

OFFICIAL OPINIONS OF THE ATTORNEY GENERAL - 1990

OPINION NO. 90-1 CRIMINAL PROCEDURE; FORFEITURES; DISTRICT ATTORNEYS: District attorneys are not prohibited from including a forfeiture action in plea discussions concerning an accompanying criminal proceeding as long as the criminal action is supported by probable cause and is not used to take an advantage in the accompanying civil forfeiture action. District attorneys in counties of classes 1 to 4, as classified in the statutory table of annual salaries, may not provide legal representation, for compensation, to a criminal defendant in this state or any other state; district attorneys in counties classified as class 5 may provide legal representation to a criminal defendant, for compensation, as long as the representation takes place in another state and is not materially limited by the district attorneys' responsibilities to their county.

Carson City, January 31, 1990

The Honorable William E. Schaeffer, District Attorney of Eureka County, Post Office Box 190, Eureka, Nevada 89316

Dear Mr. Schaeffer:

You have requested the legal opinion of this office concerning the following matters related to your position.

QUESTION ONE

Is it unethical for a prosecutor to include a forfeiture action in his discussions as to a possible plea in a criminal action?

ANALYSIS

In the statutory definition of the duties of the office of district attorney, [NRS 252.110](#) states in relevant part:

The district attorney shall:

.....
(3) Prosecute all recognizances forfeited in the district court and all actions for the recovery of debts, fines, penalties and forfeitures accruing to his county.

Forfeiture is a statutory procedure by which property derived from or used in furtherance of criminal conduct may be seized and retained by the state. Forfeiture is intended to remove the economic incentives for criminal activity and serve as a deterrent to further criminal violations. [NRS 179.1156](#) to [179.119](#) govern the procedure for seizure, forfeiture and disposition of all property and proceeds subject to forfeiture, except as to [NRS 207.350](#) to [207.520](#), which govern criminal and civil forfeiture in racketeering offenses. [NRS 179.1156](#) to [179.119](#) is a civil

forfeiture statute (see [NRS 179.1171](#), N.R.C.P. applicable to general forfeiture proceedings). Civil forfeitures are legal actions by the state against property as a result of its use in or association with criminal conduct and are not dependent on a criminal conviction of the owner of the property. Criminal forfeitures, in comparison, are dependent upon the criminal conviction of the owner having control over the property. There is nothing in Nevada statutory or case law which would prohibit a district attorney from negotiating or including a civil or criminal forfeiture action in plea discussions concerning an ongoing criminal prosecution in his jurisdiction. The practice of joint negotiation of criminal prosecution and civil forfeiture is exercised routinely in federal practice. See *Principles of Federal Prosecution, Part B, § 5* (Dep't of Justice 1980), which states that in weighing the adequacy of such alternative civil sanctions in a particular case "the prosecutor should consider the nature and severity of the sanctions that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests." See also *United States v. Roberts*, 749 F.2d 404 (7th Cir. 1984) (when forfeiture agreed to in plea bargain, court required to make inquiry as to whether property is forfeitable pursuant to statute); and *United States v. Forty-Eight Thousand Five Hundred Ninety-five Dollars*, 705 F.2d 909 (7th Cir. 1983) (one claimant signed a plea agreement stipulating he would not contest civil forfeiture proceeding regarding seized monies in return for government declining further criminal prosecution). There are, however, both ethical and legal ramifications that need to be considered in the plea bargaining process regarding a concurrent civil forfeiture action and an ongoing criminal prosecution.

In *MacDonald v. Musick*, 425 F.2d 373 (9th Cir. 1970), a prosecutor offered to dismiss charges against a defendant in return for a stipulation that there was probable cause for his arrest, which would avoid a civil proceeding against several police officers, and when the defendant refused, the prosecution amended the criminal complaint to allege an additional offense. In condemning such a practice, the court stated:

The Canons of Ethics have long prohibited misuse of the criminal process by an attorney to gain advantage for his client in a civil case. ABA Code of Professional Responsibility, 1969, provides in Section DR 7-105, p. 88: "(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

. . . In this respect, *we can see no difference between public prosecutors and other lawyers.*

Id. at 376 (emphasis added). See also *Stark County Bar Ass'n v. Russell*, 495 N.E.2d 430 (Ohio 1986), where a lawyer was suspended for one year for using his position as a city's law director to cause unfounded charges to be brought against a witness who argued with him at a deposition. Compare Nevada Supreme Court Rule 179(1) (prohibition against prosecutor from pursuing a charge not supported by probable cause). It would be proper to conclude, therefore, that as long as the criminal action is not used solely to take an advantage in the concurrent civil forfeiture action, and the criminal action is supported by probable cause in itself, plea bargaining of both cases jointly is permissible.

Finally, a plea of guilty may be invalid because of possible coercion arising from an accompanying civil forfeiture. See *Warden v. Peters*, [83 Nev. 298](#), 429 P.2d 549 (1967) and *Higby v. Sheriff*, [86 Nev. 774](#), 476 P.2d 959 (1970), as well as [NRS 174.035](#) for the general proposition that a plea of guilty or *nolo contendere* must be voluntary and not the product of ignorance, fear, inadvertence or coercion.

CONCLUSION

There is nothing in Nevada law which would prohibit a district attorney from negotiating or including a civil or criminal forfeiture action in plea discussions concerning an ongoing criminal case in his jurisdiction as long as the criminal action is supported by probable cause and not used to take an advantage in the accompanying civil forfeiture proceeding.

QUESTION TWO

May a district attorney provide legal representation for a criminal defendant in a criminal action in another state?

ANALYSIS

[NRS 245.0435](#)(1) specifies:

The district attorneys in counties of classes 1 to 4, inclusive, as classified in the table of annual salaries, shall not engage in the private practice of law.

[NRS 245.0435](#)(3) defines private practice:

As used in this section, “private practice of law” by a district attorney means the performance of legal service, for compensation, for any person or organization except his county and any other governmental agency which he has a statutory duty to serve.

[NRS 245.0435](#) seeks to place a total ban on private practice, for compensation, by district attorneys in counties 1 to 4, inclusive, as classified in the table of annual salaries in [NRS 245.043](#), regardless of the state where the private practice takes place. Since the legal representation of a criminal defendant is “performance of legal service for any person” as defined by [NRS 245.0435](#), such representation, for compensation, would be prohibited by these district attorneys in counties classified as 1 to 4 in [NRS 245.043](#). As to those district attorneys in counties designated as class 5 in the table of annual salaries, where private practice is allowed by them pursuant to [NRS 245.0435](#), the legal representation of a criminal defendant is limited, first as to within their county by [NRS 252.120](#) (prohibition of appearing or assisting criminal defense) and more generally by [NRS 7.105](#)(1) and (2), which states in relevant part:

The . . . district attorney and the deputies and assistants of each, hired or elected to prosecute persons charged with the violation of any ordinance or any law of this state; . . . shall not, during their terms of office or during the time they are so employed in any court of this state, accept an appointment to defend, agree to defend or undertake the defense of any person charged with the violation of any ordinance or any law of this state.

Although the legal representation of a criminal defendant is limited by those district attorneys in counties designated as class 5, [NRS 7.105](#) does not prohibit the legal representation of a criminal defendant charged with local or state laws by these district attorneys as long as the representation is in another state. Such representation may still, however, be prohibited by Supreme Court Rule 157, if the representation is materially limited by the district attorneys’ responsibilities to their county. As to those district attorneys in counties of classes 1 to 4, inclusive, as classified in the table of annual salaries, all private practice of law, for

compensation, would be prohibited pursuant to [NRS 245.0435](#).

CONCLUSION

District attorneys in counties of classes 1 to 4, inclusive, as classified in the table of annual salaries in [NRS 245.043](#), may not provide legal representation, for compensation, to a criminal defendant in a criminal action in this state or any other state. As to those district attorneys in counties classified as class 5 in the table of annual salaries, legal representation of a criminal defendant, for compensation, would be lawful so long as the representation takes place in another state and is not materially limited by the district attorneys' responsibilities to their county.

Sincerely,

BRIAN McKAY
Attorney General

By: Anthony R. Gordon
Deputy Attorney General

OPINION NO. 90-2 COUNTIES; COMMUNITY ANTENNA TELEVISION SYSTEMS

FRANCHISES: Local governments may grant exclusive franchises, but cannot adopt certain other restrictions, without violating federal and state antitrust laws.

Carson City, February 2, 1990

The Honorable Virgil A. Bucchianeri, District Attorney of Storey County, Storey County Courthouse, Virginia City, Nevada 89440

Dear Mr. Bucchianeri:

You have requested an opinion of this office concerning franchises for community antenna television service.

According to the facts you have provided, Comstock Community Television, Inc., currently provides community antenna television services to Gold Hill and Virginia City. It is a Nevada nonprofit corporation and was incorporated on August 4, 1967.

Recently, a separate company has made application to the Board of Commissioners ("Board") of Storey County for a franchise to operate a community antenna television system in Storey County, and possibly in areas outside the county.

QUESTION ONE

Does the grant of an exclusive franchise by the Board violate the federal antitrust laws?

ANALYSIS

The basis of federal antitrust law is the Sherman Act of 1890 (15 U.S.C.A. §§ 1-7). In relevant

part, § 1 of the Act prohibits “every contract, combination . . . or conspiracy, in restraint of trade.” Section 2 prohibits monopolies. Violations of the Act may result in, *inter alia*, criminal penalties and in treble damages, pursuant to § 4 of the Clayton Act (15 U.S.C.A. § 15(a)).

In 1984, Congress enacted the Local Government Antitrust Act (15 U.S.C.A. §§ 34-36 (West Supp. 1989)) which bars private damage actions against local governments, including a county, under the federal antitrust laws. The Act does not, however, bar claims for injunctive relief. *See Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 95 (2d Cir. 1986).

A well-recognized exception to the Sherman Act is the “state action” doctrine. Anticompetitive practices are permitted when required by the state pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition, by either regulation or a monopoly public service. *See Parker v. Brown*, 317 U.S. 341 (1943); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977). The *Parker* doctrine has been extended to local governments. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

State and local government agencies are, however, not exempt from the Sherman Act simply because of their status as governmental entities. Rather, they are exempt only if the anticompetitive activities are undertaken as an act of government in its sovereign capacity, frequently expressed in the form of a statute, pursuant to a policy to displace competition.

The Nevada Legislature has authorized the governing bodies of local governments to displace competition in the field of community antenna television (“CATV”) systems. Specifically, a governing board is expressly authorized to grant an exclusive CATV franchise. [NRS 711.185](#). This policy is clearly articulated and affirmatively expressed by [NRS 711.185](#). *See Catalina Cablevision Assoc. v. City of Tucson*, 745 F.2d 1266 (9th Cir. 1984) (state legislature contemplated granting only a single cable system license when it enacted a statute allowing local licensing authorities to impose “conditions, restrictions and limitations” upon cable system operators). *Cf. Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982) (Colorado’s “home rule” statute did not expressly authorize municipalities to enact cable television ordinances). There is no requirement that an anticompetitive practice be compelled by a state statute to be upheld. It need only be authorized. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (it is sufficient if statute authorized city to provide the services and determine the areas to be served).

Whether the conduct of the successful applicant(s) for the franchise is immune from the antitrust laws is a different matter. Where the anticompetitive activity is delegated to a private party, that party is immune from antitrust liability only if: (1) there is a “clearly articulated and affirmatively expressed” state policy to displace competition; and (2) the private party’s activity is “actively supervised” by the state. *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987); *see also Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985) (active supervision by the state is required regardless of the status of the actor). Active state supervision is not required when the actor is a municipality. *Town of Hallie*, 471 U.S. at 46. It is doubtful that either of the two prospective applicants here are instruments of the Board, as was the case of the nonprofit ambulance service corporation in *Ambulance Serv. of Reno, Inc. v. Nevada Ambulance Serv.*, 819 F.2d 910 (9th Cir. 1987). *See Medic Air Corp. v. Air Ambulance Auth.*, 843 F.2d 1187 (9th Cir. 1988). Although you have not specifically asked this question, it will probably be an issue the Board will have to consider because the county will not actually be providing CATV service.

CONCLUSION

A grant of an exclusive CATV franchise by the Board is not subject to § 1 or 2 of the Sherman Act.

QUESTION TWO

Must the Board grant a CATV franchise?

ANALYSIS

There is no provision in chapter 711 of NRS requiring a local government to grant a CATV franchise. The applicable provisions clearly indicate that the decision to grant a franchise is discretionary. [NRS 711.185](#) and [711.190](#).

The leading rule of statutory construction is to ascertain the Legislature's intent in enacting a statute. *McKay v. Board of Supervisors*, [102 Nev. 644](#), 650, 730 P.2d 438 (1986). When the statute is clear on its face, it is unnecessary to go beyond the statutory language to determine legislative intent. *Thompson v. District Ct.*, [100 Nev. 352](#), 354, 683 P.2d 17 (1984). The statutory language here is clear and it is discretionary.

CONCLUSION

The Board is not required to grant a CATV franchise.

QUESTION THREE

Can the Board limit the territory within which a franchise applicant can provide services?

ANALYSIS

This issue is less clear cut than the previous two. The CATV statute is silent on what restrictions or conditions, if any, a local government may impose on a franchise applicant. In determining whether to grant a franchise, a local government may consider only the applicant's suitability, financial responsibility and ability to perform the services efficiently. [NRS 711.230](#). The statute also permits a local government to adopt an ordinance establishing procedures to resolve subscribers' complaints. [NRS 711.250](#). Finally, local governments, of course, have the power to grant CATV franchises. [NRS 711.185](#) and [711.190](#).

The purpose of the antitrust laws is to promote competition. *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958). As previously mentioned, anticompetitive activity by the Board is exempt from these laws so long as the activity is statutorily authorized.

To intentionally divide a market for a particular product, here cable television service, is a restraint of trade and tends to lessen competition. Section 1 of the Sherman Act would be applicable.

A board of county commissioners may displace or limit competition for "[c]oncession on, over or under property owned or leased by the county." [NRS 244.187\(6\)](#). The term "concession" is substantially similar in meaning to the term "franchise" used in chapter 711 of NRS. *Black's Law Dictionary* 361 and 786 (4th ed. 1968). In amending [NRS 244.187\(6\)](#), it appears that the Legislature intended to allow local governments to limit the number of franchises for particular

services consistent with the decision in *Town of Hallie*. Hearings on Assembly Bill 588 Before the Assembly Comm'n on Gov't Affairs, Nevada Legislature, pp. 1959-62 (1985). CATV systems were not expressly included in [NRS 244.187\(6\)](#) because chapter 711 of NRS had previously been enacted and provided for exclusive franchises. *Id.* at 1961. [NRS 244.187](#) permits local governments to limit the number of franchisees providing the enumerated services. *Id.* at 160. It does not, however, permit local governments to carve out geographical areas for the franchisees to perform services in.

The Legislature has expressly prohibited CATV franchisees from engaging in promotional activities with the intent of impairing fair competition or restraining trade among CATV franchisees operating in the same area. [NRS 711.240](#). Although local governments are not expressly prohibited in the same manner, when they are attempting to displace or limit competition among CATV operators they must comply with the provisions of chapter 711 of NRS and [NRS 244.187](#).

CONCLUSION

The Board may not place territorial market restrictions or conditions upon CATV franchises.

Sincerely,

BRIAN McKAY
Attorney General

By: J. Kenneth Creighton
Deputy Attorney General

OPINION NO. 90-3 TAXATION; SALES AND USE: Nevada's liquor price affirmation statutes, codified in [NRS 369.432\(1\)](#) and 369.435, are unconstitutional and unenforceable as a violation of the Commerce Clause.

Carson City, February 5, 1990

Mr. John P. Comeaux, Executive Director, Department of Taxation, Capitol Complex, Carson City, Nevada 89710-4892

Dear Mr. Comeaux:

The Department has recently been receiving monthly statements from entities holding a supplier's certificate of compliance protesting the constitutionality of Nevada's price affirmation requirements contained in the provisions of [NRS 369.430](#) through 369.438. The basis for these protests is the recent decision of the United States Supreme Court in *Healy v. Beer Inst., Inc.*, 491 U.S. ____, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989). In this regard, you have requested an opinion from this office on the following.

QUESTION

Are Nevada's liquor price affirmation statutes enforceable after the decision of the United

States Supreme Court in *Beer Institute*?

ANALYSIS

Nevada's liquor price affirmation statutes are contained within the provisions of [NRS 369.430](#) through 369.438, which pertain to the requirements for a supplier to obtain a supplier's certificate of compliance. A "supplier" for purposes of chapter 369 of NRS is defined in [NRS 369.111](#) as:

[W]ith respect to liquor which is brewed, distilled, fermented, manufactured, produced or bottled:

1. Outside the United States, the owner of the liquor when it is first transported into any area under the jurisdiction of the United States Government; or
2. Within the United States but outside this state, the brewer, distiller, manufacturer, producer, vintner or bottler of the liquor, or his designated agent.

One of these requirements is that a supplier applying for a certificate of compliance, which is necessary in order for a supplier to export liquor, beer or wine to this state, must sign an affidavit affirming that he will comply with the requirements of [NRS 369.435](#). [NRS 369.432](#)(1)(a).

[NRS 369.435](#) provides:

1. A supplier who holds a certificate of compliance pursuant to [NRS 369.430](#) or his agent shall not sell or offer to sell to a wholesaler licensed in this state any brand of liquor, excluding beer and wine, at a price which is higher than the lowest price at which that brand of liquor is being sold by that supplier or his agent to any wholesaler in any other state or the District of Columbia or to any state or agency of a state which owns or operates retail liquor stores.
2. For the purpose of this section, the lowest price is the price for the particular brand of liquor at the place of shipment adjusted to reflect:
 - (a) Any differentials in the price based on costs of delivery or other costs not related to the quality and proof of the liquor;
 - (b) Any excise taxes or fees for licenses imposed by any state or the District of Columbia; and
 - (c) Any discounts, rebates, allowances or other inducements offered or given to any wholesaler in any state or the District of Columbia or to any state or agency of a state which owns or operates retail liquor stores.

[NRS 369.432](#)(2) requires the supplier to file monthly price lists with the Department. The prices must be set in conformance with [NRS 369.435](#).

It is precisely this type of price affirmation requirement that the United States Supreme Court addressed in *Beer Institute*. In that case, the court was faced with a challenge to Connecticut's price affirmation statutes for beer. The statute at issue required each manufacturer, wholesaler or out-of-state shipper of beer to be sold in Connecticut to post its prices for beer with the state on a monthly basis. Conn. Gen. Stat. §§ 30-63 (c) (1985). This posted price then becomes the controlling price for the following month. *Id.* The manufacturer or shipper must also affirm that at the time of posting its price for beer that this price is no higher than the price it is selling its beer to wholesalers in states bordering Connecticut. Conn. Gen. Stat. §§ 30-63b(b).

This statute originally required an affirmation that the manufacturer's or shipper's price of

beer to Connecticut wholesalers was no higher than the prices charged anywhere else in the United States, but was amended in 1984 in response to a decision of the Second Circuit Court of Appeals in *United States Brewers Ass'n v. Healy*, 692 F.2d 275, 282 (2d Cir. 1982), finding the former provision in violation of the Commerce Clause. *Beer Institute*, 109 S. Ct. at 2495. The Connecticut Legislature apparently did not similarly restrict the scope of its price affirmation requirements for wine and other types of liquor. See Conn. Gen. Stats. §§ 30-63b(a), 30-63b(c) (1985). The scope of Nevada's price affirmation requirement is the same as Connecticut's for liquor, and requires a supplier to affirm that its posted price is not higher than the lowest price at which that supplier sells the same brand of liquor to any wholesaler in any other state. [NRS 369.435](#)(1). Beer and wine are exempted from Nevada's price affirmation requirements. *Id.*

In *Beer Institute*, the United States Supreme Court struck down Connecticut's amended price affirmation statute for beer as violative of the Commerce Clause of the United States Constitution in two respects. First, the Court held that although a state had the right to regulate liquor sales within its borders, the state could not adopt legislation that has the effect of regulating liquor sales beyond its borders. *Beer Institute*, 109 S. Ct. at 2499. The Court set forth the applicable principles as follows:

Taken together, our cases concerning the extraterritorial effects of a state economic regulation stand at a minimum for the following propositions: First, the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State," *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982) (plurality opinion); see also *Brown-Forman [Distillers Corp. v. New York State Liquor Authority]*, 476 U.S. [573], at 581-583, 90 L. Ed. 2d 552, 106 S. Ct. 2080, [(1986)]; and, specifically, a State may not adopt legislation that has the practical effect of establishing "a scale of prices for use in other states." [*Baldwin v. G.A.F. Seelig, [Inc.]*], 294 U.S. [511]; at 528, 79 L. Ed. 1032 [(1935)], 55 S. Ct. 497, 101 ALR 55. Second, a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State. *Brown-Forman*, 476 U.S., at 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080. Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. Cf. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 88-89, 95 L. Ed. 2d 67, 107 S. Ct. 1637 (1987). And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another. *Brown-Forman*, 476 U.S., at 582, 90 L. Ed. 2d 552, 106 S. Ct. 2080.

Beer Institute, 109 S. Ct. at 2499.

The Court then determined that when these principles are applied to analyze Connecticut's beer price affirmation statute, the statute clearly has the effect of controlling commercial activity outside the boundary of the state in violation of the provisions and protections of the Commerce

Clause. *Id.* 109 S. Ct. at 2500.

The Supreme Court found an additional violation of the Commerce Clause in Connecticut's beer price affirmation statute in that it facially discriminates against out-of-state brewers and shippers of beer in interstate commerce. *Id.* 109 S. Ct. at 2501. The Court indicated that it followed a consistent practice of striking down state statutes that clearly discriminate against interstate commerce, "unless that discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Id.* Connecticut was unable to demonstrate a sufficient neutral justification for its discrimination against out-of-state brewers and shippers.

Finally, the Court rejected Connecticut's reliance on the Twenty First Amendment as a sanction for imposition of liquor price affirmation requirements. *Id.* 109 S. Ct. at 2502. The Court relied on its prior decision in the *Brown-Forman* case in stating that the "Twenty First Amendment does not immunize state laws from invalidation under the Commerce Clause when the laws have the effect of regulating liquor sales in other states." *Beer Institute*, 109 S. Ct. at 2502, citing *Brown-Forman*, 476 U.S. at 585.

In concluding its opinion in *Beer Institute*, the Court made clear that all price affirmation statutes that contain a provision tying in the maximum price a manufacturer or shipper may charge in one state to the lowest price charged in some other state carry an extraterritorial impact on interstate commerce which violates the Commerce Clause. *Beer Institute*, 109 S. Ct. 2502-03.

[NRS 369.435](#) carries the same Commerce Clause deficiencies as the Connecticut statute. While the beer price affirmation statute struck down in *Beer Institute* was limited to matching the lowest price in the states bordering Connecticut, [NRS 369.435](#)(1) requires suppliers to match the lowest price charged in the other forty-nine states plus the District of Columbia. Nevada similarly discriminates against out-of-state manufacturers and distributors. The definition of "supplier" is limited to out-of-state or foreign manufacturers, brewers, vintners, distillers, producers or bottlers. [NRS 369.111](#)(2). The liquor price affirmation requirements only apply to suppliers.

[NRS 369.432](#)(1)(a). Therefore, insofar as the provisions of [NRS 369.432](#)(1)(a) require a supplier of liquor to be imported and sold in Nevada to affirm that it will comply with the provisions of [NRS 369.435](#) in order to obtain a supplier's certificate of compliance, it is in violation of the Commerce Clause and unenforceable. The Department may not impose any sanction set forth in [NRS 369.438](#)(3) for the failure of a supplier or applicant for a supplier's certificate of compliance to provide the affidavit called for by [NRS 369.432](#). It is up to the Department and the Legislature to determine if any benefit is to be derived from having suppliers continue to submit monthly price schedules to the Department.

CONCLUSION

The United States Supreme Court in its recent decision in *Beer Institute* held that all state price affirmation statutes that tie in maximum prices that "suppliers" can charge liquor wholesalers in one state to the lowest price that same supplier is selling the same product in another state are violative of the Commerce Clause. Since Nevada's liquor price affirmation statutes codified in [NRS 369.432](#) and [369.435](#) clearly fall within the type of statute held invalid by the Supreme Court in *Beer Institute*, [NRS 369.432](#)(a) and [369.435](#) are unenforceable.

Consequently, the Department may not impose a sanction under the provisions of [NRS 369.438](#) against a supplier for the failure to file the affidavit called for by [NRS 369.432](#)(1)(a) or the failure to comply with the provisions of [NRS 369.435](#).

Sincerely,

BRIAN McKAY
Attorney General

By: John S. Bartlett
Deputy Attorney General

OPINION NO. 90-4 BOARDS AND COMMISSIONS; CONSTITUTIONALITY OF REGULATIONS: The Veterinary Board may not prohibit all targeted direct mail advertising without violating the First and Fourteenth Amendments to the U.S. Constitution.

Carson City, February 12, 1990

Ms. Kathy Oxborrow, Executive Secretary, State of Nevada Board of Veterinary Medical Examiners, 1005 Terminal Way, Suite 172, Reno, Nevada 89502

Dear Ms. Oxborrow:

You have requested an opinion from this office concerning the constitutionality of [NRS 638.1404\(4\)](#) and [NAC 638.015](#) of the Nevada State Board of Veterinary Medical Examiners' Practice Act ("Board"). Jack Walther, D.V.M., President of the Board, is especially concerned about the legality of the Board's prohibition against direct mail advertising.

QUESTION

Are the Board's prohibitions against solicitation, as set forth in [NRS 638.1404\(4\)](#) and [NAC 638.015](#), unconstitutional?

