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February 9, 2006

Senator Sandra Tiffany
2144n Eagle Path Circle
Henderson, NV 89074-0684

Dear Senator Tiffany:

You have asked this office several questions relating to the Board of Homeopathic Medical Examiners and the Nevada Institutional Review Board (NIRB), which was created by Assembly Bill No. 208 (A.B. 208) of the 2005 Regular Session. Chapter 489, Statutes of Nevada 2005, at p. 2521. We will answer each of your questions separately below.

BACKGROUND

Sections 5.2 to 10, inclusive, of A.B. 208 create the NIRB and prescribe its powers and duties. Chapter 489, Statutes of Nevada 2005, at pp. 2523-26. The statutory provisions creating the NIRB and prescribing its powers and duties are part of the larger statutory scheme in chapter 630A of NRS, which governs the practice of homeopathic medicine in Nevada. The provisions of chapter 630A of NRS are administered by the Board of Homeopathic Medical Examiners, which has the responsibility to "[r]egulate the practice of homeopathic medicine in this State and any activities that are within the scope of such practice, to protect the public health and safety and the general welfare of the people of this State." NRS 630A.155.

The purpose of the NIRB is to review, approve, oversee and control certain research studies which use devices, therapies or substances regulated by the Board of Homeopathic Medical Examiners, or any combination of those devices, therapies or substances, in a manner that is considered to be a form of alternative or complementary integrative medicine. Sections 5.6, 7.7 and 8 of chapter 489, Statutes of Nevada 2005, at pp. 2523-25. To carry out its statutory duties, the NIRB has been granted significant administrative powers, including the power to adopt administrative regulations. Sections 7.3 and 8 of chapter 489, Statutes of Nevada 2005, at pp. 2524-25.

Although the NIRB has been granted significant administrative powers, the activities of the NIRB are subject to the review and approval of the Board of Homeopathic Medical Examiners. Sections 6, 7.3, 8 and 12 of chapter 489, Statutes of Nevada 2005, at pp. 2524-27. Specifically, A.B. 208 provides that the NIRB is "under the supervision of the Board of Homeopathic Medical Examiners" and "is accountable to the Board of Homeopathic Medical Examiners for all the activities of the [NIRB]." Sections 6 and 8 of chapter 489, Statutes of Nevada 2005, at pp. 2524-25. A.B. 208 also provides that "[a]ll regulations adopted by the [NIRB] must be approved by the Board of Homeopathic Medical Examiners." Section 7.3 of chapter 489, Statutes of Nevada 2005, at p. 2524. Thus, the Board of Homeopathic Medical Examiners is required by A.B. 208 to supervise and oversee all the activities of the NIRB, including approving the regulations adopted by the NIRB.

With this background in mind, we will now discuss each of your specific questions.

DISCUSSION

I. May the Board of Homeopathic Medical Examiners remove and replace at its pleasure the members it has appointed to the NIRB?

The NIRB consists of seven members. Section 6 of chapter 489, Statutes of Nevada 2005, at p. 2524. After consultation with organizations in Nevada representing medical disciplines, the Board of Homeopathic Medical Examiners is required to appoint four members who represent various medical disciplines in Nevada. Id. The Governor, the Majority Leader of the Senate and the Speaker of the Assembly each appoint one of the remaining three members who must be members of the general public and residents of Nevada and who must not be licensed in any medical discipline. Id. A.B. 208 expressly provides that the members of the NIRB "serve at the pleasure of the appointing authority" and a vacancy on the NIRB "must be filled by the appointing authority in the same manner as the original appointment." Id.

The Nevada Supreme Court has held that when a person holds a position at the "pleasure" of the appointing authority, the person "may be removed at will by the appointing authority" and that such a removal "may occur without notice and without the necessity of providing a formal procedure therefor." Eads v. City of Boulder City, 94 Nev. 735, 738 (1978). Additionally, such a removal may be made "without any resignation being filed and without any reason being given" for the removal by the appointing authority. Leeper v. Jamison, 32 Nev. 327, 330 (1910). Finally, it is a well-established rule of statutory construction that "where the legislature uses words which have received judicial interpretation, they are presumed to be used in that sense unless the contrary intent can be gathered from the statute." In re Filipini, 66 Nev. 17, 24-25 (1949).

