Director, State Department of Agriculture): Assembly Bill 515 is a cleanup measure in our budget accounts. *The intent is to remove the General Fund budget for the Nevada Junior Livestock Show Board (NJLS) account and allow them to utilize a separate nonprofit organization 501(c)(3) of the Internal Revenue Code filing allowing them to receive community support to fund that activity.* In addition, certain language relative to the Board is being cleaned up. The NJLS Board is also in support of this legislation.

Hearing on A.B. 515 before the Senate Committee on Finance, 2011 Leg., 76th Sess. 8 (June 3, 2011) (emphasis added).

> Mr. Barbee said it was important to note that some of the outside accounts that had been identified were for scholarship memorials and purposes along those lines. It seemed impractical to bring those outside accounts into the state accounting system. Based upon discussions with the Budget Division, the Livestock Show Board members, and the Nevada Department of Agriculture, they had agreed to eliminate budget account (BA) 4980 and *allow the use of outside accounts and community support to fund the Livestock Show*. Mr. Barbee maintained this action would simplify agriculture budgets for the Budget Division and the agency as well as providing the Livestock Show a better opportunity to facilitate fundraising.

Hearing on A.B. 515 before the Assembly Committee on Ways and Means, 2011 Leg., 76th Sess. 10–11 (April 22, 2011) (emphasis added).

CONCLUSION

NJLSB may encourage donations to a private nonprofit entity, such as NAF, for scholarship donations for the benefit of the Livestock Show.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
DENNIS L. BELCOURT
Deputy Attorney General
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DLB/SLG

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February 19, 2014

OPINION NO. 2014-02

POLICE; PRIVACY AND SECURITY; SAFETY; STATUTES; WIRETAPPING: Nevada law does not prohibit the monitoring of oral statements in barricade or hostage situations so long as the suspects and hostages have no reasonable expectation of privacy in those statements. Because suspects who have erected a barricade or taken a hostage to avoid arrest create a potentially deadly crisis that warrants an extraordinary response from law enforcement they generally have no reasonable expectation of privacy in oral statements made during the duration of the crisis.

Steven B. Wolfson
Clark County District Attorney
Regional Justice Center
200 Lewis Ave.
P.O. Box 552212
Las Vegas, NV 89155-2212

District Attorney Wolfson:

In a letter dated December 9, 2013, you requested an opinion from the Office of the Attorney General (Office) concerning the lawfulness of surreptitious police monitoring of oral statements made by persons involved in a barricade or hostage

situation. This Office is informed that the following circumstances are relevant to the request.

BACKGROUND

A barricade situation arises when a person, intent on evading arrest, takes up a defensive position wherein he or she is armed with a gun, explosive, or other weapon capable of harming others, or is believed to be so armed; and presents a potentially deadly hazard to arresting officers. A hostage situation arises when a person holds another against his or her will.

When confronted with a barricade or hostage situation, the usual police response in Clark County is to call in tactical units, including a special weapons and tactical (SWAT) unit and crisis negotiator, in an attempt to resolve the situation in a manner that ensures the safety of any hostages, suspects, members of the public, and police personnel. The tactical unit is trained to surround the suspect's defensive position and to evacuate any persons within harm's way. Once the suspect's defensive position is surrounded and secured, police attempt to make contact with the suspect and negotiate his or her safe surrender and the release of any hostages.

To facilitate negotiations with the suspect, the tactical unit may provide the suspect with a wireless "rescue" or "throw phone." In addition to facilitating communication with the suspect, such phones have the capability to record sounds within the proximity of the device, including the oral statements of suspects or hostages, and to wirelessly transmit these sounds back to the tactical unit in real time. In addition to rescue phones, the tactical unit may deploy other devices or probes that, once placed on or within the suspect's defensive position, allow the unit to surreptitiously monitor the oral statements of the suspect and any hostages within the range of the device. As a matter of course, the tactical unit also seeks a telephonic search warrant to intercept any wire communications originating from the defensive position.

The monitoring of oral statements during a barricade or hostage situation may provide the tactical unit with information crucial to the unit's goal of preserving human life such as how many suspects and hostages are involved, the location of the suspects and hostages within the defensive position, the plan or intentions of the suspects, and when to abandon negotiations and make a tactical entry.

QUESTION

Does Nevada law prohibit law enforcement officers from engaging in the surreptitious interception or monitoring of the oral statements of suspects and hostages during a barricade or hostage situation?

ANALYSIS

The short answer to your question is that Nevada law does not prohibit the monitoring of oral statements in barricade or hostage situations so long as the suspects and hostages have no reasonable expectation of privacy in those statements. While Nevada law generally prohibits the surreptitious monitoring of "private conversations" without the authorization of at least one party to the conversation, an exception exists where the person being monitored has no reasonable expectation of privacy in his or her oral statements. Because suspects who have erected a barricade or taken a hostage to avoid arrest create a potentially deadly crisis that warrants an extraordinary response from law enforcement, they generally have no reasonable expectation of privacy in oral statements made during the duration of the crisis.

A. While Nevada Law Generally Prohibits Interception Of Wire Communications And Private Conversations, An Exception Exists For Oral Statements That Do Not Meet The Statutory Definitions Of Either A "Wire Communication" Or An "Oral Communication."

Nevada statutes generally prohibit the interception of wire communications and private conversations without the consent of at least one of the parties to the conversation. NRS 200.620 prohibits the interception of wire communications. A "wire communication" is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by wire, cable, or other similar connection between points of origin and reception of such transmission . . . ." NRS 200.610(2).

The surreptitious interception of private conversations is prohibited by NRS 200.650 as follows:

> Except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195, a person shall not intrude upon the privacy of other persons by surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record, by means of any mechanical, electronic or other listening device, any private conversation engaged in by the other persons, or disclose the existence, content, substance, purport, effect or meaning of any conversation so listened to, monitored or recorded, unless authorized to do so by one of the persons engaging in the conversation.

The term "private conversation" as used in the statute is not expressly defined, and there appears to be no Nevada law interpreting the term.