ANALYSIS

[NRS 638.1404\(4\)](#) and [NAC 638.015](#) both deal with solicitation. [NRS 638.1404\(4\)](#) provides that: "The following acts, among others, are grounds for disciplinary action: Soliciting patronage directly or by employing solicitors." The term "solicitation" is defined in [NAC 638.015](#) as "the use of direct-mail advertising which is directed to persons other than clients, or the use or employment of solicitors to directly contact persons, other than clients, to solicit patients for the veterinarian." The term "solicit" has been defined in *Black's Law Dictionary*; it means "to appeal for something" and implies a personal petition and importunity addressed to a particular individual to do some particular thing. *Black's Law Dictionary* 1248-49 (5th ed. 1979).

First, it is necessary to ascertain the legal status of solicitation in general. The issue of whether state licensing boards may adopt regulations governing professional advertising has previously been addressed by this office. *See* Op. Nev. Att'y Gen. 86-21 (Dec. 8, 1986). According to that opinion, such boards may prevent dissemination of advertising that is false, deceptive or misleading or that proposes an illegal transaction. Advertising is "commercial speech" which is entitled to *some* First Amendment protection. Commercial speech that is not false, deceptive or

misleading and does not concern unlawful activities may be restricted (a) only in the service of a substantial government interest, and (b) only through means that both directly advance that interest and are no more extensive than necessary to serve that interest. *Central Hudson Gas & Elec. Gas Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). See Op. Nev. Att'y Gen. 86-21 (Dec. 8, 1986) for specific cases and types of advertising which are either allowed or prohibited.

The Board previously sought advice from this office concerning the legality of a direct mail advertisement called the Animal Medical Services Newsletter. An informal opinion was rendered on January 27, 1987, which found the particular publication not to come within the prohibition contained in [NRS 638.1404\(4\)](#).

A recent United States Supreme Court decision, *Shapero v. Kentucky Bar Ass'n*, 108 S. Ct. 1916 (1988), held that a "State could not, consistent with First and Fourteenth Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems." *Id.* at 1916-17. In that case, the rule in question prohibited targeted, direct mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation was false or misleading. The Court held:

In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference. Our decision in *Ohralik* [*Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978)] that a State could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as "a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influence, and outright fraud." [Citations omitted.] Second, "unique . . . difficulties" [citation omitted] would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is "not visible or otherwise open to public scrutiny." [Citation omitted.] . . . Targeted, direct-mail solicitation is distinguishable from the in-person solicitation in each respect.

Id. at 1922. The Court further held:

The recipient of such advertising is not faced with the coercive presence of a trained advocate or the pressure for an immediate yes-or-no answer to the representation offer, but can simply put the letter aside to be considered later, ignored, or discarded. Moreover, although the personalized letter does present increased risks of isolated abuses or mistakes, these can be regulated and minimized by requiring the lawyer to file the letter with a state agency having authority to supervise mailings and penalize actual abuses. . . . [T]he reviewing agency can require the lawyer to prove or verify any fact stated or explain how it was discovered, or require that the letter be labeled as an advertisement or that it tell the reader how to report inaccurate or misleading matters.

Id. at 1918.

Based upon *Shapero*, the Board cannot enforce a blanket ban on targeted direct mail advertising; this portion of [NAC 638.015](#) is unconstitutional. The remaining portion of the regulation deals with the use or employment of solicitors to *directly* contact persons other than clients, to solicit patients. [NRS 638.1404\(4\)](#), also refers to "soliciting patronage *directly*." The

key to determining the meaning of this regulation and statute lies in the word “directly.” The term “direct” is defined as follows: “To write to a person; to mark with the name and address of the intended recipient; to impart orally.” *Webster’s 7th New Collegiate Dictionary* 235 (1976).

It is apparent that this statute and regulation could prohibit letters, telephone calls and in-person solicitations to persons other than clients. As aforementioned, a state cannot prohibit solicitation through letters, unless such letters contain false, deceptive, or misleading information or propose an illegal transaction. Case law has yet to address solicitation through telephone calls. On the one hand, a person could choose to hand up the phone, similar to discarding a letter. But, like an in-person solicitation, it would not be visible or open to public scrutiny; it would be difficult to regulate. Such solicitation should remain highly suspect.

The United States Supreme Court has ruled on the subject of in-person solicitation. In *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447 (1978), the Court held that a state *could* categorically ban *all* in-person solicitation.

In light of the above analysis, it would be advisable for the Board to amend [NAC 638.015](#) to remove references to “direct-mail advertising” and define solicitation in terms of “in-person” or telephone solicitation. The regulation should also provide safeguards for targeted, direct-mail advertising. Such protections could include a requirement that the veterinarian file the proposed letter with the Board prior to its mailing, so that the Board could ascertain whether it is false, deceptive, or misleading or proposes an illegal transaction. Additionally, the Board could require that the letter be labeled as an advertisement, and require that the veterinarian prove or verify any fact stated or explain how it was discovered.

CONCLUSION

The portion of [NAC 638.015](#) prohibiting direct mail advertising is unconstitutional. The Board may prohibit any advertising that is false, misleading, deceptive or that proposes an illegal transaction. It cannot prohibit all targeted, direct-mail advertisements. The Board can prohibit all in-person solicitation and perhaps could ban telephone solicitations as well. [NRS 638.1404](#)(4) is not unconstitutional *per se*, as long as it is not interpreted to prohibit all written solicitations.

Sincerely,

BRIAN McKAY
Attorney General

By: Debra W. Jeppson
Deputy Attorney General

OPINION NO. 90-5 APPLICABILITY OF LIMITED PARTNERSHIP DELAYED LICENSING PROCEDURES FOR BUSINESS ORGANIZATIONS: Business organizations, like natural persons, are eligible to apply for and receive Nevada Gaming Commission approval for delayed licensing of a limited partner of a limited partnership that applies for or holds a state gaming license. A limited partner that is a business organization which receives an approval of delayed licensing does not need to comply with the registration and reporting requirements for holding companies.

Carson City, February 14, 1990

Mr. William A. Bible, Chairman, State Gaming Control Board, 1150 East William Street, Carson City, Nevada 89710

Dear Mr. Bible:

The purpose of this letter is to respond to your request dated October 11, 1989, for an opinion of the Attorney General as to the applicability of the delayed licensing procedures for limited partnerships delineated in Nevada Gaming Commission Regulation 15A to various forms of business organizations such as corporations, trusts, and pension plans. This official opinion will confirm the prior oral opinions of this office.

SUMMARY OF RELEVANT FACTS

On December 6, 1989, the State Gaming Control Board considered the application of MarCor Resorts, L.P. V (hereinafter "MarCor") for a nonrestricted gaming license. MarCor is a limited partnership comprised of numerous limited partners.

Among these limited partners are various individuals and business organizations, such as corporations, partnerships, trusts, and pension plans. Many of these limited partners hold limited partnership interests of less than 10 percent as passive investments and are applying for approval of delayed licensing pursuant to Nevada Gaming Commission Regulation 15A.

QUESTION

Whether a business organization, such as a corporation, partnership, trust, or pension plan, that is a limited partner of a limited partnership that applies for or holds a state gaming license, may file an application for delayed licensing, if eligible, in accordance with Nevada Gaming Commission Regulations 15A.210-.260 or must comply with the registration and reporting requirements for a holding company pursuant to [NRS 463.575](#)-.615.

ANALYSIS

The Nevada Gaming Control Act ("Act") authorizes the Nevada Gaming Commission ("Commission") to issue state gaming licenses to limited partnerships. *See* [NRS 463.563](#)-.572 (1989). Limited partnerships, like corporations and publicly traded companies, are permitted to acquire gaming licenses or interests in licensed gaming companies in furtherance of the state public policy "[t]o broaden the opportunity for investment in gaming." *See* [NRS 463.563](#)(1)(a); *see also* [NRS 463.489](#).

With respect to limited partnership licensing, the Act provides that, "[e]very general partner and limited partner of a limited partnership which holds or applies for a state gaming license must be licensed individually." [NRS 463.569](#). The Commission may, however, "waive, either selectively or by general regulation, one or more of the requirements of [[NRS 463.569](#)]." [NRS 463.563](#)(2).

On August 18, 1988, the Commission adopted Regulation 15A governing the licensure and regulation of limited partnerships. *See* Nev. Gaming Comm'n Reg. 15A.010-.030 (1989). Regulation 15A provides that, [p]ursuant to the provisions of [NRS 463.563](#)(2) and Regulation 15A, the commission may waive licensing of limited partners and, in lieu thereof, grant approval

of delayed licensing for any limited partner.” Nev. Gaming Comm’n Reg. 15A.210 (1989). The regulation contains certain eligibility criteria for delayed licensing, namely:

1. A limited partnership that has registered with the board pursuant to the provisions of [NRS 463.568](#) or [NRS 463.585](#) may file an application for approval of delayed licensing of its limited partners.

2. Only limited partners whose aggregate effective ownership percentage in the limited partnership is no more than 10 percent will be considered for delayed licensing approval. For purposes of determining aggregate effective ownership percentage, a natural person who is part of a legal entity that is a limited partner shall be deemed to have the percentage ownership interest held by the legal entity.

3. A general partner is not eligible for delayed licensing.

4. A limited partnership seeking delayed licensing of its limited partners shall apply for a ruling from the commission, upon recommendation of the board, that it is eligible for delayed licensing of its limited partners. Such application may be made at the same time that the limited partnership applies for a state gaming license or registers with the board, and must include the information from limited partners required by Regulation 15A.240.

Reg. 15A.220.

Contemporaneous with or subsequent to approval of delayed licensing for a limited partnership, “each limited partner seeking delayed licensing shall file an application for delayed licensing.”¹ Reg. 15A.225. A limited partner is a person who has, with one or more other persons, formed a partnership in accordance with chapter 88 of the Nevada Revised Statutes. Reg. 15A.010(10). As used in the regulation, the term “person” means a “natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization.” [NRS 0.039](#) (1989). Similarly, the Nevada Uniform Limited Partnership Act, *see* [NRS 88.010-.645](#), defines “person” as “a natural person, partnership, limited partnership (domestic or foreign), trust, estate, association or corporation.” [NRS 88.315](#)(11). Accordingly, any form of business organization is a “person” that is legally capable of being a limited partner in a limited partnership that is licensed or registered pursuant to the Act. As a limited partner, these business organizations may apply for delayed licensing.

The mandates of the Act respecting the registration of holding companies do not alter this analysis. *See* [NRS 463.575-.615](#). A holding company is:

[A]ny corporation, firm, partnership, trust or other form of business organization not a natural person which, directly or indirectly:

- (a) Owns;
- (b) Has the power or right to control; or
- (c) Holds with power to vote,

all or any part of the limited partnership interests or outstanding voting securities of a corporation which holds or applies for a state gaming license.

[NRS 463.485](#)(1). Under [NRS 463.485](#)(1) business organizations that are limited partners are holding companies because these entities are not natural persons and directly or indirectly own, control or hold voting authority over an interest in a limited partnership. The registration and reporting requirements for holding companies under the Act, therefore, generally may apply to limited partnerships. These requirements for holding companies, like the licensing requirement

for limited partnership, may be waived by the Commission selectively or through general regulation. The delayed licensing scheme promulgated by the Commission in Regulations 15A.210 through 15A.260 constitutes such a waiver by general regulation. In furtherance of various public policies,² the Commission adopted the delayed licensing mechanism instead of requiring immediate licensure of limited partners under [NRS 463.569](#) or registration for holding companies of certain limited partnership interests pursuant to [NRS 463.585](#), or both. The Commission is statutorily empowered to promulgate this method for the licensure, regulation and control of a limited partnership gaming interest. See [NRS 463.143](#), [463.1597](#), 463.489(2) and 463.563(2).³

CONCLUSION

Any form of nongovernmental business organization is a “person” that may join with another person or persons to form a limited partnership pursuant to chapter 88 of the Nevada Revised Statutes. Generally, the Act requires licensure of each limited partner of a limited partnership that applies for or holds a state gaming license. The Commission has adopted a general regulation waiving the licensing requirement for certain limited partners, which regulation provides that a limited partner, including any business organization, may apply for delayed licensing in accordance with Nevada Gaming Commission Regulation 15A.225 if the limited partner is eligible for delayed licensing pursuant to Nevada Gaming Commission Regulation 15A.220. Regulation 15A likewise dispenses with the requirement that limited partners that are a business organization register with and report to the Commission as holding companies if the limited partner has been granted delayed licensing approval.

Consequently, business organizations, like natural persons, are eligible to apply for and receive Commission approval for delayed licensing of a limited partner of a limited partnership that applies for or holds a state gaming license. A limited partner that is a business organization which receives an approval of delayed licensing does not need to comply with the registration and reporting requirements for holding companies.

Sincerely,

BRIAN McKAY
Attorney General

By: Brooke A. Nielsen
Chief Deputy Attorney General

Footnotes

¹ Moreover, the regulation delineates numerous standards that the Board and Commission are to consider when determining whether delayed licensing should be granted or denied in a particular instance. Reg. 15A.260. The decision to grant or deny the application for delayed licensure of the limited partner is within the sound discretion of the Commission after considering all relevant facts, including those factors delineated in Nevada Gaming Commission Regulation 15A.260.

² The Commission adopted the delayed licensing scheme for limited partnerships in order to

advance the state public policy to “broaden the opportunity for investment in gaming through the pooling of capital in the limited partnership form,” while maintaining “effective control over the conduct of gaming by limited partnership licenses.” [NRS 463.563](#)(1)(b) (1989). The delayed licensing process was also adopted to enable the Board and Commission to prioritize limited license application investigative resources, allow continued regulatory jurisdiction over minor limited partnership interests until licensed and mandate certain reporting obligations for the limited partners.

³ Furthermore, the delayed licensing scheme under Regulation 15A is not inconsistent with the state public policy that “[p]ublic confidence and trust can only be maintained by strict regulation of all persons, locations, practices, associations and activities related to the operation of licensed gaming establishments” [NRS 463.0129](#)(1)(c). Licensing, whether immediate or delayed, furnishes a degree of regulatory control at least commensurate with the registration of a holding company. Although Regulation 15A does not contain continued reporting requirements for persons approved for delayed licensing that are coextensive with those for holding companies, the Commission could require any reporting requirement deemed necessary to the effective oversight of limited partners. Moreover, under the delayed licensing scheme of Regulation 15A, the Board and Commission possess the continuing jurisdiction to activate the immediate licensing process for limited partners.

OPINION NO. 90-6 INDIANS; STATE HEALTH DIVISION; CONTROL OF COMMUNICABLE DISEASES: State health authority to regulate Indians on Indian reservations who have a communicable disease has not been conclusively resolved by the courts. If a direct health threat to the general citizenry exists which has not been alleviated by the appropriate federal authorities after notice, state action may be available to protect Nevada citizens from such a communicable disease threat. The exercise of state health authority does exist relative to Indians while off the Indian reservation.

Carson City, March 16, 1990

Ms. Myla C. Florence, Administrator, Nevada Health Division, 505 East King Street, Room 200, Carson City, Nevada 89710

Dear Ms. Florence:

You have requested an opinion from our office concerning the extent of authority of the Health Division to control tuberculosis (“TB”) and other communicable diseases among Indians. The specific questions posed are as follows.

QUESTION ONE

What is the extent of authority of the Health Division to control TB and other communicable diseases among Indians living on Indian reservations in Nevada?

ANALYSIS

In *State, Dep’t of Ecology v. United States Environmental Protection Agency*, 752 F.2d 1465, 1469 (9th Cir. 1985), the court was asked to rule upon the extent of authority of the State of

Washington to regulate hazardous waste on Indian reservations. The court stated:

States are generally precluded from exercising jurisdiction over Indians in Indian Country unless Congress has clearly expressed an intention to permit it. *Bryan v. Itasca County* 426 U.S. 373, 376 n.2, 96 S. Ct. 2102, 2105 n.2, 48 L. Ed. 2d 710 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 170-71, 93 S. Ct. 1257, 1261-62, 36 L. Ed. 2d 129 (1973). This rule derives in part from respect for the plenary authority of Congress in the area of Indian affairs. See *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S. Ct. 894, 908, 71 L. Ed. 2d 21 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-43, 100 S. Ct. 2578, 2582-83, 65 L. Ed. 2d 665 (1980). Accompanying the broad congressional power is the concomitant federal trust responsibility toward the Indian tribes. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975), cert. denied, 429 U.S. 1038, 97 S. Ct. 731, 50 L. Ed. 2d 748 (1977); see *Seminole Nation v. United States*, 316 U.S. 286, 297, 62 S. Ct. 1049, 1054, 86 L. Ed. 1480 (1942). That responsibility arose largely from the federal role as a guarantor of Indian rights against state encroachment. See *United States v. Kagama*, 118 U.S. 375, 383-84, 6 S. Ct. 1109, 1113-14, 30 L. Ed. 228 (1886). . . . Respect for the long tradition of tribal sovereignty and self-government also underlies the rule that state jurisdiction over Indians in Indian Country will not be easily implied. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 141-44, 100 S. Ct. at 2582-2584; *Bryan*, 426 U.S. at 376 n.2, 96 S. Ct. at 2105 n.2 (footnote omitted).

In *White v. Califano*, 581 F.2d 697 (8th Cir. 1978), the court concluded that the State of South Dakota lacked the authority to initiate involuntary commitment procedures upon a mentally ill Indian residing on the Indian reservation. The court reasoned that the concept of tribal sovereignty could not coexist with the exercise of such state power. Reference was also made to the intention of Congress to place upon the United States the legal responsibility for the provision of medical care to Indians.

The issue of whether Congress has clearly expressed an intent to allow states to exercise jurisdiction over Indians on Indian land in the area of health and communicable diseases is subject to debate. One author has addressed the issue of state authority as follows:

As early as 1929, the Congress extended State law to Indian reservations covering inspection of health and the enforcement of "sanitation and quarantine regulations" under such rules and regulations as the Secretary of the Interior might prescribe. [25 U.S.C. § 231.]

Neither the Interior Department nor the Indian Health Service have regulations limiting this statutory authority in any way. Most sanitation work and discovery of quarantine situations on Federal reservations is performed by the Indian Health Service. The State health offices are poorly funded and poorly staffed.

The Indian Health Service contracts with State and private organizations and individuals for some Indian health services but directly provides the major portion of medical and health services for Indians in Indian Country (footnote omitted).

Taylor, *The States and their Indian Citizens*, 34 (1972).

Thus, this author appears to conclude that since neither the Secretary of the Interior nor Indian Health Service (“IHS”) have adopted regulations limiting this grant of authority, such authority to regulate in the area of health by the states presently exists.

Other authors have concluded that since the Secretary of the Interior has never adopted regulations pursuant to 25 U.S.C. § 231, no authority has yet been conferred upon or exercised by the states. For example, in Canby, *American Indian Law*, 226 (1988), the author states:

One other possible, narrow avenue for the application of state law to tribal members exists under an unusual federal statute. It provides that the Secretary of Interior, under such rules as he may prescribe, shall permit the states to enforce sanitation and quarantine regulations and, if the tribe consents, compulsory educational laws in Indian country. 25 U.S.C.A. § 231. The Secretary has never issued regulations so permitting, and the state power has accordingly been unexercised except where the tribe has approved application of school attendance laws.

Despite these actual or potential exceptions, the opportunities for state law to apply to tribal members in Indian country are extremely limited.

In F. Cohen, *Handbook of Federal Indian Law*, 377 (1982), the author states:

In 1929 Congress enacted a statute permitting state officers under regulations promulgated by the Secretary of the Interior to enter Indian lands to inspect health and education conditions and to enforce sanitation and quarantine regulations. This law was amended in 1946 to authorize secretarial regulations permitting enforcement of state compulsory school attendance laws on any reservation where the governing tribe adopts a resolution consenting to enforcement.

This statute has implementing regulations only for school conditions and compulsory attendance (footnote omitted).

Cohen concludes his analysis by indicating that the Interior Department’s position is that absent the promulgation of regulations, the statute does not compel the Secretary to allow state inspection. Likewise, in *Thomsen v. King County*, 694 P.2d 40, 44 (Wash. App. 1985), the court considered the same statute (25 U.S.C. § 231) in evaluating the authority of the state to regulate septic tanks owned by non-Indians on an Indian reservation that violated county health regulations. The court stated:

The other alleged federal statutory basis for state jurisdiction in this case is 25 U.S.C. § 231. This provision states in pertinent part:

Enforcement of State laws affecting health and education; entry of State employees on Indian lands.

The Secretary of the Interior, under such rules and regulations as he may prescribe, shall permit the agents and employees of any State to enter upon Indian tribal lands, reservations or allotments therein (1) for the purpose of making inspection of health and educational conditions and enforcing sanitation and quarantine regulations. . . .

25 U.S.C. § 231. The Interior Department’s interpretation of this provision has been

as follows:

Although the statute says that the Secretary “shall” permit state inspection and enforcement, the longstanding position of the Interior Department is that the statute does not compel the Secretary to allow state inspection or enforcement. Thus the statute authorizes only those state activities allowed by secretarial regulations.

(Footnotes omitted.) *Cohen’s, supra*, at 377 (citing 57 Interior Dec. 162, 167-68 (1940)). However, implementing regulations for the state inspection of health and sanitation conditions have not been issued. *Cohen’s, supra*.

Moreover, judicial interpretations of 25 U.S.C. § 231 have been few. A federal court noted the absence of regulations and concluded that the statute nevertheless evinced a congressional intent to permit state assumption of partial subject matter jurisdiction. *Confederated Bands & Tribes of Yakima Indian Nat. v. State of Washington*, 550 F.2d 443, 446-47 n.8 (9th Cir.) (en banc). The Supreme Court, without commenting on the lack of regulations, recognized congressional authorization for state health and sanitation enforcement jurisdiction under the statute. *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S. Ct. 562, 570, 7 L. Ed. 2d 573 (1962); accord, *Anderson v. Gladden*, 188 F. Supp. 666, 677 (D.C. Or. 1960). The Washington Supreme Court has similarly recognized the grant of state jurisdiction under 25 U.S.C. § 231:

The state has, of course, been granted jurisdiction to inspect and regulate health, sanitation, and related matters on Indian tribal lands. 45 Stat. 1185, 25 U.S.C. § 231.

Snohomish Cy. v. Seattle Disposal Co., 70 Wash. 2d 668, 674, 425 P.2d 22 (1967).

The Washington appellate court concluded, however, that state jurisdiction would have to be demonstrated under another federal statute.

The Washington Supreme Court in *Snohomish County v. Seattle Disposal Company*, 425 P.2d 22, 29 (1967), discussed at great length the state’s authority with respect to health in light of 25 U.S.C. § 231.

I see a sensible distinction available in deciding whether the police power of the state extends to the Indian reservation in a particular case. If the action or omissions prohibited by the police power are of the kind which directly injure or endanger the surrounding area and its inhabitants or the state’s citizenry at large, or reasonably appear to do so, then the Indians ought not be permitted to flout the state’s laws enacted to preserve the public peace, health, safety and welfare from the very injuries and dangers which the police regulations were reasonably designed to prevent or curtail. That the Congress recognizes this principle may be inferred from its enactment of 25 U.S.C. § 231 mandating the Secretary of the Interior to allow the states to enforce health, sanitation and educational laws on Indian reservations (statutory provision omitted).

Therefore, unless federal legislation directly prohibits the exercise of state

jurisdiction, the state, I believe, may and should exercise its police power over Indian reservations as far as may be reasonably necessary to preserve the peace, safety and welfare of its citizens—including, of course, its Indian citizens. 27 Am Jur. Indians, § 48 (1940). A different rule would prevent the state, in the reasonable exercise of the police power, from enforcing on the reservation such laws as are designed to prevent contamination of the state's waters; control and reduce air pollution, quell riots and public disturbances likely to spread to adjoining areas; *quarantine and treat epidemic diseases in imminent danger of spreading throughout the state*; suppress loud and protracted noises emanating from the reservation to the disturbance of non-Indians living nearby; enforce compliance with electrical safety codes designed to protect all users of the electrical system; enforce fire control and safety regulations, which, if ignored, may set an entire district of the state ablaze; and capture dangerous criminals.

Therefore, if the state may exercise its sovereign powers to protect its people, including its citizens of Indian extraction, from these innumerable hazards and possesses a jurisdiction over Indian reservations not directly prohibited by federal legislation, it has the power to enforce on the reservation the laws reasonably designed to protect all of its citizens, Indian or non-Indian alike, from such hazards and dangers originating on the reservation which directly threaten the peace, repose, welfare and safety of all citizens (emphasis added).

This decision may no longer be persuasive authority for the assumption of jurisdiction by the state to regulate in the area of health in light of the 1976 enactment by Congress of the Indian Health Care Improvement Act ("Act"). This Act affirms the responsibilities of the federal government and now the IHS to regulate in the area of Indian health. This Act provides:

The Congress hereby declares that it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligation to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy.

25 U.S.C. § 1602.

CONCLUSION

The extent of the authority of a state to regulate Indians on Indian reservations with respect to communicable diseases has not been conclusively resolved by the courts. A court may reasonably find that such exercise of authority is an impermissible infringement upon the Indians' sovereign right of self-government. On the other hand, a court may conclude that the exercise of state health authority is either expressly authorized by 25 U.S.C. § 231 or implied by the states' inherent authority to preserve the public health and safety of its citizens who may come in contact with Indians on the reservation infected with a communicable disease. A court may also conclude, however, that 25 U.S.C. § 231 is operative only upon the adoption of regulations by the Secretary of the Interior.

Accordingly, in light of the degree of uncertainty regarding permissible authority to enforce state communicable disease laws against the Indians on Indian reservations, efforts toward mutual cooperation with the health authority established on the Indian reservations in the area of education, information and recommended action regarding communicable disease, would indeed

be appropriate. Should such cooperative efforts fail to eliminate or substantially reduce the risk of transmission to others, both on and off the reservation, assistance from the Department of Interior, Bureau of Indian Affairs, and the Department of Health and Human Services, Bureau of Indian Health Services should be sought. This office is willing to provide support to you in requesting action by the federal government to alleviate any health risks. Resort to the judicial system may be necessary if the course of action described above fails to achieve the desired result.

