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OPINION NO. 2014-06

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

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

Dear Ms. Longo:

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

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

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

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

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

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

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

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

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

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

QUESTION ONE

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1109.

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

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

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

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

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

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

CONCLUSION TO QUESTION ONE

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

QUESTION TWO

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION TO QUESTION TWO

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

Sincerely,

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