In the absence of an express definition, courts first look to the plain meaning of the undefined term. *Davis v. Beling,* 278 P.3d 501, 508 (128 Nev. Adv. Op. 28, June 14, 2012) (citation omitted). "Private" is commonly defined as "[a]ffecting or belonging to private individuals, as distinct from the public generally." BLACK'S LAW DICTIONARY (9th ed. 2009). Webster's dictionary defines "conversation" as "oral exchange of sentiments, observations, opinions, or ideas." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 273 (11 ed. 2005).

In addition to giving undefined statutory terms their plain meaning, "[s]tatutes within a scheme and provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results." *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001). NRS 200.650, the statute in question, prohibits the surreptitious electronic interception of "any private conversation," "except as otherwise provided in NRS 179.410 to 179.515, inclusive, and 704.195 . . . ." Among the statutes referenced in the exception clause of NRS 200.650 is NRS 179.440, which defines "oral communication" as "any verbal message uttered by a person exhibiting an expectation that such communication is not subject to interception, under circumstances justifying such exception." NRS 179.460, another statute referenced in NRS 200.650, sets forth a process to obtain a judicial order authorizing "the interception of wire or oral communications . . . ." NRS 179.460(1). The statutory provision setting out the judicial authorization process does not refer to "private conversations." *See id.*

Interpreting the statutory scheme as a whole, this Office reads NRS 200.650's prohibition on electronic interception of "any private conversation" to contain an exception for oral statements that do not meet the statutory definition of an "oral communication" as found in NRS 179.440.[1] This conclusion is based on

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[1] Interception of an oral statement may also be prohibited by NRS 200.620 if the statement is transmitted by a wire or other similar connection and this transmission is intercepted by police. In the event that the transmission in question is a "wire communication" as defined by Nevada law, judicial authorization is required to intercept the transmission in all but limited circumstances. *See* NRS 200.620(1) (prohibiting interception of wire communications unless interception is made with prior consent of one of the parties *and* an emergency situation exists that makes it is impractical to obtain judicial authorization pursuant to NRS 179.460); *see also* NRS 200.610(2) (defining "wire communication"). Oral statements transmitted by a wireless device (e.g., a cellular phone) are also likely "wire communications" as defined by Nevada law, and judicial authorization is therefore required to intercept these transmissions as well. *See In re U.S. for an Order Authorizing Roving Interception of Oral Commc'ns*, 349 F.3d 1132, 1138 n.12 (9th Cir. 2003) ("Despite the apparent wireless nature of cellular phones, communications using cellular phones are considered wire communications under the [federal wiretap] statute, because cellular telephones use wire and cable connections when connecting calls."); *see also Lane v. Allstate Ins. Co.*, 114 Nev. 1176, 1179, 969 P.2d 938, 940 (1998) (noting that Nevada laws prohibiting interception of wire and oral communications are based on federal wiretap statutes). As noted above, it is the practice of the Clark County tactical units to seek judicial authorization to intercept wire communications transmitted from the defensive position when confronted with a barricade situation.

NRS 200.650's express reference to the definition of "oral communication" in its exception clause and NRS 179.460(1)'s use of the term "oral communications" in place of "private conversations" in the statutory provision establishing a judicial authorization process for the interception of wire or oral communications. This conclusion finds further support in the overlap between the plain meaning of the phrase "private conversation" and the statutory definition of "oral communication," as well as the view that interpreting the statute in this way preserves the statute's broad purpose of prohibiting interception of private conversations under circumstances where the speaker has a reasonable expectation of privacy.

B. Persons Involved In Barricade Situations Generally Have No Reasonable Expectation That Their Oral Statements Will Not Be Monitored Or Intercepted By Law Enforcement Officers, And The Statements Are Therefore Not "Oral Communications" As Defined By Nevada Law.

To avoid the prohibition on surreptitious interception of "private conversations" or "oral communications," the oral statements must be outside the scope of the term "oral communication" as defined by Nevada law. Nevada defines "oral communication" to mean "any verbal message" so long as the message was uttered (1) "by a person exhibiting an expectation that such communication is not subject to interception," and (2) "under circumstances justifying such expectation." NRS 179.440. Thus, for a statement to qualify as an "oral communication," the conduct of the person uttering the statement must exhibit an actual or subjective expectation of privacy under circumstances where, viewed objectively, the person's expectation was reasonable. Because both requirements must be met for the statement to be considered an "oral communication" under Nevada law, and because the subjective expectations of the person making the statement will vary from case to case, the remainder of this opinion will focus on whether suspects or hostages in a barricade situation have a reasonable or objective expectation of privacy in their oral statements.

The Nevada Supreme Court has noted in the analogous context of Fourth Amendment jurisprudence that an objective expectation of privacy is "one which society recognizes as reasonable." *Young v. State*, 109 Nev. 205, 211, 849 P.2d 336, 340 (1993) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)). Neither the Nevada Supreme Court nor the United States Supreme Court has developed a fixed standard by which to evaluate the objective reasonableness of an asserted expectation of privacy; instead, they have considered factors such as the Framers' intent, the uses to which an individual has put a location, and society's understanding that certain areas warrant protection from governmental intrusions. *See id.* (discussing factors recognized in *Oliver v. United States*, 466 U.S. 170, 177 (1984)).

At least two courts outside Nevada have addressed these factors as applied to a suspect or defendant involved in a barricade or hostage situation. In *State v. Arias*,

661 A.2d 850 (N.J. Super. Ct. Law Div. 1992), a New Jersey appellate court considered whether the defendant had standing to raise a Fourth Amendment challenge to evidence seized without a warrant at the crime scene. The defendant had forced his way into the home of the parents of his former lover, shot two persons, taken a child hostage, and engaged in a lengthy standoff with police before surrendering. *Arias*, 661 A.2d at 852. In considering whether the defendant had standing to challenge the subsequent search and seizure of evidence at the crime scene, the court noted that while the United States Supreme Court has predicated standing on a showing of a "legitimate expectation of privacy," New Jersey law afforded standing based only on a possessory interest in the place searched or the property seized. *Id.* at 853. The court "reluctantly" held that the defendant did have standing to raise the claim under New Jersey's generous standard, but also emphasized that the defendant was the "ultimate uninvited guest," and further expressed substantial doubt that the Framers of the Constitution intended to protect this type of defendant when they drafted the Fourth Amendment. *Id.* at 854.