QUESTION TWO

What is the extent of authority of the Health Division to control TB and other communicable diseases among Indians living on Indian reservations in Nevada while they are off the reservation and mingling with the general population?

ANALYSIS

The general rule is that an Indian who is off the reservation is subject to all the laws of the state wherein he is found, to the same extent that a non-Indian citizen or alien would be.¹ F. Cohen, *Handbook of Federal Indian Law*, 119 (1942).

This principle was enunciated in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) as follows: "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state (citations omitted)."

CONCLUSION

Indians are generally subject to the laws of Nevada while off the reservation, including any communicable disease laws equally applicable to Nevada citizens.

Sincerely,

BRIAN McKAY
Attorney General

By: Bryan M. Nelson
Chief Deputy Attorney General

Footnotes

¹ There exists minor exceptions to this rule not applicable to this opinion request, where the conduct of the Indian is a subject matter over which Congress has asserted its constitutional power and, therefore, preempted state action.

OPINION NO. 90-7 URESA; CUSTODY; VISITATION: The registration of a foreign support order under the provisions of [NRS 130.320](#) to [130.370](#), inclusive, does not permit the litigation in the URESA registration proceeding of matters involving custody and visitation.

Carson City, March 27, 1990

Ms. Roberta J. O'Neale, Chief Deputy District Attorney, DAFS Project Director, Clark County District Attorney's Office, 200 South Third Street, Las Vegas, Nevada 89155

Dear Ms. O'Neale:

You have requested the opinion of this office on the following:

QUESTION

Will registration of a foreign support order in Nevada under the Uniform Reciprocal Enforcement of Support Act ("URESAs") enable the obligor to request the Nevada court to modify the visitation and custody provisions of that order?

ANALYSIS

Nevada enacted the Revised Uniform Reciprocal Enforcement of Support Act in 1968. It is codified in chapter 130 of the Nevada Revised Statutes. Pursuant to URESAs, in addition to other provisions, one may register a foreign support order in Nevada. See [NRS 130.320](#) *et seq.* See also URESAs at section 36.

[NRS 130.290](#)(2) provides that:

Participation in any proceeding under this chapter does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding.

See also section 32 of URESAs. [NRS 130.290](#)(1) additionally provides:

The provisions of this chapter apply only with respect to proceedings for the enforcement of duties of support and do not apply to the determination of any collateral issue such as visitation, custody, property settlements or other agreements which might be asserted to exclude a child's right to support (emphasis added).

Statutes that are plain and unambiguous on their face are to be given their clear meaning. *Peot v. Peot*, [92 Nev. 388](#), 390, 551 P.2d 242 (1976); *Atlantic Commercial Dev. Corp. v. Boyles*, [103 Nev. 35](#), 38, 732 P.2d 1360 (1987). It is clear from the face of these statutory provisions that only matters involving support may be presented to the Nevada court in actions brought pursuant to the URESAs chapter. The statutes provide no authority to decide collateral issues such as custody or visitation rights. Since the registration of foreign support order provisions are part of the URESAs chapter, these provisions must be read together. Therefore, there is no authority to raise issues of custody and visitation in an action brought by registering a foreign support order in Nevada.

The analysis is further supported by other statutory provisions and case law. [NRS 130.320](#) specifically provides with respect to registration of a foreign support order: "If the duty of support is based on a foreign support order, the obligee has the additional remedies provided in [NRS 130.330](#) to [130.370](#), inclusive."

This section, when read in conjunction with [NRS 130.290](#), leads to the inescapable conclusion

that registration of foreign support orders is merely another remedy provided in chapter 130 of NRS and that the registration procedure is governed by the restrictions provided in [NRS 130.290](#) which pertain to “this chapter.” If the Legislature had intended the provisions of [NRS 130.290](#) to apply solely to [NRS 130.010](#) through 130.315, the Legislature could have so provided. It clearly did not so provide; and, therefore, the plain meaning of [NRS 130.290](#) applies to all of [NRS chapter 130](#).

[NRS 130.370](#), which relates to the effect of registration of a foreign support order, provides in subsection 1:

Upon registration, the confirmed registered foreign support order shall be treated in the same manner as a support order issued by a court of this state. It has the same effect and is subject to the same procedures, defenses and proceedings for reopening, modifying, vacating or staying as a support order of this state and may be enforced and satisfied in like manner (emphasis added).

[NRS 130.370](#)(3) provides in part: “At the hearing to enforce the registered support order, the obligor may present only matters that would be available to him as defenses in an action to enforce a foreign money judgment concerning any arrearages which have accrued thereunder.”

These statutes are written in terms that pertain to the enforcement of support. The defenses that may be raised are only those that are available to enforce a money judgment. It is therefore clear from the language that the Legislature intended only support orders to be registered and subject to enforcement pursuant to [NRS 130.320 et seq.](#)

In *Hampton v. Brewer*, [103 Nev. 73](#), 74 (1987), the court stated that statutes must be construed in light of their purpose as a whole. The purpose of [NRS chapter 130](#) is to provide a simplified and expeditious way to enforce support rights by both residents and nonresidents. See [NRS 130.030](#). With regard to requests for registration of a foreign support order received from another jurisdiction, the obligee is not ordinarily able to come to Nevada to present her claims; nor is the obligee in a position to litigate custody and visitation claims in Nevada. Therefore, to require the obligee to submit to the jurisdiction of the URESA court for purposes other than for support would defeat the manifest purpose of URESA of expediting support enforcement. This is evident not only from the statutory scheme outlined above, but also from cases from other jurisdictions where the respondent counterclaimed for custody or visitation.

In *Register v. Kandlbinder*, 216 S.E.2d 647 (Ga. App. 1975), the mother brought a URESA proceeding for support. The father counterclaimed for custody. The court ordered child support and dismissed the counterclaim for custody. Upon appeal, the court held that under the provisions of URESA (similar to [NRS 130.290](#)(2)) the trial court properly struck the counterclaim for child custody in view of the statute precluding assertion of jurisdiction in any other proceeding.

In South Dakota, the Supreme Court reversed the district court’s order holding that custodial parent’s interference with visitation could be raised as an equitable defense. The Supreme Court held that, in enacting the Uniform Reciprocal Enforcement of Support Act, the Legislature did not intend that the state’s prosecuting attorney be transformed into a private attorney representing a client in a divorce proceeding where visitation and custody issues are raised. *Todd v. Pochop*, 365 N.W.2d 559 (S.D. 1985). Likewise in *Blois v. Blois*, 130 So. 2d 373 (Fla. App. 1962), the court held that the only real issue in proceedings under URESA is support, and the defendant could not maintain a counterclaim for divorce in the URESA proceeding.

Particularly important is the case of *In Re Marriage of Ryall*, 201 Cal. Rptr. 504 (Cal. App. 1984), which thoroughly analyzes URESA. The court held at page 507:

The scope of RURESA is limited to the enforcement of past and present support obligations previously established in a foreign court. Section 1672 [of the California Code of Civil Procedure] provides: “All duties of support, including the duty to pay arrearages, are enforceable” under the Act. Conspicuously absent from the language of the Act is any grant of authority to a trial court hearing a RURESA petition to settle matters of visitation. Section 1690 [of the Code of Civil Procedure] specifies that:

“Participation in any proceeding under this title does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding,” and section 1694 specifically provides that the support order issued by another court is “subject only to any defenses or modification available to a defendant in a proceeding to enforce a foreign support judgment.” Matters concerning custody or visitation are not to be considered a defense to a duty of support: “The determination or enforcement of a duty of support owed to one obligee is unaffected by any interference by another obligee with rights of custody or visitation granted by a court.” [California Code of Civil Procedure] (§ 1694.) (footnote omitted).

This language of California’s statutes is identical to the provisions of [NRS 130.110](#), [130.290](#) and [130.210\(3\)](#).

The jurisdictions holding that custody and visitation rights may not be raised in an action brought under the URESA are in the majority. Recently, the Nevada Supreme Court reversed a URESA order for support where the divorce decree awarded custody to the defendant. *Vix v. Wisconsin, ex rel. Vix*, [100 Nev. 495](#), 497 (1984). The court held that entering a support order under the facts of the case was in effect a modification of the custody order which is not permitted under URESA. In summary, it is therefore clear that custody and visitation issues cannot be litigated in proceedings brought pursuant to [NRS chapter 130](#).

A discussion of custody and visitation issues in relation to URESA cannot be thoroughly analyzed without also discussing the Uniform Child Custody Jurisdiction Act (“UCCJA”). [NRS chapter 125A](#) contains the UCCJA. The UCCJA provides remedies to enforce visitation and custody rights. [NRS 125A.050](#) specifies the jurisdiction of the court to make a child custody decree under the Act:

1. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modifying decree if:
 - (a) This state:
 - (1) Is the home state of the child at the time of commencement of the proceeding; or
 - (2) Had been the child’s home state within 6 months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state;
 - (b) It is in the best interest of the child that a court of this state assume jurisdiction because:
 - (1) The child and his parents, or the child and at least one contestant, have a

significant connection with this state; and

(2) There is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships;

(c) The child is physically present in this state and:

(1) The child has been abandoned; or

(2) It is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected;

(d) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and it is in the best interest of the child that this court assume jurisdiction; or

(e) The child is not subject to the exclusive jurisdiction of an Indian tribe pursuant to the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 *et seq.*).

2. Except under paragraphs (c) and (d) of subsection 1, physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

3. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

This statute provides additional reasons why a custody determination may not be made in URESA proceedings as it relates to the provisions of the UCCJA. Initially, [NRS 125A.050\(1\)](#) provides that a court of this state *which is competent to decide child custody matters* has jurisdiction under certain circumstances to make an initial or modifying child custody determination. Thus, the first requirement is that the court from which a custody determination is sought must have jurisdiction to make an initial or modifying determination of child custody. As discussed above, however, the URESA court does not have such jurisdiction. [NRS 130.290\(1\)](#).

Secondly, jurisdiction is premised upon the contacts a state has with the child and the family with whom the child lives. *See* [NRS 125A.050](#). In a URESA proceeding, quite often the petitioner and child are living in another state. The sole contact with this state is for the purpose of obtaining child support from the respondent. Therefore, because the majority of the contacts are not in Nevada, the jurisdictional requirements of the UCCJA would not be met.

The issue of jurisdiction under UCCJA was analyzed in *Slidell v. Valentine*, 298 N.W.2d 599 (Iowa 1980). In that case, the father appealed from an order of the district court denying enforcement of a Florida custody decree under UCCJA. The court specifically held that Florida had lost jurisdiction under the original divorce decree to modify the child custody order because ten years had elapsed since the making of the original custody order and the purported request to modify it by Florida preceded Iowa's involvement. The court analyzed the jurisdictional provisions of UCCJA at 603:

Florida had jurisdiction to modify the custody provision if (a) it was William's "home state" at the time the proceeding was commenced or within the preceding six months, or (b) William's "best interest" required an assumption of jurisdiction because of his and at least one parent's "significant connection" with Florida.

We first address the "home state" basis of Florida's jurisdiction. "Home state" is defined in section 598A.2(5) as:

the state in which the child immediately preceding the time involved,

lived with the child's parents, a parent, or a person acting as a parent, for at least six consecutive months, and in the case of a child less than six months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six month or other period.

We have held that in determining whether an earlier court does "not now" have jurisdiction, the "now" refers to the time of the filing of the petition for modification (citation omitted). The father contends that time was 1975, when his initial modification was filed and that, because William and both of his parents resided in Florida at that time, Florida was William's home state. The mother argues that the proceedings were commenced in 1978 when the father counter-petitioned for custody in response to her URESA action for support and that in 1978, Florida was not William's "home state" because he had not resided there since 1975.

....

[I]nterpretation of the uniform act, and its application, should be tempered by its overall purposes (citation omitted). One purpose of the jurisdictional provisions of the act is to emphasize "maximum, rather than minimum contact with the state." 9 U.L.A., *Child Custody Jurisdiction Act*, § 3, Commissioners' Note at 124 (1979). This advances the best interests of the child because "the forum has optimum access to relevant evidence about the child and his family. *Id.*

In summary, the court rejected the argument that Florida had jurisdiction over the custody issues.

Under the principles enunciated in *Slidell*, it is hard to conceive of a situation where Nevada would be the home state of a child for whom support is being sought by the registration of a foreign support order where the request is made by a non-resident person with whom the child resides. It is highly unlikely under those circumstances that Nevada would be the home state of the child. Therefore, proceedings related to custody and visitation would not lie in Nevada. Even if the remote possibility existed that Nevada would have jurisdiction under UCCJA over the proceeding to determine custody, the court would lack subject matter jurisdiction under URESA. URESA specifically precludes the consideration of collateral issues such as custody and visitation from the scope of the Act. Accordingly, the proper course would be to bring an action under UCCJA.

Several courts have analyzed the relationship between UCCJA and URESA. *In Re Marriage of Ryall* supports the proposition decided by a California appellate court in *McDowell v. Orsini*, 127 Cal. Rptr. 285. In *McDowell*, as explained in *Ryall*, it was held that the trial court's order purporting to deal with the matter of the custody of the minor child was beyond the power of the court because:

(a) it was made without any written application . . . or other advance notice to petitioner that [this] relief was sought, (b) there were no circumstances justifying the exercise of jurisdiction over the child who neither resided in nor was present in California, and (c) the purpose of the proceeding was limited to enforcing the duty of support arising under the laws of this state against an obligor present in this state. (Code Civ. Proc., § 1655.) (*McDowell v. Orsini*, *supra*, 54 Cal. App. 3d at p. 961, 127 Cal. Rptr. 285.)

The *McDowell* court first determined that the interest of the parent in the “companionship, care, custody, and management of . . . children [was] a compelling one” necessitating the application of procedural due process rights of notice and opportunity to be heard to an interference with the interest. (*Id.*, at p. 961, 127 Cal. Rptr. 285, quoting *Stanley v. Illinois* (1972) 405 U.S. 645, 651, 92 S. Ct. 1208, 1212, 31 L. Ed. 2d 551; *In re Moilanen* (1951) 104 Cal. App. 2d 835, 842, 233 P.2d 91.) The court further stated that the requirement is made explicit by the provisions of the Uniform Child Custody Jurisdiction Act which provide that a court in California, competent to decide child custody matters, must afford notice and an opportunity to be heard concerning the matter of child custody to any out-of-state parent whose parental rights have not terminated. (Civ. Code, § 5154; *McDowell*, *supra*, 54 Cal. App. 3d at p. 961-962, 127 Cal. Rptr. 285.)

Although the father in the *McDowell* case, in his response to the order to show cause, asserted that he would raise the question of visitation rights in the subsequent hearing on the order, this responsive pleading did not meet the notice requirements of Civil Code section 5154 which called for personal service on the out-of-state spouse. Notice is not required if the party submits to the jurisdiction of the court, but the mother’s application for support pursuant to RURESA does not constitute a submission to the jurisdiction of the California courts with respect to the matter of custody. (§ 1690; *McDowell*, *supra*, at p. 963, 127 Cal. Rptr. 285.)

Even if the notice requirements were met, the *McDowell* court alternatively held that the exercise of jurisdiction over the custody of a minor child would not be permissible in a RURESA action unless the jurisdictional requirements of Civil Code section 5152 were established. (*Id.*, at p. 962-963, 127 Cal. Rptr. 285.) Civil Code section 5152 specifies the following situations in which the exercise of jurisdiction over the matter of child custody is proper: (a) if California is the child’s “home state,” (b) if the child and at least one contestant have a “significant connection with this state, and . . . there is available in this state substantial evidence” concerning the rearing of the child, (c) in an emergency and the child is present in the state, or (d) no other state has or will assume jurisdiction, and it is in the best interests of the child that California do so

Additionally, it is clear that the California Legislature did not intend to extend jurisdiction in a RURESA proceeding beyond the matter of child support. In *McDowell*, the court stated:

Petitioner’s application for support pursuant to the Uniform Reciprocal Enforcement of Support Act did not constitute a submission to the jurisdiction of the California courts with respect to the matter of custody. This is made clear by the provisions of section 1690 of the Code of Civil Procedure which provides: “Participation in any proceeding under this title does not confer jurisdiction upon any court over any of the parties thereto in any other proceeding.” *Id.* at p. 963, 127 Cal. Rptr. 285.

In Re Marriage of Rydall, at 508-09. The reasoning of this case is therefore particularly pertinent since similar statutes cited in *Re Marriage of Ryall* are also contained in [NRS chapters 125A](#) and 130.

In *Re Marriage of Truax*, 522 N.E.2d 402 (Ind. App. 1988), the father contended that the court

which presided over the 1977 URESA proceedings also had jurisdiction of the subject matter of visitation by virtue of Indiana's Uniform Child Custody Jurisdiction Law.

The court said at pages 406-07:

We disagree. URESA specifically provides: "Participation in any proceeding under this chapter shall not confer upon any court jurisdiction of any of the parties thereto in any other proceeding." Ind. Code § 31-2-1-30. Truax argues that subject matter jurisdiction over visitation existed under the UCCJL [Uniform Child Custody Jurisdiction Law], and that the court could decide the visitation issue because it already had personal jurisdiction over Cole by virtue of the URESA petition. We reject Truax's bootstrap argument. By filing a URESA petition, Cole did not submit to the personal jurisdiction of the Indiana courts for all purposes, but only for the limited purpose of enforcing a support claim. We reiterate our conclusion in Issue One, that in order to give effect to the URESA's purpose, we are compelled to limit a URESA court's jurisdiction to the single issue of support.

It is clear, therefore, from these cases that a court acting pursuant to URESA may enforce support but may not make determinations regarding visitation and custody. Furthermore, the specific language of [NRS 130.290\(1\)](#) speaks directly to custody and visitation rights thereby precluding them from being determined in a URESA action. Finally, in most cases no court of this state could decide the custody and visitation issues. The courts in Nevada would likely lack subject matter jurisdiction over such issues under the provisions of the UCCJA setting forth which courts have jurisdiction over a child custody and visitation proceeding.

CONCLUSION

The registration proceedings contained in [NRS chapter 130](#) are a part of URESA, under which custody and visitation issues may not be considered. This state would normally lack jurisdiction under URESA over the custody and visitation issues concerning a child living in another state with his custodian who is seeking to register a foreign support order. It is, therefore, the opinion of this office that the registration of a foreign support order under the provisions of [NRS 130.320](#) to [130.370](#), inclusive, does not permit the litigation in the URESA registration proceeding of matters involving custody and visitation.

Sincerely,

BRIAN McKAY
Attorney General

By: Nancy Ford Angres
Senior Deputy Attorney General

OPINION NO. 90-8 DEATH CERTIFICATES; PUBLIC RECORDS; VITAL STATISTICS: Death certificates are public records open to inspection and disclosure unless disclosure would lead to an unwarranted invasion of privacy, or would involve the disclosure of personal information relating to communicable diseases.

Carson City, April 27, 1990

Ms. Myla C. Florence, Administrator, Health Division, Department of Human Resources, 505 East King Street, Room 201, Carson City, Nevada 89710

Dear Ms. Florence:

You have requested an opinion from our office with regard to the following:

QUESTION

Whether death certificates preserved by the Office of Vital Statistics maintained in accordance with [NRS 440.160](#) are public records open to public inspection and disclosure?

ANALYSIS

[NRS 440.170](#) provides:

1. All certificates in the custody of the state registrar are open to inspection subject to the provisions of this chapter. It shall be unlawful for any employee of the state to disclose data contained in vital statistics, except as authorized by this chapter or by the board.
2. Information in vital statistics indicating that a birth occurred out of wedlock shall not be disclosed except upon order of a court of competent jurisdiction.
3. The board may permit the use of data contained in vital statistics records for research purposes, but without identifying the persons to whom the records relate.

This vital statistics statute is consistent with Nevada's broader public records statute which provides:

All public books and public records of state, county, city, district, governmental subdivision and quasi-municipal corporation officers and offices of this state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, shall be open at all times during office hours to inspection by any person, and the same may be fully copied or an abstract or memorandum prepared therefrom, and any copies, abstracts or memoranda taken therefrom may be utilized to supply the general public with copies, abstracts or memoranda of the records or in any other way in which the same may be used to the advantage of the owner thereof or of the general public.

[NRS 239.010](#)(1).

Death certificates clearly fall within the statutory definition of public records, and based upon [NRS 239.010](#) and [NRS 440.170](#) are, therefore, generally open to public inspection. An Indiana court, construing a similar public records statute, in *Evansville-Vanderburgh County, Dep't of Health v. Evansville Printing Corp.*, 332 N.E.2d 829 (Ind. 1975), held that death certificates were public records open to inspection by members of the public. A general rule of statutory construction is to apply, if reasonable, the construction of a similar statute by another court. *Gamb v. Morgenthaler*, [83 Nev. 90](#), 96, 423 P.2d 670 (1967). In a previous Attorney General Opinion, this office concluded that autopsy reports were public records for purposes of Nevada's public records statute. Op. Nev. Att'y Gen. No. 82-12 (June 15, 1982). Thus, it is clear that death

certificates are public records.

Since the vital statistics records are public records, the inquiry focuses on whether the right of inspection is without qualification. Other than in the area of illegitimacy, no restrictions on public access are provided in [NRS 440.170](#), the specific right to inspect provision of the vital statistics statutes. Another provision of the vital statistics statutes, [NRS 440.650](#), limits the furnishing of certified copies to persons with a “direct and tangible interest in the matter recorded.” This statute appears, however, to address only the furnishing of certificated copies. The apparent purpose of the provision is to prevent someone from obtaining a certified certificate for an improper or wrongful purpose. Moreover, to apply this interpretation to [NRS 440.650](#) allows the statute to be read harmoniously with [NRS 440.170](#). [NRS 440.170](#) provides for open inspection while [NRS 440.650](#) limits the issuance of certified copies. Statutes should generally be read in such a way to render the statutes compatible. *State v. Rosenthal*, [93 Nev. 36](#), 45, 559 P.2d 830 (1977). Therefore, the vital statistics statutes appear to allow unrestricted access to vital statistics records.

Nevada’s more general public records statute, [NRS 239.010](#) does, however, restrict public inspection if the content of the public records are “declared by law to be confidential.” Thus, the question presented is whether personal or medical information concerning the circumstances surrounding the death appearing on the death certificate, would be considered confidential as a matter of law, and, therefore, not subject to public inspection. Several arguments militate against a finding that the information contained within the death certificate would be deemed confidential. First, statutes which provide for confidentiality of public records are in derogation of the common law right to inspect public documents and must be strictly construed. *Nicklo v. Peter Pan Playskool*, [97 Nev. 73](#), 624 P.2d 22 (1981). Further, where the Legislature acts to specifically include, or enumerate certain items, a statute must be construed to mean that all other things were intended to be excluded. *Clark County Sports Center, Inc. v. City of Las Vegas*, [96 Nev. 167](#), 174, 606 P.2d 171 (1980). This rule particularly applies where the Legislature could have easily provided for other exceptions, but chose not to. In such cases, a court generally cannot judicially create an exception. *State, Dep’t of Motor Vehicles & Public Safety v. Brown*, [104 Nev. 77](#), 762 P.2d 882 (1988). In 1964, the Legislature amended [NRS 440.170](#) to specifically exclude from public inspection information which would indicate that a birth occurred out of wedlock. See [NRS 440.170\(2\)](#). Thus, applying these general rules of statutory construction, since the Legislature intended only to exempt from public inspection information relating to illegitimate births, all other information must be made available for public inspection.

Furthermore, by asserting that the information in the death certificates is confidential, the Office of Vital Statistics is, in effect, seeking to protect the privacy rights of the deceased. However, a cause of action based upon an alleged violation of one’s right to privacy does not survive death. See generally, *Marzen v. United States Dep’t of Health & Human Serv.*, 632 F. Supp. 785 (N.D. Ill. 1986); citing *Silets v. Federal Bureau of Investigations*, 591 F. Supp. 490, 498 (N.D. Ill. 1984); cert. denied, 465 U.S. 1004, 104 S. Ct. 995 (1984); *Maritote v. Desilu Prod.*, 345 F.2d 418, 419 (7th Cir. 1965); *Cordell v. Detective Publications, Inc.*, 419 F.2d 989, 990-91 (6th Cir. 1969); *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91-93 (1931); Prosser, *Law of Torts*, § 112. Moreover, as a general rule, the right of privacy does not extend to the members of a family unless their own privacy was somehow invaded. Prosser, *Law of Torts*, § 117 at 814-15; *James v. Screen Gems, Inc.*, 174 Cal. App. 2d 650, 344 P.2d 799, 801 (1959). Arguably, therefore, there is no basis for asserting a privilege of confidentiality since no right to privacy exists after death.

Based upon the law outlined above, it is our opinion that as a general rule, death certificates

must be considered public records open to inspection by members of the general public. However, under limited circumstances, the information contained in some death certificates may be considered confidential and may not be subject to public disclosure. In particular, [NRS 441A.220](#) provides:

All information of a personal nature about any person provided by any other person reporting a case or suspected case of a communicable disease, or by any person who has a communicable disease, or as determined by investigation of the health authority, is confidential medical information and must not be disclosed to any person under any circumstances, including pursuant to any subpoena [subpoena], search warrant or discovery proceeding, except as follows:

1. For statistical purposes, provided that the identity of the person is not discernible from the information disclosed.
2. In a prosecution for a violation of this chapter.
3. In a proceeding for an injunction brought pursuant to this chapter.
4. In reporting the actual or suspected abuse or neglect of a child or elderly person.
5. To any person who has a medical need to know the information for his own protection or for the well-being of a patient or dependent person, as determined by the health authority in accordance with regulations of the board.
6. If the person who is the subject of the information consents in writing to the disclosure.
7. Pursuant to subsection 2 of [NRS 441A.320](#).
8. If the disclosure is made to the welfare division of the department of human resources and the person about whom the disclosure is made has been diagnosed as having acquired immunodeficiency syndrome or an illness related to the human immunodeficiency virus and is a recipient of or an applicant for assistance to the medically indigent.
9. To a fireman, police officer or person providing emergency medical services if the board has determined that the information relates to a communicable disease significantly related to that occupation. The information must be disclosed in the manner prescribed by the board.
10. If the disclosure is authorized or required by specific statute.