In enacting A.B. 208, the Nevada Legislature expressly declared that the members of the NIRB "serve at the pleasure of the appointing authority." Section 6 of chapter 489, Statutes of Nevada 2005, at p. 2524. We have not found any language in A.B. 208 or any evidence in the

legislative history of the bill to suggest that the Legislature intended the phrase "serve at the pleasure of the appointing authority" to be interpreted in a manner contrary to the holdings of the Nevada Supreme Court in Eads and Leeper.

Therefore, based on the plain language of section 6 of A.B. 208 and the holdings in Eads and Leeper, it is the opinion of this office that any member appointed to the NIRB by the Board of Homeopathic Medical Examiners serves at the pleasure of the Board and may be removed at the will of the Board, and that such a removal may occur without notice, without the necessity of providing a formal procedure for the removal and without any reason being given for the removal. Furthermore, if the Board of Homeopathic Medical Examiners were to remove a member of the NIRB which it has appointed, it is the opinion of this office that the Board would have the power and duty to fill that vacancy in accordance with the provisions of section 6 of A.B. 208. Accordingly, it is the opinion of this office that the Board of Homeopathic Medical Examiners may remove and replace at its pleasure the members it has appointed to the NIRB.

II. Is the Board of Homeopathic Medical Examiners required by section 7.3 of A.B. 208 to approve the permanent regulations proposed by the NIRB before the NIRB holds public workshops concerning the regulations and before the regulations are submitted to the Legislative Counsel for examination and review in accordance with the Nevada Administrative Procedure Act?

Section 7.3 of A.B. 208 requires the NIRB to adopt administrative regulations to carry out its statutory duties. Section 7.3 of chapter 489, Statutes of Nevada 2005, at p. 2524. In addition, section 7.3 of A.B. 208 provides that "[a]ll regulations adopted by the [NIRB] must be approved by the Board of Homeopathic Medical Examiners." Id. Although section 7.3 of A.B. 208 requires the Board of Homeopathic Medical Examiners to approve all regulations adopted by the NIRB, section 7.3 of A.B. 208 does not specify whether the permanent regulations proposed by the NIRB have to be approved by the Board before the NIRB holds public workshops concerning the regulations and before the regulations are submitted to the Legislative Counsel for examination and review in accordance with the Nevada Administrative Procedure Act.

When a statute fails to address an issue, a court will seek to interpret the statute in line with what reason and public policy would indicate the Legislature intended. County of Clark v. Sun State Props., Ltd., 119 Nev. 329, 334 (2003). Under such circumstances, a court will interpret the statute in light of the purposes and spirit of the law and will avoid any interpretations which lead to unreasonable or absurd results. Hunt v. Warden, 111 Nev. 1284, 1285 (1995).

Furthermore, a court will interpret each statute in harmony with all other statutes relating to the same subject, and a court will presume that the Legislature enacted each statute with full knowledge of all other statutes relating to the same subject. State v. State Farm Mut. Auto. Ins.

Co., 116 Nev. 290, 295 (2000). Thus, a court will interpret statutes relating to the same subject in such a manner as to render the statutes compatible with each other whenever possible. State v. Rosenthal, 93 Nev. 36, 45 (1977).

Finally, for the purposes of the Nevada Administrative Procedure Act (APA), an "agency" is defined as "an agency, bureau, board, commission, department, division, officer or employee of the Executive Department of the State Government authorized by law to make regulations or to determine contested cases." NRS 233B.031 (emphasis added). The APA establishes the minimum procedural requirements for regulation-making by all such agencies, except for those agencies that are expressly exempted by statute from the requirements of the APA. NRS 233B.020 & 233B.039. The APA is intended to supplement other statutes that govern each specific agency and, if those other statutes provide additional procedural requirements, the agency must comply with the additional procedural requirements as well. NRS 233B.020. Thus, when an agency is authorized by law to adopt regulations, the agency must comply with the requirements of its own governing statutes and with the requirements of the APA, unless the agency is expressly exempted by statute from the requirements of the APA. See NRS 233B.010 to 233B.120, inclusive; Morgan v. Committee on Benefits, 111 Nev. 597, 601-06 (1995).