The Supreme Judicial Court of Maine reached a similar conclusion in *State v. Boutot*, 325 A.2d 34 (Me. 1974). There, the defendant had taken a hostage and stolen an automobile for the purpose of escaping the scene where he had shot two other persons. *Boutot*, 325 A.2d at 35. In evaluating the defendant's subsequent challenge to a search of the vehicle, the court ruled that "this Defendant, escaping the scene of the crime with a hostage, in a car stolen from his victim, had no expectation of privacy which the law is willing to recognize as reasonable." *Id.* at 41-42.

While neither *Arias* nor *Boutot* addresses the specific question of whether a suspect in a barricade or hostage situation may have a reasonable expectation that his or her oral statements will not be intercepted by police, they do offer support for the general proposition that the reasonableness of any asserted expectation of privacy must be considered in the context of the public safety emergency created by the unlawful conduct of the suspect. As indicated in the opinion request letter, an armed suspect who erects a barricade or takes a hostage to avoid arrest creates a potentially deadly crisis that warrants an extraordinary response from law enforcement. In responding to such a crisis, law enforcement personnel are tasked with the dangerous and difficult challenge of resolving the crisis peacefully and preserving human life. Given the exigent and inherently dangerous nature of barricade and hostage situations, it can also be assumed that the suspect knows, or should know, that the law enforcement personnel surrounding his or her position will attempt to resolve the crisis by any peaceful means, including the interception of oral statements made by the suspects or hostages.

Due to the exigent nature and public safety issues presented in barricade and hostage situations, it is the opinion of this Office that suspects and hostages will often have no reasonable expectation that their oral statements made during the crisis will not

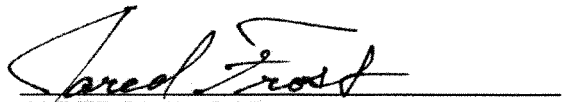
be subject to interception. Where no such reasonable expectation exists, interception of oral statements is not prohibited by Nevada law even in the absence of an order authorizing the interception made pursuant to NRS 179.460. However, the reasonableness of any asserted privacy expectation will vary from case to case, and law enforcement should therefore carefully evaluate the totality of the circumstances prior to monitoring the oral statements of barricade suspects and hostages. Law enforcement should also seek judicial authorization pursuant to NRS 179.460 before monitoring oral communications in barricade or hostage situations where appropriate and where circumstances permit to minimize any risk that their actions will later be deemed unlawful.

CONCLUSION

Nevada law does not prohibit the interception of oral statements in barricade or hostage situations where the suspects and hostages have no reasonable expectation that their oral statements will not be intercepted by police.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 

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JMF:DAW

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June 11, 2014

OPINION NO. 2014-03

BOARDS AND COMMISSIONS; PUBLIC BODIES: An American Indian may be considered for appointment to, and may be appointed as, a general public representative on the Nevada Indian Commission.

Sherry Rupert, Executive Director
State of Nevada Indian Commission
5366 Snyder Avenue
Carson City, Nevada 89701

Dear Director Rupert:

Pursuant to NRS 228.150, you have asked the Attorney General for an opinion on the following question.

QUESTION

May the Governor appoint an American Indian to the Nevada Indian Commission to fill a position that is designated as a representative of the general public?

ANALYSIS

The Nevada Indian Commission (Commission) is a five-member board established by statute. NRS 233A.020. The purposes of the Commission are to study, report, and make recommendations concerning American Indians residing in Nevada. NRS 233A.090. *See also* Op. Nev. Att'y Gen. 2000-35 (December 13, 2000). Its

members are appointed by the Governor. NRS 233A.030. Three members must be Indians; two must be representatives of the general public. *Id.*[1]

There is no legal reason why a person who is Indian[2] should be excluded from consideration for a position representing the general public. The statute on its face is unambiguous and is not exclusive: the appointee for a general public position must simply represent the general public. No intrinsic characteristic prevents a Native American from fulfilling this role.

Furthermore Native Americans are citizens of the states in which they reside. Indian Citizenship Act, 43 Stat. 253 (1924), codified as 8 U.S.C.A. § 1401. It has long been established that they are entitled to the same rights and privileges as any other state citizen. *See, e.g., Meyers By and Through Meyers v. Board of Educ. of San Juan School Dist.*, 905 F. Supp. 1544 (D. Utah 1995). *See also White Eagle v. Dorgan,* 209 N.W. 2d 621 (N.D. 1973) (Indians born in the United States and subject to its jurisdiction are citizens of the state in which they reside); *Luger v. Luger*, 765 N.W. 2d 523 (N.D. 2009) (members of tribes are citizens of the United States and of the state in which they reside and thus have the right to bring actions in state court). *Cf. In re Heff,* 197 U.S. 488 (1905) (an Indian is entitled to the benefit of, and is subject to, the laws of the State in which he resides the moment he becomes a citizen of the United States); *Wisconsin Potowatomies of Hannahville Indian Community v. Houston,* 393 F. Supp. 719 (W.D. Mich. 1973) (Indians are specifically declared by 8 U.S.C.A. § 1401 to be citizens of the United States and, under the Fourteenth Amendment, they are considered as well to be citizens of the state wherein their reservation is geographically located).

Thus a Native American who is a citizen of the State should not be excluded from consideration as a general public representative on the Commission. "'The right to hold public office is one of the valuable rights of citizenship. The exercise of this right should not be declared prohibited or curtailed except by plain provisions of the law. Ambiguities are to be resolved in favor of eligibility to office.'" *Nevada Judges Ass'n v. Lau*, 112 Nev. 51, 55, 910 P.2d 898, 901 (1996) (quoting *Gilbert v. Breithaupt*, 60 Nev. 162, 165, 104 P.2d 183, 184 (1940)). No plain provision, nor even any implication, bars Native Americans from the general public positions on the Commission.[3]

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[1] In its entirety, NRS 233A.030 states: "The Governor shall appoint: 1. Three members who are Indians. 2. Two members who are representatives of the general public."