This statute may be construed to prohibit disclosure of any information about anyone who has a communicable disease. However, [NRS 441A.220](#)(10), permits disclosure if it is “authorized or required by specific statute,” which may be construed to mean that [NRS 440.170](#) specifically authorizes disclosure. Nevertheless, we believe that certain information within the death certificate may be considered confidential. In recognition of the conflict between the public’s right to openness in government records and the public policy considerations relating to the protection of confidentiality and the privacy of the individual, some courts have applied a balancing test, weighing the countervailing interests. Dealing specifically with death certificates, the court in *Meriden Record Co. v. Browning*, 294 A.2d 646 (Conn. 1971), held that apart from whatever statutory exceptions may exist to public inspection of public records, there are exceptions which must be implied on a case-by-case basis where the “revelation [would be] . . . so intimate and so unwarranted in view of the victim’s position as to outrage the community’s notions of decency.” *Id.* at 648, quoting *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809 (2d Cir. 1952). The court stated that an *in camera* inspection should be conducted to determine if the disclosure would amount to an unwarranted invasion of the right of privacy such that it would embarrass or humiliate the survivors or adversely affect the good reputation or character of the

deceased. *Id.* at 649. Other courts have also applied a similar balancing scheme where inspection of public records could lead to substantial and irreparable private or public harm. *Carlson v. Pima County*, 687 P.2d 1242 (Ariz. 1984), citing *Mathews v. Pyle*, 251 P.2d 893, 895 (Ariz.1952); *Western Serv., Inc. v. Sargent School Dist. No. RE-33J*, 719 P.2d 355, rev. 751 P.2d 56 (Colo. App. 1986); *State ex rel. Stephan v. Harder*, 641 P.2d 366 (Kan. 1982). This legal analysis was also adopted in a previous Attorney General Opinion where this office concluded that based upon a strong public policy to keep the “secrets of a person’s body” private and confidential, the autopsy reports not be open to public inspection. Op. Nev. Att’y Gen. No. 82-12 (June 15, 1982). Thus, under limited circumstances, the information contained in a death certificate may be deemed confidential and may be shielded from public inspection.

CONCLUSION

Based upon the foregoing, it is our opinion that death certificates which are required to be kept under [NRS 440.160](#) should be presumed to be open to the public for inspection as public records. However, where disclosure might lead to an unwarranted invasion of privacy which would result in irreparable harm to survivors, or to the reputation of the deceased, the Office of Vital Statistics may appropriately refuse inspection. Such discretionary refusal may then be subject to judicial scrutiny to determine whether access was rightfully denied. Additionally, it should be noted that [NRS 440.170](#)(1) authorizes the State Board of Health to enact regulations relating to the disclosure of data contained in vital statistics. Such regulations would be of valuable assistance in more clearly defining the public’s right of access to vital statistics records.

Sincerely,

BRIAN McKAY
Attorney General

By: Page Underwood
Deputy Attorney General

OPINION NO. 90-9 FINANCIAL INSTITUTIONS; BANKING; LOANS: In computing the lending limits set forth in [NRS 662.145](#) and [662.155](#), the Legislature intended the term “capital” to be used in the more restricted sense of the money contributed by stockholders in payment for their stock. Undivided profits, loan loss reserves and, pursuant to regulation, capital notes and debentures, may not be included as capital in computing the lending limitation set forth in [NRS 662.145](#). The Commissioner should adopt a regulation pursuant to [NRS 662.115](#) addressing the treatment of capital notes and debentures with respect to the lending limitation set forth in [NRS 662.155](#). The lending limitation under both statutes must be measured against the bank’s unimpaired capital and permanent surplus.

Carson City, May 8, 1990

Mr. L. Scott Walshaw, Commissioner, Financial Institutions Division, 406 East Second Street,
Carson City, Nevada 89710

Dear Mr. Walshaw:

Nevada Revised Statutes 662.145 and 662.155 limit the amount of money that state chartered banks may lend to a single obligor. [NRS 662.145](#) limits such loans to “25 percent of the capital and surplus of the bank.” If the bank holds any private securities or debt instruments of the borrower as authorized by [NRS 662.065\(5\)](#), [NRS 662.155](#) operates to limit the combination of such investments and loans to that borrower to “25 percent of the unimpaired capital and permanent surplus” of the bank. In requesting our interpretation of these statutes, you have observed that there are divergent views as to what components may properly be included as “capital” or “surplus” in applying these limitations. You have therefore asked the following questions.

QUESTION ONE

May capital notes or debentures, undivided profits, and loan loss reserves be properly included as capital or surplus in computing the lending limits set forth in [NRS 662.145](#) and [662.155](#)?

ANALYSIS

[NRS 662.145\(1\)](#) provides, in pertinent part:

Subject to the limitations of [NRS 662.155](#), the total outstanding loans of any bank to any person, company, corporation or firm, including in the loans to any unincorporated company or firm the loans to the several members thereof, may not at any time exceed 25 percent of the *capital and surplus of the bank, actually paid in . . .* (emphasis added).

[NRS 662.065](#) authorizes a bank to purchase for its own account certain private securities. The bank’s investment in the private securities of any one obligor may not, however, amount to more than 25 percent of its unimpaired capital and permanent surplus. [NRS 662.065\(5\)](#). [NRS 662.155](#) provides:

The combination of investments in private securities provided for in subsection 5 of [NRS 662.065](#), and outstanding loans provided for in subsection 1 of [NRS 662.145](#), of any bank to any one obligor, person, company, corporation or firm, including any unincorporated company or firm and to the several members thereof, shall not at any time exceed 25 percent of the *unimpaired capital and permanent surplus of such banks* (emphasis added).

There are no reported cases interpreting these statutes. It is therefore our task to ascertain the intent of the Legislature in enacting them. *Las Vegas Sun v. District Court*, [104 Nev. 508](#), 511, 761 P.2d 849 (1988).

Your question involves the range to be given the words “capital” and “surplus.” As stated in *Fletcher Cyclopedia, Corporations*, Vol. 11, § 5080, p. 15:

The term “capital” as applied to corporations is used with widely varying significations. Formerly, it was used synonymously with the term capital stock as meaning the amount subscribed and paid in by the shareholders, or secured to be paid in, and upon which the corporation is to conduct its operations. Properly speaking, however, “capital” is often used broadly to indicate the entire assets of a corporation used for the purpose of deriving profit in the conduct of the business, and not the capital stock.

Because the same term may be, and often is, used to signify entirely different and distinct things, the phrase “capital and surplus” should be construed by reference to its context, the history, nature and purpose of the statute in which it occurs and other recognized aids to construction. *Fletcher Cyclopedia, Corporations*, Vol. 11, § 5079, p. 11.

Lending limit laws have existed for many years on both the state and federal level. Glidden, *National Bank Lending Limits and the Comptroller’s Regs: A Clarification*, 101 Banking L.J. 432-37 (1984). They are intended to prevent one individual, or a relatively small group, from borrowing an unduly large amount of the bank’s deposits by spreading the loans among a relatively large number of persons engaged in different lines of business. *Id.* at 432-33; 12 C.F.R. § 32.1(b). Since [NRS 662.145](#) appears to be patterned after the federal lending limit law set forth in 12 U.S.C. § 84, it is appropriate to review the history of that law. *Cf. Ybarra v. State*, [97 Nev. 247](#), 249, 628 P.2d 297 (1981) (statute adopted from another jurisdiction presumed to have been adopted with construction placed upon it by the courts of that jurisdiction before its adoption).

12 U.S.C. § 84 was originally enacted as part of the Currency Act of 1863 and limited loans to 10 percent of a bank’s paid-in capital stock. Glidden at 430; Act of Feb. 25, 1863, § 47, 12 Stat. 665. In 1906, Congress changed the measurement base from capital stock to unimpaired capital stock and unimpaired surplus in recognition of the increasing size of businesses and their need for larger loans. Act of June 22, 1906, ch. 3516, 34 Stat. 451; H.R. Rep. No. 1835, pt. 1, 59th Cong., 1st Sess. 1 (1906). Most of the subsequent changes added exceptions which either increased the limit or removed it altogether on specific classes of loans. Glidden at 434-35.

From 1906 to 1982, the measurement base remained a bank’s capital stock, actually paid in and unimpaired, and its unimpaired surplus fund. Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, Title IV, § 401(a) (Oct. 15, 1982) (hereinafter cited and referred to as the Garn-St. Germain Act). During this time, federal banking supervisors expressed various and changing views on the proper components of capital and surplus in computing the lending and other limits on institutions within their jurisdiction.¹

Within the past decade, numerous changes have occurred in the federal lending limit law as well as the manner in which the capital adequacy of federally-regulated financial institutions is determined. As part of the Garn-St. Germain Depository Institutions Act of 1982, 12 U.S.C. § 84 was completely re-enacted with various changes, including a change in the measurement base from “capital stock” to “capital.”² In addition, two types of lending limits were established based upon what portions of a bank’s loans were unsecured or secured. Rojc, *National Bank Lending Limits—A New Framework*, 40 Bus. Law 903, 906 (1985). The general lending limit was increased from 10 percent to 15 percent of capital and surplus and a separate limit of 10 percent was established for loans secured in the manner described in the Act. The legislative history of § 84 indicates that the additional general limit on loans was intended to provide smaller national banks with the ability to meet local credit needs and to compete with less restricted state-chartered and foreign banks. S. Rep. No. 536, 97th Cong., 2d Sess. 25-27 *reprinted in* U.S. Code Cong. & Admin. News 3054, 3079-81. After the re-enactment of 12 U.S.C. § 84 in 1982, interpretive regulations were also amended to clarify and expand the components included in the aggregate of a bank’s capital and surplus.³ Rojc at 912; 12 C.F.R. § 7.1100 (1984).

Even more recently, federal regulators have completed, at the direction of Congress, a comprehensive scheme to determine the capital adequacy of financial institutions within their jurisdiction.⁴ The result has been the adoption of regulations establishing a complicated set of “risk-based” capital adequacy guidelines comprising two “tiers”: Tier 1, “primary” or “core”

capital and Tier 2, “supplementary” or “secondary” capital. *See* 12 C.F.R. pt. 3, §§ 208 and 325. Apparently as a part of this effort, 12 C.F.R. pt. 3 § 7.1100, which previously defined the terms “capital and surplus” for purposes of 12 U.S.C. § 84, has now been superseded by regulations defining these new terms. 12 C.F.R. § 32.2(c); 12 C.F.R. § 7.1100.

Several observations are possible from a review of the history of lending limits applicable to federally-regulated financial institutions. Although the general purpose of the law has remained constant, numerous changes have occurred in the specific application of the statute to particular types of loans and banking practices. The standards for computing the lending limit have gradually evolved from a restricted view of capital as meaning the money or property contributed by stockholders in payment for stock, to the more inclusive sense of the total assets and resources of the bank. With the exception previously noted,⁵ federal administrative interpretations of “capital and surplus” prior to 1971, appear to apply the terms in the more restricted sense,⁶ The more recent liberalization of these provisions appears to be motivated, at least in part, by a desire to enable national banks and other financial institutions to compete more effectively with state chartered banks.⁷ Glidden at 436.

[NRS 662.145](#) and [662.155](#) are part of Title 55 of Nevada Revised Statutes, ch 657 to 671, inclusive, which govern banks and related organizations. As defined by [NRS 657.075](#):

“Surplus” means a fund created pursuant to the provisions of this Title by a bank from payments by stockholders or from the bank’s net earnings or undivided profits which, to the amount specified and by any additions thereto set apart and designated as such, is not available for the payment of dividends and cannot be used for the payment of expenses or losses while such bank has undivided profits.

Although federal regulators have interpreted “surplus” to include undivided profits, reserves for loan losses and subordinated debt, we believe [NRS 657.075](#) precludes consideration of undivided profits as part of “surplus,” since undivided profits are used to pay dividends, expenses and losses. There is no similar definitional statute for the term “capital.”

As used in the law, the term “capital” has no definite and plain meaning and may be subjected to at least two reasonable interpretations. Since the term by itself is ambiguous, we should construe the statute in line with what reason and public policy indicate the Legislature intended. *Hotel Employees & Restaurant Employees Int’l Union v. State, ex rel. Nev. Gaming Control Bd.*, [103 Nev. 588](#), 591, 747 P.2d 878 (1987). We, therefore, examine the provisions of Title 55 as a whole and interpret “capital” as used in [NRS 662.145](#) and [662.155](#) in the context in which it appears in other parts of Title 55.

[NRS 661.015](#) provides that no bank may be organized with less “capital” than \$250,000 and paid up surplus of \$50,000, or such “greater amounts as may be required by the Commissioner,” which shall be “paid in cash.” As used in this statute, the term “capital” clearly connotes the more restricted sense of the word—the amount of money paid by stockholders for their stock. [NRS 661.025](#), entitled “Total assets to be percentage of total liability determined by commissioner,” provides in part:

1. The paid up capital, together with the surplus, undivided profits, capital notes, debentures and reserves for losses of any state bank, must, subject to the limitations of [NRS 661.015](#), be at least 6 percent of the total deposit liability of the bank as may be determined by the commissioner. In determining the amount of paid-up capital, surplus, undivided profits, capital notes, debentures and reserves

for losses that will be required, the commissioner shall give due consideration to the character and liquidity of the assets of the bank and to the standards regarding capital requirements established by other state and federal banking supervising agencies.

2. The commissioner shall, for the purpose of determining capital requirements for any state bank, include capital, surplus, undivided profits, capital notes, debentures and any reserve for losses, and may include as capital 6 percent of the par value of all unpledged United States Government bonds owned by the bank.

As used in this statute, the term “capital” is one of several terms used to describe the total of a bank’s assets. Rather than clearly provide that undivided profits, capital notes, debentures and reserve for losses are components included within the terms “capital” or “surplus,” the Legislature has expressed them as items which are considered in addition to capital and surplus in determining the adequacy of a bank’s total assets pursuant to [NRS 661.025](#).⁸

The Legislature’s intent to treat these components separately is further evidenced by the history of other provisions in which these terms appear. In Op. Nev. Att’y Gen. No. 180 (Oct. 23, 1964), the Attorney General examined [NRS 661.010](#), the substantive predecessor to [NRS 661.025](#), and concluded that a bank was not authorized to augment its capital structure by the issuance of subordinated debenture bonds because, as it then appeared, [NRS 661.010](#) did not include subordinated debt among the items considered as components of a bank’s total assets. In 1965, the Legislature added three new sections to Nevada Revised Statutes chapter 661 which, while authorizing the issuance of capital notes and debentures, expressly provided:

In no case shall the outstanding capital notes and debentures legally issued by any bank be considered capital in the computation of reserves pursuant to [NRS 661.020](#) and in the computation of legal lending limits pursuant to [NRS 662.040](#). Outstanding capital notes and debentures legally issued by any bank shall be treated as capital in all other respects.⁹

1965 Nev. Stat. ch. 244, §§ 2-4, p. 528.

In 1971, as part of a major update and overhaul of provisions governing banks, the Legislature repealed these sections and enacted [NRS 662.115](#), which provides: “A bank may issue capital notes or debentures, convertible or otherwise, subject to such regulations as the commissioner may adopt with respect thereto.” 1971 Nev. Stat. ch. 495, § 83, p. 965, 984. As part of the same bill, the Legislature enacted [NRS 661.025](#) and expressly included capital notes and debentures among the items considered a part of a bank’s total assets under that section. 1971 Nev. Stat. ch. 495, § 52, p. 974.

In describing the authority of a bank to hold real property for the transaction of its business, the Legislature, in [NRS 662.015\(2\)\(a\)](#), expressed the limitation as a percentage of the bank’s “capital accounts plus subordinated capital notes and debentures,” and defined “capital accounts” in [NRS 662.012](#) to mean “capital stocks, permanent surplus and retained earnings.” In describing a bank’s authority to hold real property for investment, the Legislature, in [NRS 662.103](#), expressed the limitation as “an amount which exceeds its capital accounts or 10 percent of its assets, whichever is less,” and excluded consideration of capital notes or debentures.

Based upon its treatment of capital notes, debentures, and retained earnings or undivided profits in these provisions, we conclude that, by their mention in [NRS 661.025](#), the Legislature did not intend to signify their use synonymously with the terms “capital” and “surplus” as used in

other parts of the statute. Where the Legislature intended to include these components in the computation of specific limitations, it did so expressly.

As authorized by [NRS 662.115](#), the Commissioner has adopted regulations set forth in Nevada Administrative Code (NAC) 662.010 to 662.090, inclusive, describing various conditions on the issuance of long-term capital notes or debentures. [NAC 662.080](#) provides in full:

Any such long-term capital notes or debentures must be considered a portion of the capital or capital structure of the issuing bank in computation of the capital requirements set forth in [NRS 661.025](#), *but the capital notes or debentures must not be considered as capital in computation of the legal lending limits of the bank as set forth in [NRS 662.145](#)* (emphasis added).

Since the Legislature expressly provided the Commissioner with authority to condition the issuance of capital notes or debentures, we conclude that such debt may not be considered in computing the lending limit set forth in [NRS 662.145](#).¹⁰

As the Attorney General observed in Op. Nev. Att’y Gen. No. 180 (Oct. 23, 1964):

Banking is an industry coupled with a public interest, upon which the Legislature has broad powers in the protection of the public. It is within the memory of all persons who were near adulthood at the time of the great depression that failing banks were, and can be, the cause of untold hardship. Accordingly, banking regulations, in the protection of the public, have, by legislative wisdom and solicitude, become more strict and rigid. In the construction of such statutes we look to that which is specifically permitted and not to specific prohibitions.

Where the Legislature intended to include capital notes, debentures, undivided profits and reserves for losses in the computation of a particular limitation on banks, it did so expressly. Since it could easily have included these components in the computation of the lending limits set forth in [NRS 662.145](#) and [662.155](#), but chose not to, we conclude that the Legislature intended the term capital to be used in its more restrictive sense—the money contributed by stockholders in payment for their stock. *See State, Dep’t of Motor Vehicles & Pub. Safety v. Brown*, [104 Nev. 524](#), 526, 762 P.2d 882 (1988).

Our interpretation is consistent with the history and interpretation of lending limit laws in other states. In reviewing a statute similar to 1965 Nev. Stat. ch. 244, § 2, p. 528, the California Attorney General concluded that capital notes and debentures could not be included in the computation of its lending limit law. Op. Cal. Att’y Gen. No. 64-273 (Jan. 20, 1965). In 1978, the California Legislature amended its lending limit law by changing the measurement base from a percentage of “capital and surplus” to the “sum of shareholder’s equity,” (defined to include capital, surplus and undivided profits accounts) capital notes and debentures. 1978 Cal. Stat. ch. 965, §§ 69, 97. In a 1982 amendment, reserves for loan losses was added as a component in computation of the lending limit. 1982 Cal. Stat. ch. 1325, § 6. New York’s lending limit law, like California’s, lists the components included in the computation and specifically includes capital stock, surplus fund, and undivided profits. New York Banking Law, § 103.

We understand and have considered the fact that under this interpretation, a bank with a large amount of undivided profits may have the same lending limit as one that is less profitable. We note, however, that a bank with positive earnings may voluntarily increase its surplus fund and

thereby increase its lending limit. While it may be good policy to reward the more financially sound bank with a higher lending limit, we believe such a matter must be addressed to the Legislature.¹¹ We also understand that, pursuant to [NRS 662.015\(1\)\(f\)](#), the Commissioner has authorized all state chartered banks to perform all acts that a national bank is authorized to perform. State chartered banks are therefore able to make loans under the more liberal federal lending limit if they so desire.

CONCLUSION

Undivided profits and loan loss reserves may not be included as “capital” or “surplus” in the computation of the lending limits set forth in [NRS 662.145](#) and [662.155](#). The Legislature has authorized the Commissioner to enact regulations governing the issuance of capital notes and debentures. Pursuant to [NAC 662.080](#), such capital notes and debentures must not be included in the computation of the lending limit set forth in [NRS 662.145](#). The Commissioner should adopt a regulation which addresses whether such subordinated debt may properly be included as capital in computation of the lending limit set forth in [NRS 662.155](#).

QUESTION TWO

Does the reference in [NRS 662.155](#) to “unimpaired” capital and “permanent” surplus require a different application of the lending limit than that set forth in [NRS 662.145](#)?

ANALYSIS

When a bank holds any private securities issued by a borrower, [NRS 662.155](#) requires their combination with the loans to that borrower in computing the lending limit. Although by their terms the statutes operate together, [NRS 662.155](#) is limited by a percentage of a bank’s “unimpaired capital and permanent surplus,” whereas [NRS 662.145](#) is based upon “capital and surplus.” To determine whether the Legislature intended to impose a different lending limit by virtue of these differences in language we apply several well-established rules of statutory construction.

Although the two statutes should be construed, if possible, to avoid rendering any part redundant or meaningless, *Board of County Comm’rs v. CMC of Nev.*, [99 Nev. 739](#), 744, 670 P.2d 102 (1983), they should also be construed together in a harmonious manner which produces a result consistent with the purpose and policy expressed by the statute. *Westen v. County of Lincoln*, [98 Nev. 183](#), 185, 643 P.2d 1227 (1982); *Sheriff, Clark County v. Luqman*, [101 Nev. 149](#), 155, 697 P.2d 107 (1985). We should always avoid a construction which produces an absurd result.

As used in Title 55, capital is “impaired” when a bank’s undivided profits and surplus are inadequate to cover its losses. See [NRS 657.045](#), [658.115\(3\)](#), and [661.085](#). Any losses in excess of a bank’s profits may be charged to its surplus fund, but the surplus must be reimbursed from earnings until the legal minimum surplus is re-established, and no dividends may be paid while the surplus is less than the minimum. [NRS 661.215](#). Impairment of capital stock is included within the definition of insolvency, and is itself a ground for the Commissioner to take possession of the bank. [NRS 657.045\(4\)](#); [NRS 658.151\(1\)\(d\)](#) and (f). By its failure to modify the word “capital” in [NRS 662.145](#), the Legislature could not have intended to compute a bank’s lending limit based upon its impaired capital. This would produce the absurd result of permitting a bank to continue making loans up to the statutory limit when it is legally insolvent and subject to summary seizure by the Commissioner. It would also conflict with the purpose of the lending

limit law to protect depositors. We, therefore, conclude that a requirement that the capital be unimpaired is implied in [NRS 662.145](#) even in the absence of the modifying word.

We do not believe the Legislature intended to establish a different measurement base for the lending limit by its use of this modifying language in [NRS 662.155](#). While it is conceivable for the Legislature to have intended to restrict the combination of private security investments and loans to one obligor more severely than loans where no private securities are present, we are unable to discern from the language used how such a different restriction is to be effected. Expanding the meaning of “capital and surplus” in [NRS 662.145](#) to include undivided profits, reserves for loan losses and subordinated debt conflicts with other provisions of Title 55 where the Legislature expressly provided for their inclusion. See [NRS 662.012](#), [662.015\(2\)](#), and [662.103\(3\)](#). Construing the terms to mean something less than the amount of money contributed by shareholders in payment for stock would be inconsistent with even the most restricted sense of the words as used in Title 55. Since we are unable to give the two statutes any other substantive reading, we conclude that the Legislature, by its use of the qualifying language “unimpaired capital and permanent surplus” in [NRS 662.155](#) made explicit what was already implicit in [NRS 662.145](#).¹² The lending limit established by both statutes should therefore be measured against a bank’s unimpaired capital and permanent surplus as interpreted by this opinion.

CONCLUSION

A requirement that the capital and surplus be unimpaired in calculating the lending limit is implied in [NRS 662.145](#). The lending limit established by [NRS 662.145](#) and [662.155](#) should, therefore, be measured against a bank’s unimpaired capital and permanent surplus, as interpreted by this opinion.

Sincerely,

BRIAN McKAY
Attorney General

By: DOUGLAS E. WALTHER
Deputy Attorney General

Footnotes

¹ In 1963 the Comptroller of the Currency ruled that capital notes and debentures issued by national banks may be included in the aggregate of unimpaired capital funds for the purpose of the loan limitation. Opinion, Comptroller of Currency, 12-17-63; Op. Cal. Att’y Gen. No. 64-273 (Jan. 20, 1965). In 1964, the Board of Governors of the Federal Reserve Board ruled that capital notes or debentures do not constitute “capital,” “capital stock,” or “surplus” for the purpose of the provisions of the Federal Reserve Act. Statement, Federal Reserve Board, dated 1-9-64; 1964 Federal Reserve Bulletin, p. 9; Op. Cal. Att’y Gen. No. 64-273 (Jan. 20, 1965). In 1971, the Federal Reserve Board reversed its earlier ruling that a member bank’s undivided profits, which include reserves for loan losses, may not be considered as part of its “capital stock and surplus.” 36 Fed. Reg. 5673, March 26, 1971. The Board concluded that its negative view expressed in 1964 was “unnecessarily restrictive in the light of the Congressional purpose in establishing limitations on bank activities in terms of a bank’s capital structure.” 12 C.F.R. § 250.162.

² We have considered the fact that, until 1982, 12 U.S.C. § 84 referred to “capital stock” whereas [NRS 662.145](#) AND 662.155 use the term “capital.” As previously noted, the terms are often used synonymously. *Fletcher Cyclopedia, Corporations*, Vol. 11, § 5080, p.15. Since the terms appear to be used interchangeably in NRS Title 55, we have not attached any significance to this distinction. Compare, [NRS 659.075](#) (payment of “capital stock”) with [NRS 661.015](#) (minimum “capital” for organization of bank); [NRS 658.151](#)(1)(a) (impairment of “capital stock”) with [NRS 661.085](#) (impairment of “capital”); [NRS 661.225](#)(1) (prohibits withdrawal, in the form of dividends or otherwise, any portion of “capital”) with [NRS 661.225](#)(3) (statute does not prevent reduction of “capital stock” in any other authorized manner).