As discussed previously, section 7.3 of A.B. 208 authorizes the NIRB to adopt administrative regulations to carry out its statutory duties. Section 7.3 of A.B. 208 also provides that the regulations adopted by the NIRB must be approved by the Board of Homeopathic Medical Examiners. There are no provisions in A.B. 208 which expressly exempt the NIRB from the requirements of the APA. Therefore, in answering your question, we must construe the requirements of section 7.3 of A.B. 208 in harmony with the requirements of the APA, and we must interpret those statutory requirements in line with what reason and public policy would indicate the Legislature intended and in such a manner as to render those statutory requirements compatible with each other whenever possible.

Under the APA, before an agency may adopt a permanent regulation, the agency must give at least 30 days' notice of its intended action. NRS 233B.060. The APA requires the agency's notice to include information concerning "[t]he time when, the place where and the manner in which interested persons may present their views regarding the proposed regulation." NRS 233B.0603. The APA also provides that "[a]ll interested persons must be afforded a reasonable opportunity to submit data, views or arguments upon a proposed regulation, orally or in writing." NRS 233B.061. To facilitate the receipt of comments from interested persons, the APA requires the agency to hold at least one public workshop concerning the proposed regulation before the agency holds a public hearing to take final action on the proposed regulation. Id. Finally, as part of the regulation-making process, the APA requires the agency to "consider fully all written and oral submissions respecting the proposed regulation." Id.

In addition to requiring the agency to solicit and consider public comment during the regulation-making process, the APA also requires the agency to deliver a copy of the proposed permanent regulation to the Legislative Counsel. NRS 233B.063. The Legislative Counsel "shall examine and if appropriate revise the language submitted so that it is clear, concise and suitable for incorporation in the Nevada Administrative Code, but shall not alter the meaning or effect without the consent of the agency." Id. The agency may not take final action on the proposed regulation "until it has received from the Legislative Counsel the approved or revised text of the regulation in the form to be adopted." NRS 233B.064.

After the agency has taken final action on the proposed permanent regulation, the agency must submit an informational statement and a copy of the adopted permanent regulation to the Legislative Counsel. NRS 233B.067. Unless the Legislative Commission has conducted an early review of the regulation or has waived its review of the regulation pursuant to NRS 233B.0681, the regulation must be reviewed by the Legislative Commission or the Subcommittee to Review Regulations "to determine whether the regulation conforms to the statutory authority pursuant to which it was adopted and whether the regulation carries out the intent of the Legislature in granting that authority." NRS 233B.067. If the Legislative Commission or the Subcommittee, as appropriate, does not object to the regulation, the Legislative Counsel must file the regulation with the Secretary of State and notify the agency of the filing. Id. The regulation becomes effective on the date it is filed with the Secretary of State or any later date specified in the regulation. NRS 233B.070.

In light of the foregoing procedural requirements of the APA, it is clear that the Legislature intended for a proposed permanent regulation to be subject to public comment, agency review and possible revision by both the agency and the Legislative Counsel during the first part of the regulation-making process. During this period, the regulation is simply a work in progress, and it is subject to revision or rejection by the agency.

Given that proposed permanent regulations are essentially works in progress during the first part of the regulation-making process, we do not believe that it would be consistent with reason or the public policy of the APA to require the Board of Homeopathic Medical Examiners to approve proposed permanent regulations before the NIRB holds public workshops concerning the proposed regulations and before the proposed regulations are submitted to the Legislative Counsel for examination and review. During this period, the NIRB is soliciting and considering public comments regarding the proposed regulations, and the proposed regulations remain subject to review and revision by the NIRB and the Legislative Counsel. Because the proposed regulations are in a state of flux during the first part of the regulation-making process, we believe that it would be counter-productive and unreasonable to require the Board to approve the proposed regulations before they have been thoroughly evaluated by the public, the agency and the Legislative Counsel.

However, once the Legislative Counsel has returned the approved or revised text of the proposed regulations to the NIRB in the form to be adopted pursuant to NRS 233B.064, we

believe that reason and public policy dictate that the proposed regulations must be approved by the Board of Homeopathic Medical Examiners pursuant to section 7.3 of A.B. 208 before the NIRB takes final action on the proposed regulations under the APA. During this later part of the regulation-making process, the proposed regulations would be much closer to their final form. We believe this would enable the Board to exercise more effectively its approval authority under section 7.3 of A.B. 208 and, if the Board disapproved the proposed regulations, the NIRB would have the opportunity to change the proposed regulations and resubmit the proposed regulations to the Legislative Counsel for examination and revision.