[2] In common parlance, the term "Indian" is often used interchangeably with "American Indian" and "Native American." However, "Indian" can also have specific legal meaning in different contexts. *See e.g.* Op. Nev. Att'y Gen. 12-01 at 2, n. 2 (Jan. 3, 2012). Herein, it is used in its broadest sense and interchangeably with Native American.

[3] *Compare State ex rel. Oregon Consumer League v. Zielinski,* 654 P.2d 1161 (Or. App. 1982) (challenge to appointment to state agriculture board of person who was a farmer and an officer of two farming trade associations, on ground that she did not qualify for appointment as one of two members mandated to be "representative of consumer interests of the state").

Under these circumstances, the reasoning of the California Attorney General in Op. Cal. Att'y Gen. 81-701, 64 Ops. Cal. Atty. Gen. 685 (August 28, 1981) is persuasive. He concluded that "a physician and surgeon is qualified to be representative of the general public" to serve on the California Health Facilities Authority. He relied on reasoning similar to the Nevada Supreme Court's in *Nevada Judges Ass'n v. Lau*: "when the Legislature desires to exclude a member of a particular class or profession from serving as a 'public member' it appears to specifically so provide." Op. Cal. Att'y Gen. 81-701 at *2.

In the absence of a legislative exclusion, it is ultimately in the discretion of the appointing official—in this case, the Governor—whom to appoint, guided by the single statutory criterion, i.e., the appointee must be able and willing to represent the general public. The appointing authority's discretion will not be challenged unless it is arbitrary or capricious or is contrary to law in some respect. *Webb v. Workers' Compensation Com'n,* 730 S.W.2d 222 (Ark.1987) (gubernatorial power of appointment is vested with a reasonable latitude of discretion in classifying persons to be appointed to Workers' Compensation Commission, but that discretion is not without limit or restraint; classification of appointees to the Commission must measure up to minimal legal standards in order to comply with requirements of Workers' Compensation Act; whether such requirements have been met is subject to judicial review, and if they have not been met appropriate relief may be granted); *Marranca v. Harbo,* 197 A.2d 865, 869 (N.J. 1964). *See also Hollman v. Warren,* 196 P.2d 562 (Cal. 1948) (mandamus is not available to compel the Governor to exercise appointment discretion in a particular manner or to reach a particular result).

CONCLUSION

An American Indian may be considered for appointment to, and may be appointed as, a general public representative on the Nevada Indian Commission.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By _____
C. WAYNE HOWLE
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CWH/VJB

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July 30, 2014

OPINION NO. 2014-04

DEPARTMENT OF MOTOR VEHICLES; DRIVER'S LICENSES; IDENTIFICATION: The DMV has the authority under Nevada law to issue driver's licenses that do not comply with the Real ID Act of 2005.

Troy Dillard, Director
Nevada Department of Motor Vehicles
555 Wright Way
Carson City, Nevada 89711

Dear Mr. Dillard:

The Nevada Department of Motor Vehicles (the DMV) has requested an opinion as to whether it has the authority to issue Nevada driver's licenses that are not in compliance with the provisions of Real ID Act of 2005, Pub. L. No. 109-13, Title II, § 202(a), 49 U.S.C. § 30301 note (Real ID Act of 2005), which was enacted by the United States Congress to set nationwide standards for state-issued driver's licenses and identification. The short answer to the DMV's question is "yes."

The DMV has the authority to issue non-Real ID Act-compliant Nevada driver's licenses under Nevada law and the Real ID Act does not prohibit it from doing so, provided that the noncompliant driver's license is properly identified pursuant to requirements of the Act. The analysis in reaching this conclusion is set forth below.

QUESTION

Does the DMV have the authority under Nevada law to issue driver's licenses that do not comply with the Real ID Act of 2005?

ANALYSIS

To answer the above question, it is necessary to examine both the authority of the DMV to issue driver's licenses under Nevada law and whether there are any prohibitions within the Real ID Act of 2005 that may prevent the DMV from issuing a non-compliant license.

As a threshold matter, it is important to note that the issuance of a driver's license is "'a function traditionally exercised by the individual state governments,'" *Gray v. North Dakota Game and Fish Dept.*, 706 N.W.2d 614, 622 (N.D. 2005) (quoting *Koterba v. Commonwealth*, 736 A.2d 761, 765-66 (Pa. Cmmw. Ct. 1999), *cert denied*, 531 U.S. 816 (2000)), including Nevada.

Nevada statutes governing the issuance of driver's licenses by the DMV are set forth in Chapter 483 of the Nevada Revised Statutes (NRS). Within that chapter, numerous provisions expressly govern the DMV's authority to issue driver's licenses: NRS 483.230 (license required to operate motor vehicle); NRS 483.245 (issuance of license required when person becomes Nevada resident); NRS 483.290 (contents of application and acceptable documents for license); NRS 438.330 (license examination); NRS 483.340 (contents of license); NRS 483.347 (shape of license); NRS 483.382–.386 (renewal of license).

Reading these several statutory provisions together, the legislative grant of authority to the DMV over driver's licenses is broad, *see* NRS 483.908, and traditionally unencumbered by federal proscription absent clear congressional intent. *See, e.g., State Dep't Mtr. Vehicles v. Lovett*, 110 Nev. 473, 479-80, 874 P.2d 1247, 1251 (1994).

However, in response to nationwide identification and security concerns following the terrorist attacks on September 11, 2001, the United States Congress enacted the Real ID Act of 2005, Public Law 109-13, which established "minimum standards for State-issued driver's licenses and identification cards the Federal agencies would accept for official purposes on or after May 11, 2008." 6 C.F.R Part 37, Summary (2008); *see* Real ID Act of 2005, Pub. L. No. 109-13, Title II, § 202(a), 49 U.S.C. § 30301 note. An "official purpose" under the Act includes accessing federal facilities, boarding commercial airplanes, and other purposes determined by the Secretary of Homeland Security. Real ID Act of 2005, Pub. L. No. 109-13, Title II, § 201(3). Therefore, only those people who hold a state-

issued driver's license that complies with the Act's requirements may be allowed access to certain federally-controlled facilities.