³ Pursuant to 12 C.F.R. § 7.1100 (1984), 100 percent of loan loss reserves (the previous limit was 50 percent), undivided profits and, to a certain extent, subordinated debt, was counted in the computation of unimpaired surplus. As originally adopted in 1971, 12 C.F.R. § 7.1100 included undivided profits, loan loss, reserves and subordinated debt in the definition of “unimpaired surplus.” 36 Fed. Reg. § 17000 (Aug. 26, 1971). A 1976 amendment to the regulation established a 50 percent limit for loan loss reserves. 41 Fed. Reg. § 10211 (March 10, 1976).

⁴ The declared policy of the International Lending Supervision Act of 1983 (Act of Nov. 30, 1983, Pub. L. 98-181, 97 Stat. 1278) is to assure the economic health and stability of the United States and other nations of the world by strengthening the bank regulatory framework. 12 U.S.C. § 3901. In particular, the Act gave the federal banking agencies authority to regulate the capital adequacy of the institutions within their jurisdiction. 12 U.S.C. § 3907.

⁵ Note 1.

⁶ Regulations promulgated by the Comptroller of the Currency in 1971 which included undivided profits, loan loss reserves and subordinated debt in the computation of the federal lending limit were published in the Federal Register on August 26, 1971. 36 Fed. Reg. 17000 (Aug. 16, 1971). [NRS 662.145](#) and [662.155](#) were enacted as part of Senate Bill 343, approved on April 24, 1971. Although it is not entirely clear, our research has revealed no indication that the Nevada Legislature, when considering Senate Bill 343, was aware of the Comptroller’s regulations promulgated later that year. See Senate Bill 343, Minutes of the Joint Assembly and Senate Commerce Committees Meeting, March 16, 1971.

⁷ Assuming use of the same measurement base, Nevada’s lending limit law, originally enacted in 1933 Nev. Stat. ch. 190, § 15, p. 302, and set at 25 percent of a bank’s capital and surplus, has been for many years significantly more liberal than the 10 percent general limitation set forth in 12 U.S.C. § 84 prior to 1982.

⁸ Similarly, by its failure to specifically mention preferred stock in [NRS 661.015](#) or 661.025 and its direction in [NRS 661.105](#)(3) to include such stock in determining the capital adequacy of banks, we believe the Legislature intended to include preferred stock as “capital” for purposes of [NRS 662.145](#) and [662.155](#).

⁹ [NRS 662.040](#) was the substantive predecessor to [NRS 662.145](#).

¹⁰ We express no opinion as to the wisdom of such a condition; however, we note that [NAC 662.155](#) does not expressly apply to NRS. 662.155. Since both [NRS 662.145](#) and [662.155](#) provide for a legal lending limit, the Commissioner may wish to consider amending the regulation to provide for uniform application to both statutes. Even if uniform application is not

desired, the Commissioner should adopt, by regulation, a position on the inclusion of capital notes or debentures in the computation of the lending limit set forth in [NRS 662.155](#), since we believe the Legislature intended the Commissioner to address such issues by its enactment of [NRS 662.155](#).

¹¹ Unlike the federal lending limit law, which specifically authorizes the adoption of interpretive regulations, there is no similar provision in Title 55. 12 U.S.C. § 84(d)(1). Since the Legislature specifically authorized the Commissioner to adopt regulations governing the issuance of capital notes and debentures, and failed to so provide with respect to “capital” as used in the lending limit law, we conclude that any change in this definition must come from the Legislature and not by the adoption of an administrative regulation.

¹² This conclusion is consistent with the treatment given these terms under federal law. 12 C.F.R. § 32.1(c) provides, in pertinent part, that “>unimpaired capital and unimpaired surplus’ is equivalent to the term >capital and surplus.’ “ In addition, we note that, although the substance of [NRS 662.145](#) has existed in the law since 1933, [NRS 662.155](#) was enacted for the first time in 1971. 1971 Nev. Stat. ch. 495, § 91.2, p. 985.

OPINION NO. 90-10 GAMING; INVESTMENTS FOR OR PARTICIPATION IN LICENSED GAMING OPERATION BY BUYER PRIOR TO LICENSURE: Nevada Gaming Commission Regulations 8.050 and 8.060 prohibiting or requiring prior regulatory approval for certain transactions, do not apply to a person purchasing the real property, buildings, and nongaming personal property comprising the premises of a gaming establishment as a landlord or to a person investing in renovations to the real property, structures, and nongaming fixtures, furniture, and equipment comprising the premises of a gaming establishment.

Carson City, July 12, 1990

Mr. P. Gregory Giordano, Chief, Corporate Securities Division, State Gaming Control Board, 1150 East William Street, Carson City, Nevada 89710

Dear Mr. Giordano:

The purpose of this letter is to respond to your request of November 30, 1989, for an opinion of the Attorney General. Your opinion request contained facts of certain proposed transactions.

SUMMARY OF RELEVANT FACTS

The State Gaming Control Board has furnished the following facts for consideration in replying to your opinion request. White Partnership, a Nevada licensee, has indicated that as a part of the purchase by Black Corporation of the real and personal property comprising the XYZ Hotel and Casino from White Partnership, Black Corporation has agreed to assume certain obligations on White Corporation’s behalf prior to the closing of the sale. Black Corporation will take over payments to Green Company, which is refurbishing the hotel rooms, and Blue Company, which is installing new locks on the hotel room doors. White Partnership will not receive the money but will get the benefit of not having to make payments under its contracts with the two companies. If the sale does not close, White Partnership will repay Black

Corporation with interest.

The Green Company contract involves the refurbishing of XYZ Hotel rooms, including carpeting, wallpaper, drapes, and beds, as well as hotel tower hallways. The Blue Company contract involves the retrofitting of 705 wood hotel room doors for the use of plastic key cards.

Based upon these facts, you have requested the opinion of the Attorney General as to whether the transaction proposed by White Partnership requires compliance with Nevada Gaming Commission Regulation 8.050. You have also inquired whether an opinion to the contrary is consistent with a liberal construction of the term “interest” contained in Regulation 8. Alternatively, you have asked whether a Regulation 8.130 report is required of the licensee and if that regulation authorizes the Board to require the licensee to escrow the monies received as loans.

Additionally, you furnished the facts of a second transaction. This transaction involves similar questions under the applicable regulations of the Nevada Gaming Commission. The circumstances involved in this transaction are as follows:

Buyer X is purchasing all of the assets of Red Corporation at the ABC Hotel and Casino but no actual interest in Red Corporation (i.e. stock). Buyer X is also assuming all of Red Corporation’s lease obligations at the property with the Yellow Company. Buyer X also intends to apply for its own gaming license. Upon receiving possession of the property, Buyer X intends to operate the hotel and all other nongaming aspects of the property while leasing all the gaming back to Red Corporation. It is hoped that Red Corporation will continue to conduct the gaming operations under its present license until Buyer X can obtain its own gaming license, at which point Red Corporation surrenders its gaming license. The Attorney General was also advised that the buyer of the ABC Hotel and Casino would not purchase any gaming personal property from Red Corporation until after it obtains its own gaming license.

QUESTION

Whether a person is considered to have acquired an interest in a licensed gaming operation by purchasing, or investing in renovations to, the real property and structures, as well as the nongaming fixtures, furniture, and equipment, comprising the premises of a gaming establishment subject to the requisites of Nevada Gaming Commission Regulations 8.050 and 8.060.

ANALYSIS

The regulations of the Nevada Gaming Commission provide in relevant part that:

Except as and to the extent provided in these regulations pertaining to emergency situations, no money or other thing of value constituting any part of the *consideration for the transfer or acquisition of any interest in a licensed gaming operation, in a licensee or in a holding company* shall be paid over, received or used until complete compliance has been had with all prerequisites set forth in the law and these regulations for the consummation of such transaction; but such funds may be placed in escrow pending completion of the transaction. Any loan, pledge or other transaction between the parties or with other parties may be deemed an attempt to evade the requirements of this regulation and, as such, in violation of this regulation.

Nev. Gaming Comm'n Reg. 8.050 (1989) (emphasis added). Regulation 8 also prescribes the following requirements for participation in operations:

Except as provided in these regulations pertaining to emergency situations, or in subsection 2, or on approval of the commission, *no person who proposes to acquire an interest in any licensed gaming operation, in a licensee, or in a holding company* shall take any part whatever, as an employee or otherwise, in the conduct of such gaming operations or in the *operation of the establishment at which such gaming operations are conducted while his application for a license or for approval to acquire such interest is pending.*

Nev. Gaming Comm'n Reg. 8.060(1) (emphasis added).

Regulations 8.050 and 8.060, like Regulation 8 generally, relate to transfers of an interest in a licensed gaming operation. *See generally* Nev. Gaming Comm'n Reg. 8.010-.120. Consequently, before applying the requisites of Regulations 8.050 or 8.060, the Board must first ascertain whether a particular transaction involves “the transfer or acquisition of any interest in a licensed gaming operation, in a licensee or in a holding company,” Nev. Gaming Comm'n Reg. 8.050 (escrow required), or a “person who proposes to acquire an interest in any licensed gaming operation, in a licensee, or in a holding company,” Nev. Gaming Comm'n Reg. 8.060(1) (participation in operations).¹

The phrase “interest in a licensed gaming operation” is pregnant with defined terms of technical import. Technical words with a particular meaning in law must be construed according to their technical import. *See, e.g., Orr Ditch & Water Co. v. Justice Ct.*, [64 Nev. 138](#), 149-50, 178 P.2d 558 (1947).

Our prior opinions have concluded that the term “interest” contained in the Act and regulations should be interpreted broadly to conform to the legislative mandate for strict gaming control. Consequently, the Attorney General has opined that “interest” means “a right, claim, title, or legal share in something More particularly it means a right to have the advantage accruing from anything; any right in the nature of property, but less than title.” Memorandum Opinion from Michael E. Wilson to Michael J. Sargent 1, 4-7 (May 31, 1989).

The Act defines “license” as “a gaming license or a manufacturer’s, seller’s or distributor’s license” and a “gaming license” is described in part as “any license issued by the state . . . which authorizes the person named therein to engage in gaming.” [NRS 463.0159](#), [463.0165](#). Moreover, “gaming means” to deal, operate, carry on, conduct, maintain or expose for play any game” as defined by the Act. [NRS 463.0153](#). State statute defines “operation” as “the conduct of gaming.” [NRS 463.0179](#).

Accordingly, we conclude that the phrase “interest in a licensed gaming operation” as utilized in Regulations 8.050 and 8.060 means the legal right to receive any benefit in the nature of property from maintaining or exposing for play any game pursuant to a license issued by the Nevada Gaming Commission. *Cf.* [NRS 463.0169](#) (“Licensed gaming establishment” defined). Moreover, our previous opinions have noted that the Nevada Gaming Control Act and the Regulations of the Nevada Gaming Commission distinguish between interests in gaming “operations,” which require prior approval or similar regulatory approval and transfers of interests in gaming “establishments,” for which prior approval is not necessary. *Compare* [NRS 463.0179](#) and Nev. Gaming Comm'n Reg. 8.020, 8.030, 8.050 (1989) with [NRS 463.0148](#)

(1989) and Nev. Gaming Comm'n Reg. 3.020, 3.095, 8.060, 8.070-.120 (1989). See, e.g., Memorandum Opinion from Dan R. Reaser to Michael D. Rumbolz 1, 6 (Mar. 31, 1988); Memorandum Opinion from Ellen F. Whittemore to Michael D. Rumbolz 1, 2 (Jan. 8, 1988).

These opinions are consistent with the opinion of the Attorney General that the term "interest" contained in the Act and regulations, including Regulations 8.050 and 8.060, should be interpreted broadly to conform to the legislative mandate for strict gaming control. See, e.g., Memorandum Opinion from Michael E. Wilson to Michael J. Sargent 1, 4-7 (May 31, 1989). While the term "interest" is construed broadly by our opinions, we nevertheless must give effect to the description of the interest contained in the statute or regulation. See, e.g., *Board of County Comm'rs v. CMC of Nev.*, [99 Nev. 739](#), 744, 670 P.2d 102 (1983). An interest in a "gaming operation," that which exclusively involves the conduct of gaming, is a narrower interest than an interest in a "gaming establishment." The former involves the property and proceeds related to dealing, operating, maintaining, or exposing for play any "game." [NRS 463.0153](#); 463.0179 (1989). The latter relates to the premises wherein or whereon gaming is done. [NRS 463.0148](#). In this regard, the concept of "premises" is quite expansive. Nev. Gaming Comm'n Reg. 1.145 (1989).

In both of the gaming establishment acquisition transactions presented in your opinion request, the purchaser is not proposing to acquire an interest in a licensed gaming operation, in a licensee, or in a holding company. The mandates of Regulations 8.050 and 8.060, therefore, do not apply to these transactions.

The agreement between White Partnership and Black Corporation involves the payment of money to acquire an interest in a gaming establishment, namely the improvements to the premises of hotel rooms that are located in a building on land where gaming is conducted. The hotel room improvements involved here cannot be construed as an interest in a gaming operation that involves maintaining and exposing for play licensed games. Our conclusion might be different if the proposed agreement involved matters such as modifications of the casino, acquisition of gaming devices, renovation of the casino cage, vault, count rooms or changes to the surveillance system. Investments in these improvements are interests in a gaming operation. Here the investment of Black Corporation is unquestionably in the gaming establishment, but not in the gaming operation.²

The circumstances of the purchase transaction involving the ABC Hotel and Casino likewise represents the acquisition of an interest in a gaming establishment and not a licensed gaming operation. The buyer of the ABC Hotel and Casino is purchasing the real property, buildings, and nongaming personal property comprising the premises of that gaming establishment. Moreover, the buyer has agreed that upon obtaining a nonrestricted gaming license, the buyer will acquire the gaming personal property of the seller Red Corporation. At the time that the buyer acquires any gaming personal property, the licensed gaming operation of Red Corporation will no longer exist because its license will have been surrendered and the buyer will be the licensee of the gaming operation at the ABC Hotel and Casino.

The Board has expressed concern that Regulation 8.060(1) will be violated if the buyer of the ABC Hotel and Casino is permitted to purchase and operate the hotel and other nongaming aspects of the establishment without first obtaining a gaming license or emergency permission to participate from the Commission. As discussed, Regulation 8.060(1) precludes a person from participating "in the operation of the establishment at which such gaming operations are conducted while his application for a license . . . is pending" only if that person "proposes to acquire an interest in any licensed gaming operation." Regulation 8.060(1) would apply to the

proposed actions of the buyer of the ABC Hotel and Casino if it proposed to acquire an interest in the licensed gaming operation of Red Corporation at that establishment. The facts furnished to the Attorney General demonstrate that the buyer does not intend to acquire any interest in the gaming operation of Red Corporation. Instead, the buyer is merely the landlord of the “gaming establishment” at which the “licensed gaming operation” of Red Corporation is located. Under these facts, the buyer is subject to the discretionary jurisdiction of the Board and Commission to call it forward for licensing or a finding of suitability as a landlord, or as a person furnishing services or property to a licensee in exchange for payments based on earnings, profits, or receipts from gaming. See [NRS 463.162\(4\)](#); [NRS 463.167\(1\)](#).

CONCLUSION

Nevada Gaming Commission Regulations 8.050 and 8.060 apply to transactions that involve “the transfer or acquisition of any interest in a licensed gaming operation, in a licensee or in a holding company” or a “person who proposes to acquire an interest in any licensed gaming operation, in a licensee, or in a holding company,” respectively. The phrase “interest in a licensed gaming operation” means the legal right to receive any benefit in the nature of property from maintaining or exposing for play any game pursuant to a license issued by the Nevada Gaming Commission. Regulations 8.050 and 8.060, therefore, do not apply to a person purchasing the real property, buildings, and nongaming personal property comprising the premises of a gaming establishment as a landlord or to a person investing in renovations to the real property, structures, and nongaming fixtures, furniture, and equipment comprising the premises of a gaming establishment. This transaction is governed by Regulations 3.020(4) and 8.130. Regulation 8.130 does not empower the Board or Commission to prospectively modify or condition a loan to a licensee. The exclusive regulatory power granted to the Board and Commission under Regulation 8.130 is to rescind the loan transaction.

Additionally, Regulation 8.060(1) does not apply to a person acquiring the premises comprising a licensed gaming establishment with the intent to operate the nongaming aspects of the establishment, such as the hotel and restaurants, until licensed, unless that person also proposes to acquire an interest in the existing licensed gaming operation,³ the existing gaming licensee, or in a holding company. Should you have any questions or concerns, please advise this office.

Sincerely,

BRIAN McKAY
Attorney General

By: Brooke A. Nielsen
Chief Deputy Attorney General

Footnotes

¹ Under the facts furnished in your opinion request, neither Black Corporation nor the buyer of the ABC Hotel and Casino are acquiring an interest in an existing gaming licensee or a holding company through the purchase of securities of a gaming corporation or otherwise.

² We agree that the arrangement between White Partnership and Black Corporation may be characterized as a “loan” to a licensee subject to the reporting requirements of Regulation 8.130. The suggestion, however, that Regulation 8.130 may be interpreted to empower the Board to

impose escrow procedures like Regulation 8.050 is not consistent with the language of this regulation. The Board's reliance on the clause "unless more stringent conditions are imposed by the board" is misplaced. This language modifies the thirty day notice requirement of Regulation 8.130 and does not alter the exclusive remedy for disfavored loans, which is rescission, provided by the regulation. *See, e.g.*, Memorandum Opinion from Michael E. Wilson to Samuel Weaver (April 30, 1986); Memorandum Opinion from Michael E. Wilson to Dennis Amerine (June 20, 1985).

³ Examples of this type of a transaction would be a purchase agreement whereby the buyer receives lease payments for nongaming and gaming assets for a specified percentage of the gaming revenue derived from operations, a joint operating agreement, or partnership agreement.

OPINION NO. 90-11 ADVERTISING; HOTELS AND MOTELS: [NRS 651.040\(2\)\(a\)](#) and (c), which ban the outdoor advertising of rates for accommodations at hotels and motels, unconstitutionally restrict protected commercial speech and are unenforceable. [NRS 651.040\(2\)\(b\)](#), which prohibits outdoor advertising which refers to "special rates" or implies that a bargain in rates is available at hotels and motels, is a facially valid restriction on commercial speech which may be inherently misleading.

Carson City, August 21, 1990

The Honorable Richard A. Wagner, District Attorney, Pershing County, Post Office Box 299, Lovelock, Nevada 89419

Dear Mr. Wagner:

You have requested our opinion as to the following:

QUESTION ONE

Is the ban on outside advertising of room rates by motels and hotels set forth in [NRS 651.040\(2\)\(a\)](#) and (c) constitutional?

ANALYSIS

[NRS 651.040\(2\)](#) (a) and (c) provide:

It is unlawful for any owner or keeper of any hotel, inn, motel or motor court in this state to post or maintain posted on any outdoor or any outside sign:

(a) Advertising with reference to any rates at which rooms or accommodations may be secured at such establishment.

.....

(c) Advertising the corporate or fictitious name of such establishment or membership in any organization the name of which pertains to or can be reasonably construed as pertaining to the rate of rooms or accommodations at such establishment.

Pursuant to subsection (1)(d) of the statute, ">[o]utdoor sign' or >outside sign' means any sign

maintained outside the establishment, whether on, connected to or separated from the establishment, or any sign, whether within or without the establishment, which is visible to the public from the outside.” “Corporate or fictitious name” and “membership in an organization” mean names which, by themselves, imply the rates for rooms, such as “\$4.00 motel.” [NRS 651.040](#)(1)(a) and (c). Violation of the statute is a misdemeanor. [NRS 651.040](#)(6).

In *Viale v. Foley*, [76 Nev. 149](#), 350 P.2d 721 (1960), the court upheld the validity of this statute against the contention that its prohibition against outside advertising of rates was unconstitutional. While this decision would normally control our opinion on the issue presented, we do not believe *Viale* reflects the current state of the law on the degree of permissible government regulation of commercial speech. See Op. Nev. Att’y Gen. No. 84-11 (June 8, 1984). The court in *Viale*, without discussion, declared that the statutory ban on outside advertising did not infringe upon the constitutional guarantee of free speech. 76 Nev. at 156. At that time, such “commercial speech” was “generally not thought to be subject to first amendment freedom of speech protection.” *State v. Hutchinson*, 699 P.2d 402, 404 (Ariz. App. 1985). It is now clear, however, that “commercial speech” is entitled to limited first amendment protection. *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 761 (1976). See also, Op. Nev. Att’y Gen. No. 90-4 (Feb. 12, 1990) (prohibition of direct-mail advertising by veterinarians invalid); Op. Nev. Att’y Gen. No. 86-21 (Dec. 8, 1986) (authority of state licensing boards to regulate professional advertising); Op. Nev. Att’y Gen. No. 84-11 (June 8, 1984) (statutory ban on solicitation of business by persons providing services to claimants seeking unemployment compensation benefits invalid). We, therefore, proceed to analyze your question in the context of United States Supreme Court decisions which delineate the bounds of permissible regulation of commercial speech.¹

The case of *Bigelow v. Virginia*, 421 U.S. 809 (1975), was the Supreme Court’s first departure from the view that advertising, as such, is entitled to no first amendment protection. In *Bigelow*, the Court invalidated a Virginia statute prohibiting the promotion or advertising of abortions in the state, noting that the subject of abortions was a matter of substantial public interest. *Id.* at 822. In *Virginia Pharmacy*, the Court invalidated a statute which banned the advertising of prices of prescription drugs, observing that society has a strong interest in the free flow of commercial information. *Id.* at 764. Virginia’s interest in maintaining the professionalism of its pharmacists was held not to justify keeping its citizens ignorant of truthful information about the prices of prescription medicines. *Id.* at 769-70.

In *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), the Court extended free speech protection to the advertising of prices for routine legal services. Subsequent decisions have established that states may not prohibit lawyers’ use of nondeceptive terminology to describe their fields of practice, *In re R.M.J.*, 455 U.S. 191 (1982), prohibit advertisements containing information or advice on specific legal problems; *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and may not categorically prohibit lawyers from soliciting legal business by sending truthful and nondeceptive letters to potential clients known to face particular legal problems. *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466 (1988). Other courts have invalidated statutes banning the truthful advertisement of the terms and availability of marriage and family counseling services, *Family Counseling Serv. of Clark County, Nev., Inc. v. Rust*, 462 F. Supp. 74 (D. Nev. 1978), and advertisements concerning dental services. *Baker v. Registered Dentists of Okla.*, 543 F. Supp. 1177 (W.D. Okla. 1982).

The Supreme Court has recognized, however, “the >common sense’ distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.” *Ohralik v. Ohio State Bar Ass’n*, 436 U.S.

447, 445-56 (1978). “The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.” *Id.* at 456-57. In *Ohralik*, the Court held that the possibility of fraud, undue influence, intimidation, overreaching, and other forms of “vexatious conduct” was so likely in the context of in-person solicitation, that such solicitation could be prohibited. *Id.* at 462.

Because [NRS 651.040](#) involves the restriction of pure commercial speech which does “no more than propose a commercial transaction,” *Virginia Pharmacy*, 425 U.S. at 767, we apply the general principles identified in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980):

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the first amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

We first note that a sign displaying rates for motel or hotel rooms concerns entirely lawful activity—the operation of a motel or hotel.² A more difficult question is whether such advertising is misleading or deceptive, as the prevention of deception has been cited as the state’s interest in the enactment of the statute:

It is a matter of common knowledge that travelers are often confronted with a sign proposing comfortable lodging at very modest prices, say \$2.50 to \$4.00 per night. He pulls up to such a place and finds that all rooms at the advertised price are taken and that the only available lodging is two or three times the price advertised.

It can readily be seen that the underlying purpose of the act is to break up this species of deception. Some of the hotels go so far as to advertise their rates and then when one gets in and registers he is charged a “convention” rate, four or five times the regular rate advertised.

Viale v. Foley, 76 Nev. at 154, quoting from *Adams v. Miami Beach Hotel Ass’n*, 77 So. 2d 465 (Fla. 1955).

It is apparent that there is nothing *inherently* misleading about the display of room rates. Rather, a traveler may be misled by the lack of *complete* information concerning the number of rooms available at the advertised price. The statute, therefore, appears directed at deceptive conduct by motel or hotel operators, rather than anything inherently misleading in the display of rates itself.

While recognizing that advertising does not provide a complete foundation on which to select an attorney, the court in *Bates* stated:

[It] seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed

decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance.

433 U.S. at 374-75 (citation and footnote omitted). In *Friedman v. Rogers*, 440 U.S. 1 (1979), the Court held that Texas could prohibit the use of trade names by optometrists, distinguishing the types of commercial speech found to be protected in *Virginia Pharmacy* and *Bates*:

In those cases, the state had proscribed advertising by pharmacists and lawyers that contained statements about the products or services offered and their prices. These statements were self-contained and self-explanatory. Here, we are concerned with a form of commercial speech that has no intrinsic meaning. A trade name conveys no information about the price and nature of the services offered by an optometrist until it acquires meaning over a period of time by associations formed in the minds of the public between the name and some standards of price or quality. Because these ill-defined associations of trade names with price and quality information can be manipulated by the users of trade names, there is a significant possibility that trade names will be used to mislead.

Id. at 12-13 (footnote omitted). Because it contains basic, verifiable, information about the cost of lodging, and none of the inherently misleading attributes found to have existed in *Friedman*, we conclude that an advertising display of rates for motel or hotel accommodations is protected commercial speech.