Furthermore, once the NIRB takes final action on the proposed regulations under the APA, the regulations have been adopted in their final form and they must be submitted to the Legislative Counsel for review by the Legislative Commission or the Subcommittee to Review Regulations. NRS 233B.067. We believe that an interpretation of section 7.3 of A.B. 208 which would allow the NIRB to take final action on the proposed regulations without first obtaining the approval of the Board of Homeopathic Medical Examiners would lead to an unreasonable and absurd result because such an interpretation would interfere with the review function performed by the Legislative Commission and the Subcommittee to Review Regulations.

Finally, we must emphasize that under A.B. 208, the Board of Homeopathic Medical Examiners has been given the authority to supervise and oversee all the activities of the NIRB, including approving the regulations adopted by the NIRB. Therefore, if the Board decides that it is more appropriate for it to approve proposed permanent regulations before the NIRB holds public workshops concerning the proposed regulations and before the proposed regulations are submitted to the Legislative Counsel for examination and review, then we believe the Board has the authority and discretion to impose that requirement on the NIRB.

In sum, it is the opinion of this office that the Board of Homeopathic Medical Examiners is not required by section 7.3 of A.B. 208 to approve the permanent regulations proposed by the NIRB before the NIRB holds public workshops concerning the regulations and before the regulations are submitted to the Legislative Counsel for examination and review in accordance with the APA. However, it is also the opinion of this office that the Board of Homeopathic Medical Examiners is required by section 7.3 of A.B. 208 to approve the permanent regulations proposed by the NIRB before the NIRB takes final action on the regulations in accordance with the APA.

III. Is the NIRB or any of its officers authorized to create a nonprofit tax exempt organization that would act as the official entity authorized by section 10 of A.B. 208 to solicit and receive grants, gifts and donations to assist the NIRB?

It is a well-established legal principle that "neither the State nor a public officer may accept donations of private funds or expend the same except as may be duly authorized by law." State ex rel. Kirkland v. Kirk, 198 So. 2d 331, 332 (Fla. 1967). In Nevada, state

agencies may accept grants, gifts and donations of property or services from any source when the authority for such action is included in an act of the Legislature which authorizes the expenditure of nonappropriated money. NRS 353.335.

Sections 9 and 10 of A.B. 208 contain provisions relating to the acceptance and expenditure of grants, gifts and donations to assist the NIRB in carrying out its duties. Sections 9 and 10 of chapter 489, Statutes of Nevada 2005, at pp. 2525-26. In particular, section 10 of A.B. 208 provides:

> **Sec. 10.** ***1. Except as otherwise provided in subsection 3, the Nevada Institutional Review Board may be funded by:***
>
> ***(a) A nonprofit organization, created by the Board of Homeopathic Medical Examiners, which is exempt from taxation pursuant to 26 U.S.C. § 501(c)(3); and***
>
> ***(b) Grants, gifts, appropriations or donations to assist the Nevada Institutional Review Board in carrying out its duties pursuant to the provisions of sections 5.2 to 10, inclusive, of this act.***
>
> ***2. Any money received by the Nevada Institutional Review Board must be placed with the financial institutions described in section 9 of this act.***
>
> ***3. The Nevada Institutional Review Board may not be funded by any money from:***
>
> ***(a) The sponsor of any research study; or***
>
> ***(b) The manufacturer of any device, drug or other substance regulated by the Board of Homeopathic Medical Examiners.***

Section 10 of chapter 489, Statutes of Nevada 2005, at pp. 2525-26.

In interpreting the provisions of section 10 of A.B. 208, we are guided by several well-established rules of statutory construction. First, as a general rule of statutory construction, a court presumes that the plain meaning of statutory language reflects a full and complete statement of the Legislature's intent. Villanueva v. State, 117 Nev. 664, 669 (2001). Therefore, when the plain meaning of statutory language is clear and unambiguous on its face, a court generally will not engage in statutory construction or resort to legislative history or other extrinsic aids to determine legislative intent. State v. State Farm Mut. Auto. Ins. Co., 116 Nev. 290, 293-94 (2000); Acklin v. McCarthy, 96 Nev. 520, 523 (1980). Rather, a court will apply the plain meaning of the statutory language as written, unless such a meaning violates the spirit of the act or leads to an absurd or unreasonable result. Anthony Lee R. v. State, 113 Nev. 1406, 1414 (1997).