Nevada, along with seventeen other states, has been granted a renewable extension by the Secretary of Homeland Security to achieve full compliance with the Act. The extension is currently set to expire on October 10, 2014, but can be renewed. Memorandum from United States Department Of Homeland Security, "Real ID Enforcement In Brief," (December 20, 2013).

The analysis turns upon whether the Act overrides or preempts the DMV's traditional and statutory authority to issue Nevada driver's licenses that are not in compliance with the Act. It does not.

Nowhere is it expressly stated in Nevada law that the DMV is limited to issuing *only* Real ID Act-compliant licenses. To the contrary, Nevada law already provides that the DMV has the authority to issue non-Real ID Act-compliant driver's licenses in the form of a driver authorization card, so long as the authorization card is obtained in accordance with section 202(d)(11) of the Act. *See* NRS 483.291(5).

Section 202(d)(11) of the Act expressly contemplates instances in which a state may issue a driver's license that is not in compliance with the Act when the following two conditions are satisfied. First, the license must clearly state "on its face that it may not be accepted by any [f]ederal agency for federal identification or any other official purpose." Real ID Act of 2005, Pub. L. No. 109-13, Title II, § 202(d)(11)(A). Second, the license must use "a unique design or color indicator to alert [f]ederal agency and other law enforcement personnel that it may not be accepted for any such purpose." *Id.* at § 202(d)(11)(B).

Based upon the foregoing analysis, including the absence of any Nevada law prohibiting the DMV from issuing a non-compliant Real ID Act driver's license, and express language of the Act permitting such a license to be issued, it is the opinion of this Office that the Act does not abrogate the DMV's authority to issue a standard Nevada driver's license. Rather, the DMV retains its traditional authority to issue a non-Real ID Act-compliant driver's license, so long as the two conditions set forth in Section 202(d)(11) of the Act are met.[1]

This conclusion is further supported by the opinion of the United States Department of Homeland Security's own interpretation of the Act, in which it posits the following question and answer:

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[1] In doing so, it may be necessary for the DMV to review and amend any regulations that conflict with Section 202(d)(11) of the Act.

> [Question] Can jurisdictions meeting the standards of REAL ID continue issuing non-compliant REAL ID driver's licenses and identification cards?
>
> [Answer] Yes. REAL ID allows jurisdictions to issue identification cards and driver's licenses that are not in compliance with the requirements of the Act. Those licenses and identification cards, however, must clearly state on their face and in the machine readable zone that the card is not acceptable for official purposes.

See Real ID Frequently Asked Questions for States Compliance Procedure, http://www.dhs.gov/real-id-faqs-states (last visited June 27, 2014).

While this opinion does not address the policy implications of the DMV offering a non-compliant Nevada driver's license under the Act, neither the current Nevada law nor the Act appear to prohibit the DMV from doing so.

CONCLUSION

The DMV has the authority under Nevada law to issue driver's licenses that do not comply with the Real ID Act of 2005.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
JOSEPH C. REYNOLDS
Chief Deputy Attorney General
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JCR/JCR

STATE OF NEVADA

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August 7, 2014

OPINION NO. 2014-05

DISTRICT ATTORNEYS; OPEN MEETING LAW; PUBLIC BODIES: The Association does expend public funds because dues are assessed to each member and paid by the county where the member was elected; however this fact does not disturb our opinion that the Association is not a public body because the mere receipt of public money by any entity, unless the entity had been created by State or local government, does not constitute a public body within the meaning of the Open Meeting Law.

Steve Wolfson, Esq.
Association President
Nevada District Attorneys Association
P.O. Box 552212
Las Vegas, Nevada 89155-2212

Dear Mr. Wolfson:

You have requested that the Office of the Attorney General (Office) opine as to whether the Nevada District Attorneys Association (Association or NDAA) is subject to the Nevada Open Meeting Law.

QUESTION

Is the Nevada District Attorneys Association subject to the Nevada Open Meeting Law, NRS Chapter 241?

FACTS

The Nevada District Attorneys Association is a private, unincorporated, nonprofit association as defined in NRS 81.740. Seventeen elected Nevada District Attorneys constitute the voting membership. The Association is governed by a constitution and the bylaws, and it is funded by dues assessed on its members; it is authorized to exchange information with other members and to lobby the Legislature regarding matters of commonality among the members' jurisdiction. Three members appointed by the governing body of the NDAA serve on the Advising Council of Prosecuting Attorneys, which is a public body created by NRS 241A.040.

The Legislature did not create the Association, nor was it created by statute or pursuant to a statute by the Legislature for a specific purpose. The Association's purpose is expressed in its constitution and is directed by its bylaws.

ANALYSIS

Public body is defined in NRS 241.015(4).[1] The Open Meeting Law is broadly interpreted by the Nevada Supreme Court (Court) so that citizens are not deprived of

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[1] Except as otherwise provided in NRS 241.016, "public body" means:

> (a) Any administrative, advisory, executive or legislative body of the State or a local government consisting of at least two persons which expends or disburses or is supported in whole or in part by tax revenue or which advises or makes recommendations to any entity which expends or disburses or is supported in whole or in part by tax revenue, including, but not limited to, any board, commission, committee, subcommittee or other subsidiary thereof and includes an educational foundation as defined in subsection 3 of NRS 388.750 and a university foundation as defined in subsection 3 of NRS 396.405, if the administrative, advisory, executive or legislative body is created by:
> (1) The Constitution of this State;
> (2) Any statute of this State;
> (3) A city charter and any city ordinance which has been filed or recorded as required by the applicable law;
> (4) The Nevada Administrative Code;
> (5) A resolution or other formal designation by such a body created by a statute of this State or an ordinance of a local government;
> (6) An executive order issued by the Governor; or

the opportunity to witness their government in action. The Court, citing an Attorney General's Opinion, said that "a statute promulgated for the public benefit such as a public meeting law should be liberally construed and broadly interpreted to promote openness in government." *Dewey v. The Redevelopment Agency of the City of Reno,*119 Nev. 87, 94, 64 P.3d 1070, 1075 (2003), quoting Op. Nev. Att'y Gen. No. 85-19 (Dec. 17, 1985).