Applying the second prong of the *Central Hudson* test, we do not question the state’s interest in preventing deception in the advertisement or operation of motels or hotels. Clearly, the Legislature has a “substantial interest” in regulating in this area. See *Hutchinson*, 699 P.2d at 405. We must, therefore, determine whether [NRS 651.040](#) “directly advances” that interest and whether it is not more extensive than necessary to achieve the desired goal. These last two steps of the *Central Hudson* analysis involve a consideration of the “fit” between the legislative ends and the means to accomplish those ends. *Posadas De Puerto Rico Ass’n. v. Tourism Co.*, 478 U.S. 328, 341 (1986).

Although information about room rates may not be inherently deceptive or misleading, there is an obvious connection between a motel or hotel operator who would seek to falsely imply that all rooms are available at the advertised price and the signs used to create that impression. A total ban of such signs may, therefore, directly advance the state’s interest in preventing this practice; however, we must still determine whether such a prophylactic rule is “narrowly tailored to achieve the desired objective.” *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 109 S. Ct. 3028, 3033 (1989). We conclude that it is not.

The Supreme Court has consistently disallowed absolute bans on written commercial speech that has only the potential for deception or abuse. See, e.g., *Virginia Pharmacy*, 425 U.S. at 766-70; *Bates*, 433 U.S. at 381-84; *In re R.M.J.*, 455 U.S. at 206-07; *Zauderer*, 471 U.S. at 644-47; *Shapero*, 486 U.S. at 475-76. Not present in such cases are concerns raised by in-person solicitation. See *Ohralik*, 436 U.S. 447; see also, *National Funeral Serv., Inc. v. Rockefeller*, 870 F.2d 136 (4th Cir. 1989) (ban on in-person and telemarketing advertising of prearranged funeral

contracts upheld). Although the Court has not ruled out the possibility of a total prohibition on potentially misleading speech which has been shown in fact to have misled the public, it has not yet so held. *In re R.M.J.*, 455 U.S. at 200, n.11; *Zauderer*, 471 U.S. at 644.

That advertising may not convey complete information regarding a product or service does not itself justify a total ban. *Bates*, 433 U.S. at 374-75. Even if a particular type of advertising has the potential to confuse or mislead the public, the usual remedy is to require the inclusion of additional information such as disclaimers or explanations. *Bates*, 433 U.S. at 375; *Central Hudson*, 447 U.S. at 565. If the information may be conveyed in a way that is not deceptive, a total ban will not be justified. *In re R.M.J.*, 455 U.S. at 203.

In its most recent commercial speech decision, the Court in *Peel v. Disciplinary Comm'n of Ill.*, 58 U.S.L.W. 4684 (June 5, 1990), held that states may not categorically prohibit a statement by a lawyer that he is "certified" or a "specialist." In the absence of evidence that such statements are actually deceptive or misleading, or that less restrictive means will not effectively prevent deception, a total ban will not be justified by the potential for such statements to mislead some consumers. *Id.* at 4689.

We conclude that the total ban on the use of outside signs to advertise the rates of accommodations at motels or hotels is more restrictive of commercial speech than is constitutionally permissible.³ The Legislature could prevent the creation of misleading impressions by requiring more information in such advertising.⁴ It could, for example, require the display of both the minimum and maximum rates for rooms as was done in *Hutchinson*, or it could require the inclusion of a disclaimer such as "not all rooms available at the advertised price." Since a total ban on outside advertising of rate information also suppresses accurate information by motel and hotel operators who would not seek to use it to create false impressions, it goes well beyond that which is necessary to accomplish its intended purpose and violates the first and fourteenth amendments to the U.S. Constitution.⁵ See *Central Hudson*, 447 U.S. at 570.

CONCLUSION

Because it relates to a lawful activity and is not inherently deceptive or misleading, the advertising of rates for rooms at motels and hotels on outdoor signs is constitutionally protected commercial speech. Although the state has a substantial interest in preventing motel and hotel operators from using such advertising to create false impressions regarding the availability of rooms at the advertised rate, the existence of less restrictive means to achieve that goal requires the invalidation of a total ban on the outside advertising of rates for rooms at motels and hotels. [NRS 651.040\(2\)\(a\)](#) and (c) are, therefore, unconstitutional and unenforceable. Insofar as it concludes that these sections of the statute are constitutional, Op. Nev. Att'y Gen. No. 33 (April 2, 1959) is overruled.

QUESTION TWO

Is the ban on advertising by motels or hotels which refers to "special rates" or "similar phraseology the construction of which implies that a bargain in rates is offered at such establishment" set forth in [NRS 651.040\(2\)\(b\)](#) constitutional?

ANALYSIS

[NRS 651.040\(2\)\(b\)](#) provides:

It is unlawful for any owner or keeper of any hotel, inn, motel or motor court in this state to post or maintain posted on any outdoor or any outside sign:

....
(b) Advertising which employs terminology with reference to special rates for rooms or accommodations at such establishment.

“Special rates” means “special rates,” “cut rates,” “low rates,” “lowest rates,” “lowest rates in town,” “reasonable,” “inexpensive” or any similar phraseology the reasonable construction of which implies that a bargain in rates is offered at such establishment. [NRS 651.040\(1\)\(g\)](#).

Like [NRS 651.040\(2\)\(a\)](#) and (c), the ban on advertising which implies a bargain in rates is offered at motels and hotels restricts commercial speech. We believe, however, that the question of whether such speech may be completely prohibited is a much closer one than that considered in question one:

The first amendment’s concern for commercial speech is based on the informational function of advertising Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it

Central Hudson, 447 U.S. at 563 (citation omitted). Misleading advertising may therefore be prohibited entirely. *In re R.M.J.*, 455 U.S. at 203.

In *Bates*, 433 U.S. at 381-82, the court was not persuaded that the reference in the lawyer’s advertisement to a “legal clinic” offering services at “very reasonable rates” was misleading. At least one court has interpreted *Bates* as prohibiting a ban on the “verifiable, truthful use of restrained adjectives” characterizing legal fees, such as “reasonable,” “very reasonable” and “modest,” but authorizing a ban on the use of “unrestrained, hucksterish” adjectives, such as “cut-rate,” “lowest,” “give-away,” “below-cost” and “special.” *Bishop v. Commission on Professional Ethics, Inc.*, 521 F. Supp. 1219, 1226 (1981), *vacated on other grounds*, 686 F.2d 1278 (8th Cir. 1982). In light of subsequent Supreme Court commercial speech cases, we question this extension of *Bates*.

The Court in *In re R.M.J.*, 455 U.S. at 200, emphasized that the decision in *Bates* was a narrow one, and that it might reach a different decision as to price advertising on a different record.

If experience with particular price advertising indicates that the public is in fact misled or that disclaimers are insufficient to prevent deception, then the matter would come to the court in an entirely different posture. The commercial speech doctrine is itself based in part on certain empirical assumptions as to the benefits of advertising. If experience proves that certain forms of advertising are in fact misleading, although they do not appear at first to be “inherently” misleading, the court may take such experience into account.

455 U.S. at 200, n.11. Thus where the record indicates that a particular form or method of advertising has in fact been deceptive, regulation is permissible. 455 U.S. at 202; *see also Friedman*, 440 U.S. at 13.

In *Bates*, the Court considered the use of the phrase “very reasonable rates” in the context of a total ban on lawyer advertising on a record which indicated that this description of the rates was in fact an accurate one. 433 U.S. at 382. The Supreme Court has not squarely addressed whether a state may prevent deception in advertising by banning the use of adjectives such as those listed in [NRS 651.040\(1\)\(g\)](#) which imply that prices or rates are a “bargain.” We observe, however, that a description of a price as “reasonable” appears to fall somewhere between the type of truthful, verifiable price information discussed in *Virginia Pharmacy* and the trade names discussed in *Friedman* which have no intrinsic meaning and were found to have been the subject of actual abuse. The question whether such descriptive words are of the informative, protected type, or the misleading, unprotected type, is, we believe, an open one.

Even assuming that some “restrained adjectives” characterizing the rates for motel or hotel rooms are protected commercial speech, we cannot say that the prohibition in [NRS 651.040\(2\)\(b\)](#) is not “narrowly tailored” to directly advance a substantial state interest. The state need not demonstrate that the restriction is “absolutely the least severe that will achieve the desired ends.” *Fox*, 109 S. Ct. at 3035. Given our conclusion that a ban on accurate rate information cannot be enforced, the limited effect of the statute’s ban on terminology which states or implies that the rates are a “bargain” appears more designed to ensure that outdoor rate advertising appears “in such a form . . . as [is] necessary to prevent its being deceptive.” *Friedman*, 440 U.S. at 16, quoting *Virginia Pharmacy*.

Nor can we say that [NRS 651.040\(2\)\(b\)](#) is unconstitutional in all its applications. The statute may also be applied to the use of “unrestrained, hucksterish” adjectives such as “cut-rate” which have a greater potential to mislead. *Bishop*, 521 F. Supp. at 1226. While some advertising may present truthful, verifiable information of the type protected by the first amendment, some may be so inherently misleading as to justify a total ban on such advertising.

Absent more definitive guidance from the courts, we are unable to conclude that the statute on its face impermissibly restricts protected commercial speech.

The use of the adjectives listed, or others which imply that the rates at motel or hotel rooms are “bargains,” may be found to be inherently misleading, or, if only potentially misleading, the subject of actual abuse, on a case-by-case basis. We decline to speculate as to the outcome of specific cases involving numerous applications of the statute. We instead defer to the presumption that the statute is constitutional and conclude that [NRS 651.040\(2\)\(b\)](#) is not unconstitutional on its face.⁶ See *K-Mart Corp. v. State Indus. Insur. Sys.*, [101 Nev. 12](#), 18, 693 P.2d 562 (1985).

CONCLUSION

[NRS 651.040\(2\)\(b\)](#) is a facially valid restriction on commercial speech which may be inherently misleading.

Sincerely,

BRIAN McKAY
Attorney General

By: DOUGLAS E. WALTHER
Deputy Attorney General

Footnotes

¹ Although it did not directly address the free speech issue, the conclusion of *Op. Nev. Att’y Gen. No. 33* (April 2, 1959) that [NRS 651.040](#) was constitutional, must also be reviewed in light of current constitutional doctrine.

² The fact that a particular activity may be extensively regulated, or even prohibited in the public interest, does not compel the conclusion that speech relating to that activity is unprotected. *See Posadas De Puerto Rico Ass’n. v. Tourism Co.*, 478 U.S. 328, 340 (1986) (legalized gambling). However, the government’s authority to completely ban an activity indicates a substantial-enough interest to justify reducing demand through the suppression of advertising promoting the activity. *Id.* at 343-44; *see also Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (1983), *cert. denied*, 467 U.S. 1259 (1984), (ban on intrastate advertising of liquor justified to prevent artificial stimulation of demand in light of state’s unique power under the twenty-first amendment to regulate liquor). Because we do not believe that operation of a motel or hotel business may constitutionally be banned, and because we discern no legislative intent to dampen demand for motel and hotel rooms by the operation of [NRS 651.040](#), the issue presented is distinguishable from those considered in *Princess Sea Indus. v. State of Nev.*, [97 Nev. 534](#), 635 P.2d 281 (1981) (advertising brothels in counties where prostitution is illegal) and *Republic Entertainment v. Clark County*, [99 Nev. 811](#), 672 P.2d 634 (1983) (advertising escort services), where no constitutional infringement of commercial speech was found to have occurred.

³ The fact that [NRS 651.040](#) is limited to outdoor signs does not change this conclusion. *See Linmark Ass’n, Inc. v. Willingboro*, 431 U.S. 85, 94 (1977). Nor do we believe the statute may be upheld as a valid, time, place and manner restriction. Such restrictions are valid “provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.” [NRS 651.040](#) is directly aimed at restricting the content of the advertising, room rates, for its primary effect—that those receiving the information will act upon it. *Id.* In addition, the alternatives to outdoor advertising are much less likely to reach the traveling public and are therefore inadequate. *Id.* at 93.

⁴ Because one’s constitutionally protected interest in *not* providing any particular factual information in one’s advertising is minimal, a state may prevent deception by requiring disclosure of certain facts as long as such requirements are reasonably related to the state’s interest. *Zauderer*, 471 U.S. at 651.

⁵ Our conclusion that [NRS 651.040](#)(2)(a) and (c) are, in effect, “broader than necessary” must be distinguished from the “overbreadth doctrine.” The “overbreadth doctrine,” which permits a litigant to challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him, does not normally apply in commercial speech cases. *Bates*, 433 U.S. at 379-81. A litigant must therefore show that a particular restriction, as applied to him, infringes upon constitutionally protected speech. *Id.* at 381. The Supreme Court has recognized, however, that while a decision disallowing a particular restriction may not result in its invalidity in *all* its applications, a decision that a statute is not “narrowly drawn” to achieve the state’s interest may render the statute “effectively unenforceable.” *Fox*, 109 S. Ct. at 3036. Since [NRS 651.040](#)(2)(a) and (c) are not narrowly drawn to achieve the state’s interest in preventing deception, we conclude that these sections are effectively unenforceable.

⁶ We emphasize that this is a developing area of the law. This part of the statute may be vulnerable to a constitutional challenge if enforced against advertising which employs the more

restrained type of descriptive rate terminology. In such cases, prosecutors may wish to consider whether evidence exists that members of the traveling public were in fact misled by the sign in question.

OPINION NO. 90-12 HUMAN RESOURCES; RECORDS; FACILITIES: The right to inspect records at a long-term care facility as provided in [NRS 422A.145](#) includes the right to make copies of those records.

Carson City, October 5, 1990

Mr. Stephen Empey, Chief of Elder Rights, Department of Human Resources, Division of Aging Services, 340 North Eleventh Street, Suite 114, Las Vegas, Nevada 89101

Dear Mr. Empey:

You have requested an opinion from this office regarding the following:

QUESTION

Does [NRS 427A.145](#) authorize ombudsmen to copy medical and/or financial records of a resident of a long-term care facility?

ANALYSIS

It is indicated in your request that the ombudsmen is given access to the medical and financial records of a recipient by the facility. However, the facility is not allowing the ombudsman to make copies of the records.

[NRS 427A.125](#) provides in pertinent part:

[A]n advocate shall, under direction of the administrator:

1. Receive, investigate and attempt to resolve complaints made by or on behalf of residents of facilities for long-term care.
2. Investigate acts, practices, policies or procedures of any facility for long-term care or any governmental agency which relates to such care and may adversely affect the health, safety, welfare or civil rights of residents of such facilities, and report the results of the investigations to the administrator.

See also [NRS 427A.135](#) (1), (2) and (3).

[NRS 427.145](#)(1) provides:

In conducting an investigation, the advocate or his representative may:

1. Inspect . . . any records maintained by the facility. Except as otherwise provided in this subsection, the medical and personal financial records may be inspected only with the informed consent of the resident, his legal guardian or the person or persons designated as responsible for decisions regarding the resident. If the resident is unable to consent to the inspection and has no legal guardian, the

inspection may be conducted without consent.

The question, then, is whether the right to inspect carries with it the concomitant right to copy the records.

In *Mulford v. Davey*, [64 Nev. 506](#), 186 P.2d 360 (1947), the court said at page 511:

It seems clear that the right of inspection preserved by the statute to parties or their attorneys carried with it the right to obtain certified and exemplified copies thereof.

The statute permitting the sealing of part of the record in divorce cases is in derogation of the common law and, pursuant to familiar principles, must be construed strictly. A strict construction of the statute preserved to parties and their attorneys the broadest rights of inspection consistent with the language of the legislature. In further support of the construction we here adopt, it is incumbent upon this court to avoid any absurd or unjust results unless the statute plainly requires it

In *State of Missouri, ex rel. Stufflebam v. Appelquist*, 694 S.W.2d 882 (Mo. App. 1985), the court said at page 885: “The physician-patient privilege did not exist at common law, and it has >no constitutional underpinnings.’ The statutory privilege is that of the patient, and not of the physician and it may be waived by the patient” (Citations omitted.)

When the patient or resident consents to inspection of his records, he has waived the physician-patient privilege. When he has not consented, under the conditions outlined in [NRS 427A.145\(1\)](#), the statute waives the privilege for him. The physician-patient privilege should be strictly construed because it is in derogation of the common law. This construction of the statute would permit copying as well as inspecting the records. *See Mulford, supra*.

In *Fuller v. State*, 17 So. 2d 607 (Fla. 1944), the court said at page 607:

The appellant is Town Clerk of the Town of Surfside and the appellees are citizens of the town. It is admitted that the latter have a right under the quoted statute to inspect the records, but it is contended that the right to inspect does not include the right to make copies. There is no merit to this contention. The best-reasoned authority in this country holds that the right to inspect public records carries with it the right to make copies. This [is] on the theory that the right to inspect would in many cases be valueless without the right to make copies (citations omitted).

While this case deals with municipal records, the principle should apply to the right to inspect generally when that inspection is provided for, as here, by statute. *See also Direct Mail Serv. v. Registrar of Motor Vehicles*, 5 N.E.2d 545 (Mass. 1937), where the court said at pages 546-47: “The right to inspect commonly carries with it the right to make copies, without which the right to inspect would be practically valueless. We see no reason why the right to make copies is not co-extensive with the right to inspect” (citations omitted), and *Winter v. Playa del Sol, Inc.*, 353 So. 2d 598 (Fla. App. 1977), where the court said at page 599: “The right to inspect public records carries with it the right to make copies. This is on the theory that the right to inspect would in many cases be valueless without the right to make copies.”

Basing its reasoning upon the foregoing cases, this office is of the opinion that the right of the ombudsmen to inspect the records under the provisions of [NRS 427A.145](#) includes the right to make copies of the records. The work of the ombudsmen would be severely hindered if they were

not allowed to make copies of the records in furtherance of their investigations for the benefit of the residents of long-term care facilities pursuant to their duties under [NRS 427A.125](#) and [427A.135](#).

CONCLUSION

The right to inspect the records of long-term care facilities, as provided for in [NRS 427A.145](#), includes and carries with it the right to make copies of those records.

Sincerely,

BRIAN McKAY
Attorney General

By: Nancy Ford Angres
Chief Deputy Attorney General

OPINION NO. 90-13 FISH AND GAME; PERMITS; CONSTITUTIONAL LAW: Permit denial for commercial harvest of nongame fish is justified under [NRS 503.380](#) when denial is not arbitrary and is based on concern that additional harvest will damage fish resource which is naturally indigenous or planted or propagated at public expense. Favoring existing permit holder over new applicant does not violate equal protection guarantees when all new applicants are treated alike, classification is designed to protect investment made by current holder, and classification is rationally related to resource protection.

Carson City, October 5, 1990

Mr. William A. Molini, Director, Department of Wildlife, Post Office Box 10678, Reno, Nevada 89520

Dear Mr. Molini:

You have requested an opinion regarding the Department of Wildlife's authority to deny an application for a permit for commercial taking of nongame fish.

The Nevada Department of Wildlife ("Department") has received a request for a commercial wildlife permit to commercially harvest Sacramento blackfish from Lahontan and Rye Patch Reservoirs. The Sacramento blackfish is a nongame species but serves as a forage base for walleye, a game fish. The blackfish were planted in Rye Patch Reservoir one year ago expressly for the purpose of serving as a food base for the walleye, and the population of blackfish at that location is still in the process of establishing itself. The blackfish also serves as a food base for the walleye at Lahontan Reservoir.

There is one outstanding permit for commercially harvesting the blackfish. The permittee operates only at Lahontan Reservoir where the blackfish population is established. Survey data collected by the Department indicate nonetheless that the blackfish take equals and may even exceed the sustainable harvest. It is the opinion of the Department that the resource base cannot justify issuance of a second permit to the current applicant. The Department's opposition to

issuance of a new permit is based on concern both for the Sacramento blackfish and the walleye.

QUESTION ONE

On what basis does the Department authorize or deny permits for commercial taking of nongame fish?

ANALYSIS

Commercial permits for harvesting unprotected wildlife are issued under the authority of [NRS 503.380](#), which reads: “The department may take or permit the commercial taking of unprotected wildlife in any manner approved by the commission. The commission may fix a price to be paid for wildlife so taken. Unprotected wildlife taken under this authorization may be sold.”

The Department has promulgated regulations pursuant to this statute to guide the issuance of permits. [NAC 503.545](#) reads:

Any person may obtain a permit to take unprotected fish commercially from the waters of the State upon application and payment to the Department of an annual permit fee of \$100, if:

1. The location, time and manner of conducting the operation is approved by the department; and
2. The operation is not deleterious to fish or other wildlife naturally indigenous or planted or propagated therein at public expense.

Neither under the statute nor the regulations is there an absolute right to have a commercial wildlife permit. The statute says that “[t]he department *may* . . . permit the commercial taking of unprotected wildlife” (Emphasis added.) [NRS 503.380](#). The discretionary nature of the Department’s permit issuance authority is reiterated in the regulations: “Any person *may* obtain a permit” (Emphasis added.) [NAC 503.545](#).

Though the Department has discretion in issuing the permits, the discretion is limited by objective criteria. The Department may impose reasonable time, place and manner restrictions on permit issuance. [NAC 503.545](#)(1). These are not at issue in the present case. The Department must also exercise its discretion based upon the biological effect of permit issuance. Its authority for doing so is found in the legislative declaration that:

1. Wildlife in this state not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada.
2. The preservation, protection, management and restoration of wildlife within the state contribute immeasurably to the aesthetic, recreational and economic aspects of these natural resources.

[NRS 501.100](#).

Consistent with the legislative declaration, the Department by regulation has made wildlife conservation the determinative factor in permit decisions. The operation for which a permit is requested must not be “deleterious to fish or other wildlife naturally indigenous or planted or propagated . . . at public expense.” [NAC 503.545](#)(2). This clearly allows the Department to deny a permit when it determines that the additional harvest would be deleterious in the described fashion.

CONCLUSION

The decision whether to issue a permit for commercial taking of nongame fish is determined by the objectively measurable effects which the permit would have on the resource. The Department has concluded that additional harvest pressure on the blackfish will be deleterious to the blackfish and walleye, both of which were introduced at public expense. Since it must be assumed that these are supportable professional judgments, the statutes and regulations justify denial of the permit request.

QUESTION TWO

Is seniority a justifiable reason to deny a second application?

ANALYSIS

By denying the current applicant's permit request on the grounds that the existing permittee already takes the maximum sustainable harvest, the Department could face a claim of unlawful discrimination under the U.S. Equal Protection Clause, U.S. Const. amend. XIV, § 1, and art. 4, § 21 of the Nevada Constitution. The effect of the denial would be to create two classes of applicants and treat each differently. Similar classification schemes in other jurisdictions have been found, however, to be valid and not in violation of the U.S. Constitution. On similar reasoning, the Department's permit denial would probably be sustained against constitutional challenge under either the state or federal law.

Equal protection challenges are resolved by differing analyses depending upon the nature of the right involved. When, as is the case with commercial fishing permits, there is no fundamental right at stake, the "rational basis" test is applied. *Weikal v. Washington Dep't of Fisheries*, 679 P.2d 956, 958 (Wash. App. 1984). This is a deferential test involving a low level of scrutiny by the court. It involves a three-step inquiry: "(1) Does the classification apply alike to all members within the designated class (2) Whether some basis in reality exists for reasonably distinguishing between those within and without the designated class, and (3) Whether the challenged justifications have any rational relation to the purposes of the challenged [action]." *Id.* at 959.

The plaintiff fishermen in *Weikal* challenged a law which allowed crab licenses to be issued to persons who were already working in the crab fishing industry, and denied permits to new applicants. After applying the three-step rational basis test, the court upheld the law. First, it found that the law was applied equally to all within the class of new applicants. Next, it found that an interest in "protecting those with an investment and interest in the fishery, who are actively pursuing that interest," was a reasonable basis for the classification scheme and is not an equal protection violation. *Id.* Last, the court found that "[l]imiting the number of those who may participate in the fishery is rationally related to the goal of protecting the resource and regulating the industry." *Id.*

Other cases involving fishing rights have come to the same conclusion. For example, in *Martinet v. Department of Fish & Game*, 250 Cal. Rptr. 7 (Cal. Ct. 1988), the court upheld a shark and swordfish fishery law which limited the number of permits available to new entrants, but did not limit the number of permits available to prior permittees. In an equal protection challenge, the court found the law was reasonably drawn to protect against overfishing while protecting persons in the industry who had made investments in the equipment required by the

trade. See also *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1267 (Alaska 1980).

The opinion in *Owsichek v. State, Guide Licensing & Control Bd.*, 763 P.2d 488 (Alaska 1988), struck down a law granting monopolies to commercial hunting guides within certain hunting areas (known as “exclusive guide areas,” or “EGA’s”). However, that decision is distinguishable from the present situation in that it rested on a unique provision in the Alaska Constitution known as the “common use clause,” which reads: “Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.” Alaska Const., art. VIII, § 3. The court found that the common use clause created rights to wildlife not available under other provisions of the constitution, such as the equal protection clause. “To give meaning and effect to the common use clause, it must provide protection of the public’s use of natural resources distinct from that provided by other constitutional provisions.” *Owsichek* at 496. Nevada, in contrast, has no common use clause in its constitution, and the legitimacy of a classification is measured only under the state and federal equal protection clauses which, by inference, the *Owsichek* court found would not invalidate the granting of monopolies in wildlife.

Denial of a new commercial permit to harvest blackfish in Nevada is sustainable in this case against equal protection challenge for the reasons cited in *Weikal*. There is first no allegation or indication that other new applicants have received permits while the current applicant has not. It is also reasonable to favor the existing permittee because of the investment he has made in the enterprise. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Martinet*, 250 Cal. Rptr. at 9 (“[a] law which favors existing business over new ones will be upheld if there is any reasonable and substantial justification for the distinction”); *Apokedak*, 606 P.2d at 1267 (“[a]cts conferring >grandfather rights’ have generally withstood equal protection challenge”). Finally, the limitations imposed on permitting are related to conservation of the resource, and it is rational to conclude that limiting the number of operators involved in harvesting will beneficially affect fish numbers and size. *Weikal*, 679 P.2d at 959. This is all that the law requires. *Solis v. Miles*, 524 F. Supp. 1069, 1073-74 (S.D. Tex. 1981).