Second, in interpreting a statutory provision, a court will generally follow the rule of *expressio unius est exclusio alterius*, which provides that "the expression of one thing is the exclusion of another." Galloway v. Truesdell, 83 Nev. 13, 26 (1967). Under this rule of statutory construction, when a statute expressly mentions one thing or person, it is presumed

that the Legislature intended to exclude all other things or persons. Virginia & Truckee R.R. v. Elliott, 5 Nev. 358, 364 (1870). Thus, when a statute expressly gives a particular agency or officer the authority to exercise a specific power, it is presumed that the Legislature intended to exclude all other agencies or officers from exercising that same power. See King v. Board of Regents, 65 Nev. 533, 556 (1948) (quoting State ex rel. Crawford v. Hastings, 10 Wis. 525 (1860)) ("Every positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department, or person.").

Based on the plain language of section 10 of A.B. 208, the Board of Homeopathic Medical Examiners is expressly authorized to create a nonprofit tax exempt organization to fund the NIRB. There is no language in section 10 of A.B. 208 that authorizes the NIRB or its officers to create such an organization. Thus, in interpreting section 10 of A.B. 208, we must presume that the Legislature intended to exclude the NIRB and its officers from having the power to create a nonprofit tax exempt organization that would act as the official entity authorized by section 10 of A.B. 208 to solicit and receive grants, gifts and donations to assist the NIRB.

However, in reaching this conclusion, we must note that there is nothing in the plain language of section 10 of A.B. 208 which would prohibit nonprofit tax exempt organizations created by entities other than the NIRB and its officers from soliciting money and donating that money to the NIRB, so long as such organizations do not represent themselves as the official entity authorized by section 10 of A.B. 208 to solicit and receive grants, gifts and donations to assist the NIRB.

The First Amendment protects the right to engage in charitable solicitation. Illinois ex rel. Madigan v. Telemarketing Assocs., 123 S. Ct. 1829, 1836 (2003). As a general rule, state and local laws which limit the right to engage in charitable solicitation are subject to strict scrutiny, and such laws will be struck down if they are not narrowly tailored to further a compelling governmental interest. See Riley v. National Fed'n of the Blind of N.C., Inc., 108 S. Ct. 2667, 2673-76 (1988); Secretary of State of Md. v. Joseph H. Munson Co., 104 S. Ct. 2839, 2848-54 (1984); Village of Schaumburg v. Citizens for a Better Env't, 100 S. Ct. 826, 833-37 (1980). Applying the strict scrutiny standard, several courts have struck down laws which permitted one type of organization to engage in charitable solicitation for a particular cause but which severely restricted other types of organizations from engaging in charitable solicitation for the same cause. See, e.g., Texas State Troopers Ass'n v. Morales, 10 F. Supp. 2d 628, 632-37 (N.D. Tex. 1998); Telco Communications, Inc. v. Barry, 731 F. Supp. 670, 676-(D.N.J. 1990).

As a general rule of statutory construction, "[w]here a statute may be given conflicting interpretations, one rendering it constitutional, and the other unconstitutional, the constitutional interpretation is favored." Sheriff v. Wu, 101 Nev. 687, 689-90 (1985); see also Bell v. Anderson, 109 Nev. 363, 366 (1993); Standard Oil Co. of Cal. v. Pastorino, 94 Nev. 291, 293 (1978). Thus, where one possible interpretation of a statute would raise serious constitutional

concerns, a court will generally reject that interpretation of the statute if it is fairly possible for the court to construe the statute in an alternative manner that avoids any constitutional problems. See INS v. St. Cyr, 121 S. Ct. 2271, 2279 (2001); Communications Workers of Am. v. Beck, 108 S. Ct. 2641, 2657 (1988).