A public body is any administrative, advisory, executive, or legislative body of the state or local government supported in whole or in part by tax revenue, if it was created by one of seven statutory methods. NRS 241.015(4)(a). The Association is a legal entity which enjoys powers and perpetual existence as an unincorporated nonprofit association under authority of NRS 81.755, but it was not created by any one of the methods in NRS 241.015(4)(a). It is also not an executive body created by executive order of the Governor or by any one of the other methods in NRS 241.015(4)(b). Thus under the plain meaning of the statute, the Association is not a public body and is not subject to the Open Meeting Laws.

CONCLUSION

The Nevada District Attorneys Association was not created by any method set forth in NRS 241.015(4)(a) or (b). It is a voluntary association of elected county District Attorneys. It is based on agreement and given certain powers and perpetual existence under NRS 81.755, as an unincorporated, nonprofit association.

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(7) A resolution or an action by the governing body of a political subdivision of this State;

(b) Any board, commission or committee consisting of at least two persons appointed by:

(1) The Governor or a public officer who is under the direction of the Governor, if the board, commission or committee has at least two members who are not employees of the Executive Department of the State Government;

(2) An entity in the Executive Department of the State Government consisting of members appointed by the Governor, if the board, commission or committee otherwise meets the definition of a public body pursuant to this subsection; or

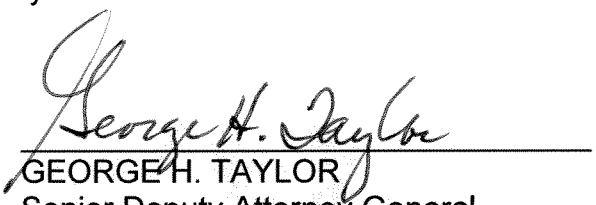
(3) A public officer who is under the direction of an agency or other entity in the Executive Department of the State Government consisting of members appointed by the Governor, if the board, commission or committee has at least two members who are not employed by the public officer or entity; and

(c) A limited-purpose association that is created for a rural agricultural residential common-interest community as defined in subsection 6 of NRS 116.1201.

The Association does expend public funds because dues are assessed to each member and paid by the county where the member was elected; however this fact does not disturb our opinion that the Association is not a public body because the mere receipt of public money by any entity, unless the entity had been created by State or local government, does not constitute a public body within the meaning of the Open Meeting Law.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

By: 

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October 15, 2014

OPINION NO. 2014-06

CONSTITUTIONAL LAW; FIRST AMENDMENT; OSTEOPATHY: The intent of NRS 629.076(1)(d) is to establish transparency within the Nevada health care system and this is a substantial government interest. The restriction it creates on advertising is reasonable to notify the public of a physician's qualifications. It therefore does not violate the United States or Nevada Constitutions.

Barbara Longo, Executive Director
Nevada State Board of Osteopathic Medicine
901 American Pacific Drive, Suite 180
Henderson, Nevada 89014

Dear Ms. Longo:

You have requested an opinion from this office regarding whether newly enacted Nevada Revised Statute (NRS) 629.076(1)(d) passes constitutional muster and thus requires the Nevada State Board of Osteopathic Medicine (Board) to enforce this new provision as required by NRS 629.076(1)(e).

The request for this opinion is based on the 2013 Legislature enacting Senate Bill 211 that has now been codified as NRS 629.076(1)(d) and (e), which provide:

> (d) A physician or osteopathic physician shall not hold himself or herself out to the public as board certified in a specialty or subspecialty, and an advertisement for health care services

must not include a statement that a physician or osteopathic physician is board certified in a specialty or subspecialty, unless the physician or osteopathic physician discloses the full and correct name of the board by which he or she is certified, and the board:

(1) Is a member board of the American Board of Medical Specialties or the American Osteopathic Association; or

(2) Requires for certification in a specialty or subspecialty:

(I) Successful completion of a postgraduate training program which is approved by the Accreditation Council for Graduate Medical Education or the American Osteopathic Association and which provides complete training in the specialty or subspecialty;

(II) Prerequisite certification by the American Board of Medical Specialties or the American Osteopathic Association in the specialty or subspecialty; and

(III) Successful completion of an examination in the specialty or subspecialty.

(e) A health care professional who violates any provision of this section is guilty of unprofessional conduct and is subject to disciplinary action by the board, agency or other entity in this State by which he or she is licensed, certified or regulated.

QUESTION ONE

Does NRS 629.076(1)(d) violate the United States Constitution or the Nevada Constitution as an infringement of protected commercial speech?

ANALYSIS

The United States Constitution states: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. Amend. 1. The First Amendment, as applied to the states through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation. U.S. CONST. amends. I and XIV. Commercial speech is expression related solely to the economic interests of the speaker and his or her audience. Specifically, the United States Supreme Court in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976), defined commercial speech as speech that does "no more than propose a commercial transaction." *See also, Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). Because a physician's or osteopathic physician's advertisement for health care services is made with the intent to benefit the economic interest of the speaker, this speech is classified as commercial speech. *Cf. Brandwein v. Cal. Bd. of Osteopathic Examiners*, 708 F.2d 1466, 1469 (9th Cir. 1983) ("use of a degree [i.e., M.D.] is in effect a representation to the public concerning the holder's academic training and qualifications . . . . [and] it is closer to a form of commercial speech than a philosophical statement").