CONCLUSION

The Department does not violate constitutional guarantees of equal protection under the laws by refusing to issue a permit to a new applicant while allowing commercial harvesting under an existing permit. The decision to deny the permit is based upon legitimate conservation and resource objectives, and achievement of these objectives is legitimately obtained by favoring existing operations over new ones.

Sincerely,

BRIAN McKAY
Attorney General

By: C. Wayne Howle
Deputy Attorney General

OPINION NO. 90-14 COLLECTION AGENCIES; INTEREST: When a person incurs a bill for services rendered in another state and then subsequently moves to Nevada, a Nevada

collection agency may only charge the rate of interest allowed by the other state when collecting the debt.

Carson City, October 5, 1990

Mr. Glenn F. Walquist, Deputy Commissioner, Financial Institutions Division, 2601 East Sahara Avenue, Suite 264, Las Vegas, Nevada 89104

Dear Mr. Walquist:

You have requested an opinion from this office concerning the rate of interest to be applied to a debt which is incurred out of state but is collected in Nevada.

BACKGROUND

The situation that gives rise to this opinion request usually occurs when a resident of another state incurs a medical bill in the other state and subsequently moves to Nevada without paying the bill. For purposes of this opinion, we are assuming that the contract was entered into in the foreign state and the payment for services was to be rendered in that state. The creditor then engages a licensed Nevada collection agency to collect the bill on the creditor's behalf. The Nevada collection agencies have taken the position that when there is no express contract fixing the rate of interest, the Nevada statute allowing interest at the prime rate plus 2 percent applies.

QUESTION

Does [NRS 99.040](#) apply when a debtor's bill for services that originated in another state is forwarded to Nevada for collection by a Nevada collection agency?

ANALYSIS

In order to resolve this issue, the law of conflicts must be examined as it relates to contracts. A general rule is that the construction and the validity of a contract are governed by the law of the place where it is made. *Boat Town U.S.A. v. Mercury Marine Div.*, 364 So. 2d 15 (Fla. App. 1978). The place of performance may also be looked to in determining what law is to be applied. *Id.* at 18. In the case where the ultimate object of the contract is the payment of money, the contract is considered to be performed at the place of payment. *Reighley v. Continental Ill. Nat'l Bank & Trust Co. of Chicago*, 61 N.E.2d 29 (Ill. 1945).

The Nevada Supreme Court has recently examined the conflicts-of-laws issue in *Sotirakis v. United States Automobile Assoc.*, [106 Nev. 123](#), 787 P.2d 788 (1990). That case involved an auto accident which occurred in Nevada but was covered by an insurance policy purchased in California. In determining whether to apply Nevada or California law regarding the family exclusion clause contained in the policy, the court began its analysis by citing to *Sievers v. Diversified Mortgage Investors*, [95 Nev. 811](#), 603 P.2d 270 (1979). The court in *Sievers* held that the state whose law is applied must have a substantial relation with the transaction, and the transaction must not be contrary to the public policy of the forum. 95 Nev. at 815. The foregoing is known as the significant relationship test, and the court in *Sotirakis* went on to examine a Washington Supreme Court case which adopted the significant relationship test and set forth the following standard:

The most significant contacts [sic] to be considered in resolving such questions

revolve around the expectations of the parties at the time of contracting, including:

- a. the place of contracting,
- b. the place of negotiation of the contact,
- c. the place of performance,
- d. the location of the subject matter of the contract, and,
- e. the domicile, residence, nationality, place of incorporation and place of business of the parties.

Dairyland Ins. v. State Farm Mut. Auto. Ins., 701 P.2d 806, 808 (Wash. App. 1985).

The Nevada Supreme Court has not dealt specifically with the issue of conflicts of law as it relates to what would be characterized as prejudgment interest when there is no express agreement dealing with the interest rate. There is a conflict among the authorities of other jurisdictions as to whether the law of the state in which the contract is made governs the rate of interest or whether the law of the forum governs. *Perkins v. Benguet Consol. Mining Co.*, 132 P.2d 70 (Cal. App. 1942). Still other authorities look to the law of the place the contract should have performed, that is where the money should have been paid, to determine the rate of interest. *Indiana Nat'l Bank of Indianapolis v. Goss*, 208 F.2d 619 (7th Cir. 1953).

Given the test set out by the court in *Sotirakis*, we must conclude that Nevada would look to the place of contracting and the place of performance and not the law of the forum to determine the amount of prejudgment interest. In the situation you describe, the place where the debtor and creditor agree that the debtor will pay for medical services is out of state. Any negotiations regarding the payment would likewise take place in the other state. The services are performed in the other state, and the creditor expects to be paid for those services in that state. The debtor and creditor, at the time of the making of the agreement, are both residents of the same state. The only relationship that these parties have to Nevada is the mere fact that the debtor has moved to Nevada after all of the foregoing has occurred. The conclusion to be drawn in the instant case must be that the most significant relationship between the transaction and a state is with the other state and not Nevada.

CONCLUSION

When a person incurs a bill for services rendered in another state and then subsequently moves to Nevada, a Nevada collection agency may only charge the rate of interest allowed by the other state when collecting a debt.

Sincerely,

BRIAN McKAY
Attorney General

By: Despina M. Hatton
Chief Deputy Attorney General

OPINION NO. 90-15 PUBLIC RECORDS; NURSES; STATE BOARD OF NURSING:
Portions of a licensee's file maintained by the Board are public; other parts are confidential.
Differentiating between the public and confidential portions of the file rests on a balancing of

public against private interests which must be performed by the Board in consultation with legal counsel.

Carson City, October 15, 1990

Lonna Burress, M.S., R.N., Executive Director, Nevada State Board of Nursing, 1281 Terminal Way, Room 116, Reno, Nevada, 89502

Dear Ms. Burress:

This letter is in response to your inquiry regarding the obligations of the Nevada State Board of Nursing ("Board") under the Nevada Public Records Law ("[NRS chapter 239](#)").

QUESTION

What portions of a licensee's file are public records required to be kept in the office of the Board and subject to public inspection during normal working hours upon reasonable notice?

BACKGROUND

[NRS 632.320](#)(4) provides that disciplinary action may be taken against a nurse who is guilty of habitual intemperance or who is addicted to the use of controlled substances. We have been told that nurses who are habitually intemperate or who are addicted to the use of controlled substances represent a significant threat to the public health, safety, and welfare. However, these types of addictive behavior are usually progressive in nature. Consequently, in the early stages of the disease process, impaired nurses may go undetected for significant periods of time.

The Board has informed us that impaired nurses normally come to the attention of the Board in one of two ways: (1) they self-report, or (2), they commit some related violation of the Nurse Practice Act that is reported to the Board by the nurse's employer. It has been the experience of the Board that nurses who self-report do so at an earlier stage in the disease process. Frequently, nurses who self-report have not yet committed an "practice related" violations. Thus they pose a significantly lower risk to the public health, safety, and welfare.

On the other hand, nurses who are reported to the Board by their employers for related violations of the Nurse Practice Act (diversion or improper wastage of controlled substances, improper charting or record keeping relating to controlled substances, job impairment, etc.) are usually much further into the disease process. Additionally, they more frequently present a direct threat to patient safety.

Based upon its past experience with substance abusers, the Board has found that these nurses can be rehabilitated under a strictly regulated program of recovery. The Board's statistics have documented a relapse rate of less than 15 percent. The Board has further documented that recovering nurses under Board supervision represent a far lower risk to the public than do unreported nurses whose disease is often out of control. Consequently, the sooner impaired nurses are brought to the attention of the Board and the sooner they commence a program of recovery, the greater the protection that can be offered to the public.

In order to accomplish this objective, the Board has actively encouraged self-reporting by impaired nurses. Two factors significantly increase the likelihood of self-reporting: (1) confidentiality; and (2) the ability to maintain a livelihood as a nurse.

The Board has recently received a request from the media for information concerning the files of nurses who are currently in a program of recovery supervised by the Board. Release of this information to the media will destroy the confidentiality that the Board has sought to maintain. Additionally, it is believed facilities that are singled out by the media as employers of nurses under supervision by the Board will feel it necessary to terminate these nurses as a result of adverse publicity. Thus the release of this information undercuts the entire objective of the rehabilitation program instituted by the Board. Nurses who risk public disclosure of their files and loss of employment are less likely to self-report. The Board believes that an unrestricted release of the type of information requested will adversely affect the public health, safety, and welfare by discouraging nurses from self-reporting. For this reason, the Board has requested an opinion from this office regarding what information contained in a nurse's file must be disclosed pursuant to the Nevada Public Records Law.

FACTS

You indicate that a licensee's file could contain the following categories of documentation: (1) information relating to initial licensure; (2) information relating to license renewal; and (3) information relating to disciplinary action. Initial licensure information normally consists of the application form itself, supporting documentation regarding education and licensure in other jurisdictions and test scores. Additionally, an applicant who discloses a basis for refusing to issue a license under [NRS 632.320](#) may be required to submit additional documentation in support of the application. Renewal information normally consists of the renewal application itself and proof of satisfaction of continuing education requirements. Again, an applicant who fails to certify that he is eligible for relicensure may be required to submit additional documentation in support of renewal.

Information relating to disciplinary action is used in the broadest sense to cover all information received by the Board which could result in disciplinary action and the Board's response thereto. It should be noted that not all adverse information results in disciplinary action. For ease of reference only, these matters will be referred to as disciplinary information even though formal disciplinary action may not have actually been taken by the Board. Disciplinary information normally consists of a complaint or self-report or both; investigative notes compiled by Board staff; documentary evidence obtained from facilities consisting of patient records and personnel records; correspondence between Board staff and the licensee and/or the licensee's counsel; a record of any interviews of the licensee conducted by Board staff; a copy of any formal charges filed against the licensee; a copy of any Board order entered regarding the licensee; and records relating to Board supervision of licensees.

Records compiled by the Board during the supervision of a licensee may consist of one or more of the following types of information: medical records relating to in-patient treatment for substance abuse; reports from substance abuse counselors concerning the licensee's aftercare; reports from the licensee's supervisor; reports from the licensee's sponsor at Alcoholics Anonymous ("AA") or Narcotics Anonymous ("NA"); reports from the licensee regarding his own rehabilitation; documentation of attendance at Nurse Support Group meetings, AA meetings, NA meetings, and/or required continuing education; drug screen reports obtained through analysis of bodily fluids; a schedule documenting the timeliness of required reports prepared by Board staff; and documents relating to any further disciplinary action required by the licensee's noncompliance with the supervisory requirements imposed by the Board.

ANALYSIS

[NRS 239.010](#)(1) provides in pertinent part:

All public books and public records of state, county, city, district, governmental subdivision and quasi-municipal corporation officers and offices of this state (and all departments thereof), the contents of which are not otherwise declared by law to be confidential, shall be open at all times during office hours to inspection by any person

[NRS 239.010](#)(2) further provides that any officer having custody of any public books and records who refuses any person the right to inspect such books and records is guilty of a misdemeanor.

There is no provision in the Nurse Practice Act which specifically declares any portions of the records maintained by the Board to be confidential. It should be noted that many of the professional occupations licensed under Title 54 do contain confidentiality provisions. (See, e.g., [NRS 630.336](#) relating to physicians; [NRS 641.090](#)(3) and 641.225 relating to psychologists; [NRS 641A.191](#) relating to marriage and family therapists; and [NRS 641B.430](#) relating to social workers.) It could be argued that because the Legislature specifically provided for the confidentiality of records relating to some professions, it specifically intended to require that all records relating to the Board be open to the public. See *Clark County Sports Center, Inc. v. City of Las Vegas*, [96 Nev. 167](#), 174, 606 P.2d 171 (1980). However, the better explanation is simply that the Nurse Practice Act is far older than some of the practice acts relating to other professions. At the time the Nurse Practice Act was passed by the Legislature, the issue of privacy and confidentiality was not of great concern. Consequently, the Legislature saw no need to address this issue. The Board may wish to seek legislative action to bring the Nurse Practice Act into conformity with the provisions regulating other professions.

Chapter 239 of the Nevada Revised Statutes does not define public records. As a result, since 1980, the Office of the Attorney General has been called upon to answer numerous inquiries relating to the application of chapter 239 to requests for release of documents in the custody of governmental agencies.¹ In Opinion Number 86-7, this office declared that the spirit and intent of the Nevada Public Record Statute required that it be construed in favor of public inspection where there is insufficient justification for maintaining that a document is confidential. In the same opinion this office adopted a case-by-case balancing test as a method of analysis of the sufficiency of the justification offered for nondisclosure where the document is not defined as a public record. This evaluation includes “a balancing of (1) the document’s content and function; (2) the interest and justification of either the agency or the public in general in maintaining the confidentiality of the document; and (3) the extent of the interest or need of the public in reviewing the document.” Op. Nev. Att’y Gen. No. 86-7 (May 12, 1986). We note that our high court recently adopted a case-by-case balancing test in determining whether certain criminal investigative files were subject to public disclosure under Nevada’s Public Records Law. *Donrey of Nev., Inc. v. Bradshaw*, [106 Nev. 630](#), 798 P.2d 144 (1990). In order to fully respond to the Board’s inquiry, this analysis must be applied to each document identified in the Facts portion of this opinion.

Three categories of documentation were identified in the Facts portion of this opinion: (1) information relating to initial licensure; (2) information relating to license renewal; and (3) information relating to disciplinary action. The first two types of documentation are essentially the same. For ease of analysis they will be treated together. A separate, more detailed analysis of the third category of documentation is required.

Two previous opinions have been issued since 1980 regarding disclosure of information contained in applications. In *Op. Nev. Att’y Gen. No. 89-18* (Nov. 30, 1989), this office concluded as follows:

Whether the application file of the applicant is a public record and open to inspection turns on a balancing of public interests and private interests. Whether the applicant has a legitimate expectation of privacy for such information, as well as other information in his application file, turns on the nature of the information sought in the application process and the context in which that information would be viewed. The Reno Housing Authority must make this evaluation.

Id. at 5. In an earlier opinion, this office made the following conclusion:

Materials submitted by private schools to the department of education as part of a school license application are public records within the meaning of section 239.010 of the Nevada Revised Statutes and are thus subject to public inspection and copying.

Op. Nev. Att’y Gen. No. 87-5 (Jan. 26, 1987).

The seemingly disparate approach evidenced by these two opinions can best be explained by the nature of the applicant. In the 1989 opinion, an individual was applying for the position of Director of Maintenance for the Reno Housing Authority. In the 1987 opinion, materials were submitted to the State Department of Education in support of an application for a private school. Traditionally, the law has recognized that a private individual has a greater expectation of privacy than a business organization.

Essential to a constitutional claim of a right of privacy is the existence of a legitimate expectation of privacy. *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 458 (1977) In *Byron v. State*, 360 So. 2d 83 (Fla. Dist. Ct. App. 1978), the court stated that a legitimate expectation of privacy existed where the information revealed is highly personal and sensitive, such that its disclosure would be objectionable to a reasonable person of ordinary sensibilities. *Id.* at 95.

Portions of the application materials contain highly personal and sensitive information. Other portions of the application package are not as sensitive and the public has a legitimate need to know. In judging the various interests, there appears to be insufficient justification for withholding information regarding an applicant’s educational background, including the educational facilities attended, the degrees awarded and continuing education. Similarly, the public has a right to know whether the applicant has passed the appropriate licensure examination, although the Board can consider the actual passing score to be confidential. Finally, the public has a right to know the status of an applicant’s license in this and other jurisdictions and whether any disciplinary action has been taken against the applicant. Remaining portions of the application relating to residence address, date of birth, social security account number, and medical and criminal history can be considered by a reasonable person of ordinary sensibilities to be personal and sensitive, such that its disclosure would be objectionable. *Id.* Courts in some states have resolved the dilemma between public inspection of records and the constitutional right to privacy by excluding only the confidential information from public inspection. *See Tew v. City of Topeka, Police & Fire Civil Serv. Comm’n*, 697 P.2d 1279 (Kan. 1985).

As stated above, disciplinary files normally contain a complaint or self-report or both; investigative notes compiled by Board staff; documentary evidence obtained from facilities

consisting of patient records and personnel records; correspondence between Board staff and the licensee and/or the licensee's counsel; a record of any interviews of the licensee conducted by Board staff; a copy of any formal charges filed against the licensee; a copy of any Board order entered regarding the licensee; and records relating to Board supervision of the licensee. All of these documents are compiled as part of the investigation of the licensee except the formal charges filed against the licensee; the Board order entered regarding the licensee; and the records relating to Board supervision of the licensee.

The Board must start from the proposition that formal charges and Board orders are matters of public record and must be open to public inspection.² Working backwards from this proposition, the Board could find a legitimate expectation of privacy in investigative records compiled by the Board which do not lead to the filing of formal charges. A reasonable person of ordinary sensibilities would consider unfounded allegations of misconduct to be personal and sensitive, such that their disclosure would be objectionable. *Byron*, 360 So. 2d at 95. Additionally, any patient records that were obtained during the investigation would be confidential. See [NRS 449.700-730](#).

As set forth above, records compiled by the Board during the supervision of a licensee may consist of one or more of the following types of information: medical records relating to in-patient treatment for substance abuse; reports from substance abuse counselors concerning the licensee's aftercare; reports from the licensee's supervisor³; reports from the licensee's sponsor at AA or NA; reports from the licensee regarding his own rehabilitation; documentation of attendance at Nurse Support Group meetings, AA meetings, NA meetings, and/or required continuing education; drug screen reports obtained through analysis of bodily fluids; a schedule documenting the timeliness of required reports prepared by Board staff; and documents relating to any further disciplinary action required by the licensee's noncompliance with the supervisory requirements imposed by the Board. Of these, only documentation of attendance at required continuing education, the schedule documenting the timeliness of required reports and those documents relating to any further disciplinary action required by the licensee's noncompliance with the supervisory requirements imposed by the Board, are open to public inspection. The Board can find that the remaining documentation is confidential.

Medical records relating to in-patient treatment for substance abuse and reports from substance abuse counselors concerning the licensee's aftercare are declared confidential by federal law. 42 U.S.C. § 290dd-3, 42 U.S.C. § 290ee-3, and 42 C.F.R. §§ 2.1 and 2.2. Drug screen reports obtained through analysis of bodily fluids are medical records and, as such, are confidential. See *Op. Nev. Att'y Gen. No. 82-12* (June 15, 1982). The Board can conclude that the reports from the licensee's supervisor, the reports from the licensee's sponsor at AA or NA, and the reports from the licensee regarding his own rehabilitation are confidential because the public interest in encouraging candidness from the reporting persons outweighs the public need to know. See *Nero v. Hyland*, 386 A.2d 846 (N.J. 1978). Finally, the Board can determine that documentation of attendance at Nurse Support Group meetings, AA meetings, and NA meetings are confidential because a reasonable person of ordinary sensibilities would consider this information to be personal and sensitive, such that their disclosure would be objectionable. *Byron*, 360 So. 2d at 95. This is especially true if this information contains the names of other members of the groups who are not the subject of the request for information and may not even be licensees of the Board.

CONCLUSION

The determination regarding which portions of a licensee's file maintained by the Board is a

public record subject to disclosure under the Nevada Public Records Law rests on a balancing of public and private interests. The foregoing analysis reveals that portions of the file are open to public inspection, while other portions of the file can be considered confidential. The Board, itself, must make this evaluation. Op. Nev. Att’y Gen. No 89-18 (Nov. 30, 1989). Before making a decision, the Board must carefully evaluate the competing interests in conjunction with Board counsel. In cases where the Board believes information is confidential and the person requesting the information maintains that it is not, an *in-camera* inspection by a court of competent jurisdiction could be utilized to resolve the controversy. See *Meriden Record Co. v. Browning*, 294 A.2d 646, 649 (Conn. Cir. 1971).

Sincerely,

BRIAN McKAY
Attorney General

By: Donald H. Haight
Deputy Attorney General

Footnotes

¹ Op. Nev. Att’y Gen. No. 90-8 (April 27, 1990); Op. Nev. Att’y Gen. No. 89-18 (Nov. 30, 1989); Op. Nev. Att’y Gen. No. 89-1 (Feb. 6, 1989); Op. Nev. Att’y Gen. No. 87-5 (Jan. 26, 1987); Op. Nev. Att’y Gen. No. 86-7 (May 12, 1986); Op. Nev. Att’y Gen. No. 83-2 (May 2, 1983); Op. Nev. Att’y Gen. No. 82-12 (June 15, 1982); Op. Nev. Att’y Gen. No. 82-7 (May 24, 1982); Op. Nev. Att’y Gen. No. 80-6 (March 10, 1980). In the same time frame, this office has issued 13 letter opinions on the subject.

² Board agendas, minutes of public meetings and transcripts of disciplinary hearings are matters of public record and must be made available for public inspection. Frequently, the Board does not undertake the expense of transcribing a disciplinary hearing. A transcript is only required in the event a petition for judicial review is filed. The Nevada Public Records Law allows a public agency to recover the cost of providing copies of public records. If a member of the public has requested a copy of a transcript of a disciplinary hearing which has not previously been transcribed at the request of the Board, the Board should obtain an estimate from the court reporter as to the cost of the requested transcript and obtain that sum in advance from the person requesting access.

³ One of the items specifically requested by the media is the place of employment of nurses under supervision of the Board. The Board does not keep this data as a separate category of information. Employment information can only be obtained by extracting it from the reports received from supervisors. Place of employment is not the type of information that has traditionally been considered confidential. Upon request from the public, the Board should abstract and supply this information from its files.

OPINION NO. 90-16 EVIDENCE; BOATS; RECORDS: The Department of Wildlife may accept and act on applications for certificate of number and certificate of title which are transmitted by telefax.

Carson City, October 24, 1990

Mr. William A. Molini, Director, Nevada Department of Wildlife, Post Office Box 10678, Reno, Nevada 89520

Dear Mr. Molini:

You have asked this office for an opinion concerning the legality of a “faxed” signature.

QUESTION

May the Boat Registration and Title Office of the Nevada Department of Wildlife (“Department”) accept and act upon applications for certificate of number and certificate of title which are transmitted by telefax?

ANALYSIS

STATUTORY REQUIREMENTS

In order to answer your query, it is necessary first to determine whether the applicable statute or regulation carries any express requirement for an original signature. No such requirement exists. The boat registration statute only requires that the application “must be signed by the owner of the motorboat.” [NRS 488.075](#). The regulations are similarly unspecific: “Except as otherwise provided in subsection 2, each application for a certificate of number must contain . . . the signature of the owner.” [NAC 488.100\(1\)](#).

BEST EVIDENCE RULE

In the absence of any express requirement for an original applicant signature, it is necessary next to examine the Nevada rules of evidence in order to establish the admissibility and effect of a facsimile signature in a judicial proceeding.

The principal rule of evidence implicated by your inquiry is the “best evidence” rule. It establishes a requirement that any writing offered to prove the truth of its contents must be the original writing unless the original is unavailable. Thus a copy will not be admitted into evidence when there is no reason why the original could not be presented instead. *McCormick on Evidence*, § 230 (3d ed. 1984).

FACSIMILE APPLICATIONS AS “ORIGINALS”

The Nevada rules for documentary evidence relax the best evidence rule in two significant ways. First, where the common law rule defined “original” very narrowly, the Nevada rule defines it as “the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it.” [NRS 52.205](#) (1). Thus the meaning given “original” turns more on the issuer’s intent than on the physical properties of the document, and it could include a facsimile copy sent to the Department by an applicant intending that the facsimile—not the copy retained by the applicant—be acted upon by the Department.

FACSIMILE APPLICATIONS AS “DUPLICATES”

The second way in which the Nevada rules relax the best evidence rule is by providing for the

treatment of duplicates as originals as set forth, in part, in subsection 1 of [NRS 52.245](#):

- [A] duplicate is admissible to the same extent as an original unless:
- (a) A genuine question is raised as to the authenticity of the original; or
 - (b) In the circumstances it would be unfair to admit the duplicate in lieu of the original.

A “duplicate” is defined in [NRS 52.195](#) as:

“Duplicate” means a counterpart produced:

1. By the same impression as the original;
2. From the same matrix;
3. By means of photography, including enlargements and miniatures;
4. By mechanical or electronic rerecording;
5. By chemical reproduction; or
6. By other equivalent technique designed to insure an accurate reproduction.

Thus, even if a faxed application is not deemed an original, it may be treated the same as an original if it qualifies as a duplicate.

Whether a facsimile, or “fax,” is a duplicate is a question which the courts have rarely addressed because of the novel technology involved. “Facsimile technology is relatively new. It is common knowledge that ‘fax’ machines electronically scan documents, reduce the documents to a series of digital signals and transmit them over telephone lines to a receiving machine which reassembles the signals and then reproduces the original.” *Madden v. Hegadorn*, 565 A.2d 725, 728 (N.J. Super. Ct. Law Div. 1989).

Recent opinions from a few jurisdictions indicate that fax technology is fully reliable and that a fax copy is admissible as a duplicate. In *Harwood v. State*, 555 N.E.2d 513 (Ind. Ct. App. 1990), the criminal defendant complained of the trial court’s admission of fax copies documenting defendant’s prior out-of-state conviction on a similar charge, as well as a faxed certification that the copies were correct. The court found no error in the decision of the lower court to admit the copies.

To render the facsimile copy of the certification of state’s exhibit 3 inadmissible would be to close our eyes to modern technology. The law, like society and business, does not live in the past, but must adapt constantly to a changing world. Thus, we hold, absent a serious challenge to its authenticity, state’s exhibit 3 was not rendered inadmissible because the document and certification were facsimile copies.

Id. at 517.