Purely commercial speech is subject to an intermediate level of scrutiny. *Coyote Pub., Inc. v. Miller,* 598 F.3d 592, 598 (9th Cir. 2010). Specifically, "[r]estrictions on commercial speech are now reviewed under the standard of intermediate scrutiny announced in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-66, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980)." *Id.*

Central Hudson established a four-pronged test to measure the validity of restraints upon commercial expression. 447 U.S. at 566. Under the first prong, the speech must concern lawful activity and not be misleading. *Id.* Second, the asserted governmental interest must be substantial; third, the restriction must directly advance the governmental interest; and fourth, the restriction must not be more extensive than necessary to serve that interest. *Id.*

Under the first prong for the purposes of this opinion, the osteopathic physician's speech proposes a lawful transaction and is not misleading and therefore is entitled to First Amendment protection. *Brandwein v. Cal. Bd. of Osteopathic Examiners*, 708 F.2d 1466, 1469 (9th Cir. 1983). *See also In re R.M.J.*, 455 U.S. 191, 203 (1982) ("Truthful advertising related to lawful activities is entitled to the protection of the First Amendment"); *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990) (Attorney has First Amendment right, under standards applicable to commercial speech, to advertise certification as trial specialist by National Board of Trial Advocacy (NBTA)).

To determine whether the governmental interest is substantial under the second prong of the *Central Hudson* test, the courts look to the interest offered by the government and can also look to the legislative intent for adopting the statute. *See Am. Acad. of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1109 (9th Cir. 2004) ("The legislative history of section 651(h)(5)(B) reveals that the intent of the legislation was to assure that the term 'board certified' had a designated meaning upon which the medical community and the general public could rely"); *see also Abramson v. Gonzalez*, 949 F.2d 1567, 1578 (11th Cir. 1992) (Presumably, Florida's substantial governmental interest is reflected in the "Intent" section of the Psychological Services Act . . .).

NRS 629.076(1)(d) was adopted by the Legislature with the intent of forming transparency within the Nevada health care system. The legislative history, including the testimony provided at the Assembly Committee on Commerce and Labor, indicates that the bill (S.B. 211, adopted as NRS 629.076) is "an effort to help provide increased clarity and transparency for Nevada's patients." *Hearing on S.B. 211 before the Assembly Committee on Commerce and Labor,* 2013 Leg., 77th Sess. 33 (May 8, 2013). The testimony references

> [a] recent telephone survey conducted by the American Medical Association ("AMA") of 852 adults nationwide [which] yielded results that 67 percent of respondents believed that podiatrists were medical doctors when they are not. The same

> AMA survey revealed that only 32 percent of respondents believed that laryngologists are physicians when most certainly they are.

Hearing on S.B. 211 Before the Assembly Committee on Commerce and Labor, 2013 Leg., 77th Sess. 35 (May 8, 2013). The bill "also helps ensure patients know the education, training, and licensure of their health care provider." *Id. at* 33. The testimony further brought out that "these measures are intended to help alleviate what is known as the 'white coat confusion' that exists in Nevada's healthcare system." *Id.* at 35.

Thus, there is no doubt that Nevada has a substantial interest in ensuring the accuracy of commercial information in the marketplace, including deterring the "white coat confusion" in the healthcare system. *See, e.g., Virginia State Bd. of Pharmacy,* 425 U.S. at 771-772. The Supreme Court in *In re R.M.J.*, 455 U.S. at 202, held that the "public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product' renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling."

Under the third prong of the test, to determine whether the restriction directly advances the governmental interest, it is the government's burden to show the challenged restriction advances the government's interest "in a direct and material way." *Edenfeld v. Fane,* 507 U.S. 761, 767 (1993). That burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-771.

In *Am. Acad. of Pain Mgmt. v. Joseph*, the Ninth Circuit court again looked to legislative history to conclude that application of California's statute limiting physicians from advertising a "board certified" specialty was invalid unless the certifying board or association met certain requirements legitimately advancing a governmental interest. The history revealed that

> [a]dvertising one's professional specialty has become a common means of promoting one's medical practice in recent years. While it would seem that a physician's stated credentials would provide assurance to a prospective patient that this physician was trained and qualified to do the procedures stated in the ad, such is not the case. Doctors who advertise as 'board certified' can have authentic credentials, or they may claim credentials from a 'bogus board,' and the unsuspecting consumer would have a very difficult time differentiating one from the other. A 'bogus board' credential can be obtained by mail for a fee, or by taking a weekend course in the subject.

Id. at 1109.

The court also noted that "[c]urrently a physician who takes a weekend course can advertise themselves [sic] as 'board certified' in that specialty. There is no quality control, and some patients have been severely hurt. They do not realize that sometimes a framed 'specialty' certification could be the result of two-day course." *Id.* at 1110 (quoting the report by the Assembly Committee on Health).

Here, testimony from hearings before the Assembly Committee on Commerce and Labor reveals that Nevada had a similar intent when adopting SB 211. The "white coat confusion" can lead to patients being grossly mismanaged and mishandled, or even confusion about which type of physician to seek treatment from. The testimony also showed that "it only makes sense that patients be informed of the specific training and credentials of their treating provider." *Hearing on S.B. 211 Before the Assembly Committee on Commerce and Labor,* 2013 Leg., 77th Sess. 35 (May 8, 2013). This testimony indicates that the harm of the "white coat confusion" addressed in *Edenfeld* was the type of harm S.B. 211 was designed to address, namely patient confusion. It also confirms that assisting patients to identify the qualifications of a specific physician is a substantial governmental interest, and that the restrictions imposed will advance that interest.

The last prong of the *Central Hudson* test is to determine whether the restriction is "no more broad or no more expansive than 'necessary' to serve its substantial interests." *Central Hudson*, 447 U.S. at 566. The restriction requires only a reasonable "'fit' between the [government's] ends and the means chosen to accomplish those ends. . . . a fit [is required] that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Board of Trustees v. Fox,* 492 U.S. 469, 480 (1989) (internal citations omitted). The Court has generally said it is "up to the legislature" to choose between narrowly tailored means of regulating commercial speech. *Id.* at 479.

As in *Am. Acad. of Pain Mgmt.*, NRS 629.076(1)(d) does not discourage advertising, but merely requires identification of licensure. The osteopathic physician is not restricted from advertising that he or she has special training or education with a non-qualifying board, but only limits use of the specific term, "board certified." *See Am. Acad. of Pain Mgmt.*, 353 F.3d at 1111. The statute does not place restrictions on the current scope of practice of any health care practitioners in Nevada, but rather "increases transparency of health care practitioners' qualifications for Nevada patients so they can clearly see and make their own informed decisions about who provides health care to them and their families." *Hearing on S.B. 211 Before the Assembly Committee on Commerce and Labor,* 2013 Leg., 77th Sess. 35 (May 8, 2013).