Fax technology was also endorsed as a reliable technology in *People v. May*, 557 N.Y.S.2d 203, 204 N.Y. App. Div. 1990): “[I]t is enough that the document is identified as a photocopy of the original or the product of some similarly accurate copying process, for example, a fax transmission.” Though the court in *May* considered the reliability of the technology under New York’s business records exception to the best evidence rule, which has no Nevada counterpart, it indicates generally the court’s approval and acceptance of the technology.

The Nevada Supreme Court has not assessed the technology under the best evidence rule, but

it has shown acceptance of it by permitting filing of certain court papers by means of “telephonic transmission.” N.R.A.P. 25(2). This would indicate the court’s inclination to adopt the same position expressed in *Harwood*, and there are no contrary indications in the rules or opinions of the court.

FACSIMILE APPLICATIONS AS “COPIES”

Finally, even if faxed applications for certificates of number or ownership are held by the court to be neither originals nor duplicates, they would probably be admissible into evidence as copies under [NRS 52.255](#):

The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible, if:

1. All originals are lost or have been destroyed, unless the loss or destruction resulted from the fraudulent act of the proponent.
2. No original can be obtained by any available judicial process or procedure.
3. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing.

Under this standard, a party wishing to use the application for evidentiary effect would be required first to attempt to obtain the original. But a copy could be used in lieu of the original in most cases when the original is not available. “[S]econdary evidence is always to be preferred over no evidence at all.” *Thompson v. State*, 488 A.2d 995, 1006 (Md. Ct. Spec. App. 1985).

AUTHENTICATION

The foregoing analysis assumes that the introduction of an application into evidence will be desired to prove some or all of the content of the application. If the only thing to be demonstrated by the facsimile application is to prove the fact that the applicant signed the application, then the question becomes one of authentication, and the best evidence rule may have no application. The best evidence rule, by its terms, is applied only when the writing is offered to prove its content. [NRS 52.235](#). The purpose for the rule is to guard against inaccurate copying. “[P]resenting to a court the exact words of a writing is of more than average importance, particularly in the case of operative or dispositive instruments such as deeds, wills or contracts, where a slight variation of words may mean a great difference in rights.” *McCormick*, at § 231. This purpose is not served when a writing is offered merely to prove that it was signed.

It is apparent that this danger of mistransmission of the contents of the writing, which is the principal reason for the rule, is only important when evidence other than the writing itself is offered for the purpose of proving its terms. Consequently, evidence that a certain document is in existence or as to its execution or delivery is not within the rule and may be given without producing the document.

Id. at § 233.

Under this reasoning, if a fax copy is offered only to prove that it was signed by an individual, there could be no objection based on the best evidence rule, and the only basis for challenge would be its authenticity. *Thompson*, 488 A.2d at 995. Authentication can be accomplished in a number of ways, examples of which are listed at [NRS 52.025](#) to [52.105](#). These include

identification of a signatory's handwriting, [NRS 52.035](#), [52.045](#), and 52.055, which can be done by reference to a copy. *Id.* at 1004-05.

CONCLUSION

The Department may accept and act upon faxed applications for boat certificates of number and ownership. There is no requirement in the boat registration statutes or regulations for original applications or signatures. Further, there is no rule of evidence which would render the Department's reliance on faxed applications inadvisable.

Sincerely,

BRIAN McKAY
Attorney General

By: C. Wayne Howle
Deputy Attorney General

OPINION NO. 90-17 PUBLIC EMPLOYEES; LOBBYING; WILDLIFE: The Nevada Department of Wildlife has statutory authority to attempt to influence the Nevada Legislature for increased funding; but there is no authority to hire an employee whose sole duty is to lobby the Legislature, or to contract with an independent contractor for lobbyist services.

NOTE: THIS OPINION WAS REVERSED BY AGO 91-5 (May 7, 1991)

Carson City, November 1, 1990

Mr. B. Mahlon Brown, Chairman, Board of Wildlife Commissioners, Post Office Box 10678,
Reno, Nevada 89520-0022

Dear Mr. Brown:

You have requested an opinion of this office on the issue of whether the Nevada Department of Wildlife ("Department") may legally hire or contract for the services of a lobbyist who would lobby the Nevada Legislature for funding for the Department.

QUESTION

May the Department legally hire a lobbyist who would lobby the Nevada Legislature for funding for the Department?

ANALYSIS

Lobbying by administrative agencies is widely practiced, so much so that a distinct agency lobbying style has emerged. *See Abney, Lobbying by the Insiders: Parallels of State Agencies and Interest Groups*, 48 Pub. Admin. Rev. 911 (1988). However, while the practice has become widely accepted, it is unclear from what source the authority to engage in it derives. *See generally* Note, *The Use of Public Funds for Legislative Lobbying and Electoral Campaigning*,

NO STATUTORY PROHIBITION

There is no express prohibition in the Nevada Revised Statutes preventing a state officer or employee from lobbying the Legislature. The Nevada Lobbying Disclosure Act, [NRS 218.900](#) through 218.944, appears in fact to contemplate it. In describing unlawful acts, the statute says that:

[A] member of the legislative or executive branch of the state government and an elected officer or employee of a political subdivision *shall not receive compensation or reimbursement other than from the state or the political subdivision* for personally engaging in lobbying.

[NRS 218.942](#)(6) (emphasis added). The reference in this section to compensation of state employees for lobbying cannot be limited to payment for appearances before the Legislature merely to explain the meaning or import of a bill. A “lobbyist” is defined to mean someone who “appears in person in the legislative building and communicates directly with a member of the legislative branch on behalf of someone other than himself to influence legislative action.” [NRS 218.912](#)(1). The definition expressly excludes an employee of a department of the state government “who appears before legislative committees only to explain the effect of legislation related to their department” [NRS 218.912](#)(2)(c). The provision allowing payment for lobbying with state funds thus necessarily must refer to attempts by an agency officer or employee to influence a legislator.

EXPRESS STATUTORY AUTHORITY

The mere fact that there is no prohibition on agency spending for lobbying does not justify a conclusion that such spending is lawful. It is necessary also to find authorization for such spending. “[E]xpenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment.” *Stanson v. Mott*, 551 P.2d 1, 6 (Cal. 1976).

The statutes of some jurisdictions are very clear in authorizing the agencies to engage in legislative lobbying. The Washington statutes, for instance, provide:

Any agency, not otherwise expressly authorized by law, may expend public funds for lobbying, but such lobbying activity shall be limited to (a) providing information or communicating on matters pertaining to official agency business to any elected official or officer or employee of any agency or (b) advocating the official position or interests of the agency to any elected official or officer or employee of any agency.

Wash. Rev. Code Ann. § 42.17.190(3) (Supp. 1990).

The Nevada statute does not so clearly provide authority for lobbying. However, an oblique statutory reference similar to the one at [NRS 218.942](#)(6) was cited as adequate authority in *North Carolina, ex rel. Horne v. Chafin*, 302 S.E.2d 281 (N.C. Ct. App. 1983). There the statute generally required lobbyist registration, but excepted agency officials from the requirement. The exemption was taken by the court as authority for agency personnel to lobby. “Defendants contend, and we agree, that lobbying is authorized by general law, by implication, in G.S. 120-

47.8(3), which exempts [government personnel] from the registration requirements imposed on lobbyists.” *Id.* at 284.

It is therefore possible to read the Nevada Lobbying Disclosure Act as providing not only permission but authority for agency lobbying in the same manner. However, this authority, if it exists, is limited by the terms of the statute to lobbying by “member[s] of the legislative or executive branch of the state government [or] elected officer[s] or employee[s] of a political subdivision” [NRS 218.942\(6\)](#). It would be difficult to extend the wording of the statute to include express authorization for agreements with independent contractors.

IMPLIED AUTHORITY

Even if the Nevada Lobbying Disclosure Act does not furnish authority for agency lobbying, it would seem to indicate recognition of an already extant implied authority arising from an agency’s general statutory authorization.

The clearest statement on the implied authority to lobby occurs in *Peacock v. Georgia Mun. Ass’n, Inc.*, 279 S.E.2d 434 (Ga. 1981), where the court approved expenses incurred by a county for legislative activities. Among the government activities of which the plaintiffs complained were:

[E]mployment of a lobbyist, the sponsoring of meals, seminars, and meetings for legislators in an attempt to influence legislation; the mailing of literature and other materials to legislators; personal consultation with individual legislators or groups of legislators, or entertainment of various legislators or groups of legislators.

Id. at 436. The court approved such expenses on the basis of authorization implied by more specific powers and duties. “We find that in today’s complex world the activities carried on by defendant organizations constitute necessary activities for the administration of county government.” *Id.* at 437.¹ The *Peacock* opinion is one among several “recent cases addressing the issue [which] almost unanimously permit governmental entities to engage in legislative lobbying” Note, *The Use of Public Funds*, 43 Vand. L. Rev. at 471 (1984).

Lobbying for funding to support the Department could likewise be described as “necessary activity” implied in the Department’s statement of general powers. The mission of the Department, in the person of the Director, is set out at [NRS 501.337](#). There, the Director is instructed to “[c]arry out the policies and regulations of the commission,” [NRS 501.337\(1\)](#), “[d]irect and supervise all administrative and operational activities of the department, and all programs administered by the department as provided by law” [NRS 501.337\(2\)](#), and “[a]ppoint or remove such technical, clerical and operational staff as the execution of his duties and the operation of the department may require” [NRS 501.337\(4\)](#).

These broad directives contain no express authority to hire a lobbyist. However, this does not mean that technical and operational staff employees cannot appear at legislative meetings in an attempt to influence legislation affecting the Department. Additionally, technical and operational staff employees can mail literature and other materials to legislators and consult personally with individual legislators or various groups of legislators. However, the provisions of [NRS 501.337\(2\)](#) and (4) are not broad enough to authorize the employment of an employee whose sole duty is to lobby legislators on matters affecting the Department. Furthermore, there is nothing in the wording of [NRS 284.173](#) which would countenance the director’s contracting with an independent contractor for these same lobbyist services.

CONCLUSION

Legislative lobbying is a legitimate agency function. The authority for officers and employees of the Department to lobby the Legislature can reasonably be found in both the express and implied provisions of the Nevada statutes. However, there is no authority to hire an employee whose sole duty is to lobby the Legislature. The Department cannot contract with an independent contractor for lobbyist services.

Sincerely,

BRIAN McKAY
Attorney General

By: C. Wayne Howle
Deputy Attorney General

Footnotes

¹ Even though Peacock involved a county government, not an administrative agency of the state, the same principles govern in both cases. Both types of entities are bodies with limited powers, empowered to act only as authorized. Op. Nev. Att’y Gen. No. 283 (June 18, 1957) (“agencies performing state functions have only such powers as are specifically given them by legislative acts or those which are reasonably or necessarily implied therefrom”); Op. Nev. Att’y Gen. No. 750 (May 9, 1949) (counties and municipalities have only such powers as are granted them by the state). The articles and opinions dealing with the powers of state agencies generally refer without qualification to opinions concerning the authority of municipal and county governments, and vice versa.

OPINION NO. 90-18 CONSTITUTIONAL LAW; TAXATION: The real property transfer tax exemption created by [NRS 375.090\(8\)](#) is constitutional but the Legislature may want to expand the exception to include single persons. The tax exemption contained in [NAC 375.170\(2\)](#) lacks statutory authorization and is therefore invalid.

Carson City, December 7, 1990

Chester H. Adams, Esq., Deputy District Attorney, Washoe County District Attorney’s Office,
Post Office Box 11130, Reno, Nevada 89520

Dear Mr. Adams:

You have requested an opinion from this office regarding the applicability of Nevada’s real property transfer tax to certain conveyances or transfers involving trusts.

QUESTION ONE

Is the real property transfer tax exemption created by [NRS 375.090\(8\)](#) constitutional?

ANALYSIS

The real property transfer tax (“RPTT”) is codified in chapter 375 of the Nevada Revised Statutes. The Nevada Legislature created this tax in 1967 to replace the federal documentary stamp tax on conveyances which expired January 1, 1968. See Act of January 1, 1968, ch. 548, 1967 Nev. Stat. 1759.

When read together, [NRS 375.020](#), [375.030](#), and 375.100 place a duty upon the county recorder to impose and collect the RPTT upon each and every deed evidencing a transfer of title and prohibit the recorder from recording any deed until the tax is paid. It is not the recorder’s responsibility to determine if a conveyance or transfer is valid.

Section 375.090 of NRS contains a list of title transfers that are exempt from the imposition of the RPTT. Section 375.090(8) of NRS exempts “[a] transfer of title by spouses without consideration to an inter vivos trust” from the RPTT.

In Nevada, “[t]here is a strong presumption in favor of the constitutionality of statutes, which can only be overcome by clear and fundamental violations of the law.” *Wise v. Bechtel Corp.*, [104 Nev. 750](#), 754, 766 P.2d 1317 (1988); see *State v. Board of County Comm’rs*, [21 Nev. 235](#), 238, 29 P. 974 (1892). When the constitutional validity of a statute is at issue, strong evidence is necessary to overcome this presumption.

You have raised the argument that [NRS 375.090\(8\)](#) may violate the Equal Protection Clause of the fourteenth amendment of the United States Constitution as well as article 10, § 1 of the Nevada Constitution by discriminating against single persons.

In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some “reasonable basis,” it does not offend the Constitution simply because the classification “is not made with mathematical nicety or because in practice it results in some inequality.”

Bayless v. Commissioner, 61 T.C. 394, 396 (1973); See *Black v. Commissioner*, 69 T.C., 505, 507 (1977).

Marital status is not a suspect classification as the United States Supreme Court defines that term and therefore the state need only demonstrate a rational basis for the statute. A compelling state interest need not be shown for the statute to withstand an equal protection challenge.

Courts have stated that “>[a] statutory discrimination will not set aside if any state of facts reasonably may be conceived to justify it.’ *McGowan v. Maryland*, 366 U.S. 420, 426.” *Id.* at 396-97; see *Keeler v. Commissioner*, 70 T.C. 279, 285 (1978).

“No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact.” See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973). We think it sufficient for us to state that the differences in exposure to tax liability between married and single persons do not rise to the level of an impermissible interference with the enjoyment of the fundamental right to marry or remain married.

Druker v. Commission, 77 T.C. 867, 873 (1981), *cert. denied*, 461 U.S. 957 (1983).

In 1968, when the Nevada Legislature enacted the RPTT and the exemptions, including the exemption for spouses when transferring title to an inter vivos trust without consideration, using trusts in estate planning was just coming into vogue. Also, it was not common for single persons to participate in estate planning. Granting the exemption to married people to encourage estate planning was reasonable in 1968. The exemption has not been changed by the Legislature nor has it been challenged in court. If there is a need to expand the exemption to include single persons, the Legislature should do this.

This office finds that a rational basis exists for the classification found in the exemption: to encourage estate planning by married people. Since the classification has some rational basis, the statute does not violate the Equal Protection Clause.

CONCLUSION

The real property transfer tax exemption created by [NRS 375.090\(8\)](#) is constitutional. A rational basis exists for the classification found in the exemption, therefore the statute does not violate the Equal Protection Clause. If the exemption is to be expanded to include single persons, the Legislature should amend the statute.

QUESTION TWO

Does the conveyance of trust property into a “subtrust” create a taxable event?

ANAYLSIS

There is no express exemption in [NRS chapter 375](#) for a conveyance without consideration of trust property from one trust to another. However, [NAC 375.170\(2\)](#) purports to exempt from tax the recording of a deed transferring property from one trust to another not pursuant to a sale. If this regulation is valid, then a trustee could convey trust property to a subtrust with no RPTT due if the conveyance is not pursuant to a sale.

Section 375.080 of NRS authorizes the Department of Taxation to prescribe such regulations as it may deem necessary to carry out the purposes of chapter 375. Regulations were adopted and became effective January 1, 1968. [NRS 233B.038](#) defines a regulation to mean “an agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency.” In *State Bd. of Equalization v. Sierra Pac. Power Co.*, [97 Nev. 461](#), 464 634 P.2d 461 (1981), the court stated that “[a] properly adopted substantive rule [regulation] establishes a standard of conduct which has the force of law.” See *State, ex rel. Tax Comm’n v. Saveway*, [99 Nev. 626](#), 630, 668 P.2d 291 (1983).

For a regulation to be valid it must be authorized by the statute pursuant to which it was promulgated. In *Cashman Photo v. Nevada Gaming Comm’n*, [91 Nev. 424](#), 428, 538 P.2d 158 (1975), the court held a regulation invalid because it imposed a tax on an activity that was not mentioned in the statute as taxable. The court stated “the [gaming] commission cannot by such rule impose a tax that is not mentioned in the statute as taxable.” *Id.*

Chapter 375 of NRS does not grant an exemption from the RPTT to any trust conveyance except the one stated in [NRS 375.090\(8\)](#) which only applies to married people. No other

provision of [NRS chapter 375](#) deals with trust conveyances. Without statutory authority, the regulation is not valid. A regulation will be upheld, but only if it “is within the language of the statute.” *Saveway*, 99 Nev. at 630.

No authority exists in [NRS chapter 375](#) for the exemption listed in [NAC 375.170\(2\)](#) (a deed to or by a trustee not pursuant to a sale). Therefore, this regulation is invalid.

CONCLUSION

The conveyance of trust property into a subtrust creates a taxable event since there is no valid provision for exempting this type of conveyance.

Sincerely,

BRIAN McKAY
Attorney General

By: Kateri Cavin
Deputy Attorney General

OPINION NO. 90-19 TRANSPORTATION; REGULATION OF PARKING ON STATE

HIGHWAYS: Local authorities, such as the City of Reno, have concurrent jurisdiction with the State of Nevada to regulate parking on State highways within their respective territorial boundaries.

Carson City, December 21, 1990

Mr. Garth Dull, Director, Nevada Department of Transportation, 1263 South Stewart Street,
Carson City, Nevada 89712

Dear Mr. Dull:

This letter is in response to your inquiry and that of your chief traffic engineer regarding the jurisdiction of a local authority to regulate parking on a state highway.

QUESTION

Whether local authorities, such as the City of Reno, have the legal authority to regulate parking on state highways within their jurisdiction.

BACKGROUND

Recently, the City of Reno (“City”) prohibited a new automobile dealership on Kietzke Lane from any on-street parking. In turn, the City required the dealership to provide off-street parking for its customers as a condition of obtaining a building permit. Kietzke Lane is a state highway. The dealership has questioned the authority of the City to make such a requirement on a state highway.

ANALYSIS

Your question is whether local authorities such as the City, have the authority to regulate parking on state highways within their respective jurisdictions. The City is organized under a charter and obtains its authority from that charter. The charter provides broad general police powers which, by legislative intent, are to be liberally construed. Reno Municipal Code § 1.010 (Nev. 1982). *See Koscot Interplanetary, Inc. v. Draney*, [90 Nev. 450](#), 456, 530 P.2d 108 (1974) (if enacted under police power, presumed to promote public welfare and presumed valid). Title 6 of the Reno Municipal Code pertains to vehicles and traffic. Specifically, § 6.06.010 provides for regulation of “stopping, standing, and parking.” *See* Reno Municipal Code § 6.06.010 (Nev. 1982).

Chapter 484 of the Nevada Revised Statutes is entitled “Traffic Laws,” and provides for the regulation of traffic within the State of Nevada. Chapter 484 also provides the legislative authority for the regulation of parking by a “local authority.” Specifically, [NRS 484.399](#)(3) states as follows:

A local authority may place official traffic-control devices prohibiting or restricting the stopping, standing or parking of vehicles *on any highway where, in its opinion, stopping, standing or parking is dangerous to those using the highway or where the vehicles which are stopping, standing or parking would unduly interfere with the free movement of traffic.* It is unlawful for any person to stop, stand or park any vehicle in violation of the restrictions stated on those devices.

[NRS 484.399](#)(3) (emphasis added). The same chapter further provides the authority for the Department of Transportation to regulate parking on its highways. [NRS 484.403](#)(4) provides:

The *department of transportation* with respect to highways under its jurisdiction *may place official traffic-control devices prohibiting or restricting the stopping, standing or parking of vehicles on any such highway* where, in its opinion, such stopping, standing or parking is dangerous to those using the highway or where the stopping, standing or parking of vehicles would unduly interfere with the free movement of traffic thereon. It is unlawful for any person to stop, stand or park any vehicle in violation of the restrictions stated on those devices. (Emphasis added.)

These two statutes are very similar, and appear to provide for concurrent jurisdiction over parking on state highways which are within the territorial limits of any local authority, such as the City of Reno. Local authorities are authorized to regulate *any parking* within its boundaries, while the department may regulate *parking only on highways under its jurisdiction*, namely state highways.

[NRS 484.429](#) also makes no distinction between official traffic control devices which are erected by local authorities or by the department when it provides, “when official traffic-control devices are erected at hazardous or congested places, a person may not stop, stand or park a vehicle in any such designated place.” *Id.* Finally, to distinguish between a local authority’s power to regulate parking on “any highway” and highways “under its jurisdiction,” [NRS 484.441](#)(1) states, “a local authority may erect, pursuant to ordinance, official traffic-control devices regulating the stopping, standing or parking of vehicles on *any highway under its jurisdiction.*” *Id.* (emphasis added).

It should be noted that [NRS 484.777](#) through 484.789 are specifically set out to address the

“Respective Powers of State and Local Authorities.” Upon further analysis of this area, it becomes more apparent that local authorities have concurrent jurisdiction to regulate highways. [NRS 484.777](#) provides, among other things, that the “provisions [within the] chapter are to be uniform throughout this state,” and “any local authority may enact by ordinance traffic regulations which cover the same subject matter as the various sections of this chapter if the provisions of the ordinance are not in conflict with this chapter.” [NRS 484.777](#)(1) and (2).

Furthermore, [NRS 484.779](#) pertains to the “Powers of Local Authority” and provides in relevant part as follows:

1. Except as otherwise provided in subsection 3, a local authority may adopt, by ordinance, regulations with respect to highways under its jurisdiction within the reasonable exercise of the police power:

....
(e) Adopting such other *traffic regulations* related to specific highways as are expressly authorized by this chapter.

2. An ordinance relating to *traffic control* enacted under this section is not effective until official *traffic-control* devices giving notice of those local *traffic regulations* are posted upon or at the entrances to the highway or part thereof affected as is most appropriate.

3. *An ordinance enacted under this section is not effective with respect to:*

(a) *Highway constructed and maintained by the department of transportation under the authority granted by chapter 408 of NRS*

....

Id. (emphasis added). See *Ex Parte Boyce*, [27 Nev. 299](#), 334, 75 P. 1 (1904) (legislature free to exercise its judgment in matters coming within police power); *Draney*, 90 Nev. at 456.

Because Kietzke Lane is a state highway maintained by the Department under chapter 408 of the Nevada Revised Statutes, it would appear that subsection 3 of [NRS 484.779](#) prevents a local authority such as the City from regulating this road. This potential conflict, however, is easily resolved by some rules of construction. A statute dealing specifically with a subject area prevails over a general provision. *La Pena v. State*, [96 Nev. 43](#), 47, 604 P.2d 811 (1980); *State Indus. Ins. Sys. v. Surman*, [103 Nev. 366](#), 368, 741 P.2d 1357 (1987); *Laird v. Nevada Pub. Employees Retirement Bd.*, [98 Nev. 42](#), 45, 639 P.2d 1171 (1982). The language in [NRS 484.779](#) is general in nature enabling a local authority to exercise “reasonable police power” to adopt regulations respecting highways in its jurisdiction. The statute addresses *traffic control* and *traffic regulation*, whereas [NRS 484.399](#) and [484.441](#) are more specifically addressed to parked vehicles. [NRS 484.399](#)(3) specifically authorizes a local authority to prohibit or restrict “stopping, standing or parking” of vehicles on any highway where, in its opinion, the parking interferes with the free movement of traffic.

The definitions of “park” and “traffic” in chapter 484 also show a distinction between a standing vehicle and traveling vehicles. Compare [NRS 484.097](#) with [NRS 484.203](#). Clearly, the specific provisions concerning parking regulation, when construed with [NRS 484.779](#), will prevail over the general traffic provisions when determining state and local powers governing parking.

Further, the rules of construction provide that an act should be read to give meaning to all parts. *McCrakin v. Elko County School Dist.*, [103 Nev. 655](#), 658, 747 P.2d 1373 (1987). *Board of County Comm’rs v. CMC of Nev.*, [99 Nev. 739](#), 744, 670 P.2d 102, 105 (1983); *K.J.B., Inc. v.*

Second Judicial Dist. Ct., [103 Nev. 473](#), 476, 745 P.2d 700 (1987). If we were to read [NRS 484.779](#) to preclude local control of parking on state highways, we would be nullifying [NRS 484.399](#) and [484.441](#). Additionally, if the language of statutes is plain and unambiguous, courts cannot go beyond the language in an attempt to determine legislative intent. *Nevada Power Co. v. Public Serv. Comm'n.*, [102 Nev. 1](#), 4, 711 P.2d 867 (1986); *National Tow & Road Serv. Inc. v. Integrity Ins. Co.*, [102 Nev. 189](#), 191, 717 P.2d 581 (1986); *Acklin v. McCarthy*, [96 Nev. 520](#), 523, 612 P.2d 219 (1980). *See State v. Washoe County Pub. Defender*, [105 Nev. 299](#), 775 P.2d 217 (1989). The language and intent of these statutes is clear and unambiguous showing a distinction between standing and traveling vehicles and their regulation. The plain meaning of the statutes should be followed. Therefore, [NRS 484.779](#) is wholly consistent with [NRS 484.399](#) and [484.441](#) and other specific provisions of previously discussed statutes. The statutes are designed to provide local authorities concurrent jurisdiction over any highway within its territory in areas such as regulation of parking.

CONCLUSION

Local authorities, such as the City of Reno, have concurrent jurisdiction to regulate any highway within their territory, like Kietzke Lane, in the specific area of parking regulation. Properly adopted regulations for parking are not prohibited.

Sincerely,

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