The analysis under the United States Constitution is also applicable to Nevada law. The Nevada Constitution, Article 1 states: "Every citizen may freely speak, write and

publish his sentiments on all subjects being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Nev. CONST. art. 1, § 9. The Nevada Supreme Court has held that the free speech provisions of the State Constitution do not afford greater protection than those of the First Amendment. *S.O.C., Inc. v. Mirage Casino-Hotel,* 117 Nev. 403, 23 P.3d 243 (2001). *See also Erwin v. State,* 111 Nev. 1535, 1541-42, 908 P.2d 1367, 1371 (1995), in which Nevada's Supreme Court follows the *Central Hudson* test regarding commercial speech. *Accord, Republic Entertainment, Inc. v. Clark County Liquor and Gaming Licensing Bd.,* 99 Nev. 811, 816, 672 P.2d 634, 638 (1983).

CONCLUSION TO QUESTION ONE

The intent of NRS 629.076(1)(d) is to establish transparency within the Nevada health care system and this is a substantial government interest. The restriction it creates on advertising is reasonable to notify the public of a physician's qualifications. It therefore does not violate the United States' or Nevada Constitution's free speech guarantees.

QUESTION TWO

Does NRS 629.076(1)(d) violate the United States' or Nevada's constitutional guarantees of equal protection under the law?

ANALYSIS

The United States Constitution, Fourteenth Amendment, guarantees equal treatment under the law:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV.[1]

This guarantee is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburn, Texas v. Cleburn Living Center*, 473 U.S. 432, 439 (1985), citing *Plyer v. Doe*, 457 U.S. 202, 216 (1982). All osteopathic physicians in the State of Nevada are licensed by the Board of Osteopathic Medicine and, therefore, are

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[1] Nevada's constitutional guarantee is the same as the federal guarantee. *In re Candelaria*, 126 Nev.___, 245 P.3d 518, 523 (Adv. Op. No. 40, October 14, 2010) ("Article 4, Section 21 of the Nevada Constitution requires that all laws be general and of uniform operation throughout the State. The standard for testing the validity of legislation under the equal protection clause of the state constitution is the same as the federal standard.") (Citation omitted).

individuals who are similarly situated who should be treated alike. *See Seabolt v. Texas Bd. of Chiropractic Examiners*, 30 F. Supp. 2d 965, 969 (S.D. Tex. 1998).

The issue you identify pertains to whether NRS 629.076(1)(d) is unconstitutional in that it does not treat similarly situated osteopathic physicians alike. Specifically, it differentiates between osteopathic physicians who already have attained board certification approved by the Accreditation Council for Graduate Medical Education (ACGME) or the American Osteopathic Association (AOA) prior to October 1, 2013 and osteopathic physicians who have not. Osteopathic physicians in the former group receive a state-sanctioned benefit by being able to advertise their board certification whereas the latter group is denied the same benefit although the course of study may have been substantially equivalent. Based upon this difference, you ask whether the statutory scheme is unconstitutional.

It is recognized that NRS 629.076(1)(d) results in osteopathic physicians being placed into two different classifications. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 174-175 (1980). Although the Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives, *Police Dept. of City of Chicago v. Mosley,* 408 U.S. 92, 101 (1972)*; see also Brandwein v. California Bd. of Osteopathic Ex'rs*, 708 F.2d 1466, 1470 (9th Cir.1983), because NRS 629.076(1)(b) is content-neutral, it does not trigger heightened scrutiny under the Equal Protection Clause. *Jones Intercable of San Diego, Inc. v. Chula Vista*, 80 F.3d 320, 325 (9th Cir.1996); *see also Mosley*, 408 U.S. at 96 (content discrimination subject to same condemnation under Equal Protection Clause as under First Amendment). Instead, the statute must merely be rationally related to a legitimate state interest. *Gandee v. Glaser*, 785 F. Supp. 684, 694 (S.D. Ohio 1992) *aff'd*, 19 F.3d 1432 (6th Cir. 1994) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." *New Orleans v. Duke*, 427 U.S. 297, 303-04 (1976)).

In *Brandwein*, the court noted that the plaintiff has a heavy procedural burden in proving his case. 708 F.2d at 1470. The Supreme Court in *Vance v. Bradley*, 440 U.S. 93, 97 (1979), explained that under the rational basis test, "the Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process . . . ." Further, "[t]he State has broad powers to regulate businesses and professions within its boundaries, especially when the profession deals so directly with the health and welfare of the people of the State." *Oliver v. Morton*, 361 F. Supp. 1262, 1267 (N.D. Ga. 1973). It is also well-settled under rational basis scrutiny that the reviewing court may hypothesize the legislative purpose behind legislative action. *Brandwein*, 708 F.2d at 1470–71. Thus, the test favors validity of the state's statute because "the State bears a special responsibility for maintaining standards among

members of the licensed professions." *Id.* at 1470 (quoting *Ohralik v. State Bar Assn.*, 436 U.S. 447, 460 (1978)).

As mentioned in the preceding analysis, the government has a legitimate interest in providing transparency within the Nevada health care system and assuring the public has the information necessary to make an informed decision in choosing a physician. The advertising restriction for osteopathic physicians is rationally related to the state's interests in reducing patient confusion and assisting the patient to identify the qualifications of a specific physician. According to *Brandwein*, this legitimate interest in "maintaining standards among members of the licensed professions" does not violate the Equal Protection clause. Therefore, applying the rational relation test, equal protection has not been denied to osteopathic physicians who have attained board certification approved by ACGME or AOA prior to October 1, 2013 because a rational relationship exists between the advertising statute and the State's legitimate interest in providing transparency by assuring that the public has the information necessary to make an informed decision in choosing a physician.

CONCLUSION TO QUESTION TWO

Based on the foregoing, NRS 629.076(1)(d) does not violate either the Equal Protection Clause of the Fourteenth Amendment, or the State's analogous constitutional guarantee.

Sincerely,

CATHERINE CORTEZ MASTO
Attorney General

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