Because limitations on the right to engage in charitable solicitation raise serious constitutional concerns, we believe it is appropriate to interpret section 10 of A.B. 208 in a manner that avoids any constitutional problems. Therefore, we must presume the Legislature did not intend for section 10 of A.B. 208 to prohibit nonprofit tax exempt organizations created by entities other than the NIRB and its officers from soliciting money and donating that money to the NIRB, so long as such organizations do not represent themselves as the official entity authorized by section 10 of A.B. 208 to solicit and receive grants, gifts and donations to assist the NIRB.

In sum, it is the opinion of this office that the NIRB and its officers are not authorized to create a nonprofit tax exempt organization that would act as the official entity authorized by section 10 of A.B. 208 to solicit and receive grants, gifts and donations to assist the NIRB. However, it is also the opinion of this office that section 10 of A.B. 208 does not prohibit nonprofit tax exempt organizations created by entities other than the NIRB and its officers from soliciting money and donating that money to the NIRB, so long as such organizations do not represent themselves as the official entity authorized by section 10 of A.B. 208 to solicit and receive grants, gifts and donations to assist the NIRB.

IV. Is the Board of Homeopathic Medical Examiners authorized to take legal action against individuals or organizations using the term "Nevada Institutional Review Board" or "NIRB" or any other words, letters or combination of words or letters in such a manner as to cause confusion among donors desiring to make contributions to support the NIRB?

In Nevada, the Attorney General and his deputies are the legal advisers on all state matters arising in the Executive Department of the State Government, and the Attorney General and his deputies serve as the counsel of record for most state agencies. NRS 228.110. However, a state agency may employ its own attorneys if "an act of the Legislature specifically authorizes the employment of other attorneys or counselors at law." Id.

The Board of Homeopathic Medical Examiners is authorized by statute to employ attorneys in the discharge of its duties. NRS 630A.190. As a general rule of administrative law, when an agency has been given the power to employ attorneys, the agency is impliedly clothed with the power to use those attorneys to bring legal actions to protect the public interest in matters over which the agency has regulatory authority. See 73 C.J.S. Public Administrative Law & Procedure § 28 (2004). Therefore, because the Board of Homeopathic Medical Examiners is authorized to employ attorneys, we believe the Board may use those attorneys to

bring legal actions to protect the public interest in matters over which the Board has regulatory authority.

Pursuant to NRS 630A.155, the Board of Homeopathic Medical Examiners has the statutory duty to "[r]egulate the practice of homeopathic medicine in this State and any activities that are within the scope of such practice, to protect the public health and safety and the general welfare of the people of this State." The Board also has the statutory duty to supervise and oversee all the activities of the NIRB. Sections 6, 7.3, 8 and 12 of chapter 489, Statutes of Nevada 2005, at pp. 2524-27. In performing its statutory duties, the Board must carry out and enforce the provisions of chapter 630A of NRS "for the protection and benefit of the public." NRS 622.080. Taken together, we believe these statutory provisions give the Board regulatory authority over matters involving the NIRB and authorize the Board to take legal action to protect the public interest in matters involving the NIRB.

As discussed previously, the First Amendment protects the right to engage in charitable solicitation. Illinois ex rel. Madigan v. Telemarketing Assocs., 123 S. Ct. 1829, 1836 (2003). However, "the First Amendment does not shield fraud." Id. Thus, the First Amendment does not prohibit the government from taking legal action against an individual or organization that engages in fraudulent, misleading or deceptive charitable solicitation. Id. at 1836-42; Commonwealth ex rel. Preate v. Cancer Fund of Am., Inc., 620 A.2d 647, 653-54 (Pa. Commw. Ct. 1993). The First Amendment also does not prohibit a nonprofit organization from taking legal action against another nonprofit organization for improper use of a name. See, e.g., Fund for Cmty Progress v. United Way of Se. New Eng., 695 A.2d 517, 523-24 (R.I. 1997).

In Nevada, a nonprofit organization is liable for injury or damage caused by its wrongful acts or the wrongful acts of its agents, employees or servants acting within the scope of their agency or employment. NRS 41.480. Thus, a nonprofit organization which commits a wrongful act in Nevada is subject to legal liability in the same manner as other organizations.

Under Nevada law, there are several common-law principles and statutory provisions which prohibit an organization from improperly using a name that is the same or similar to the name used by another organization. In light of these common-law principles and statutory provisions, we believe the Board of Homeopathic Medical Examiners may be able to seek legal redress against individuals or organizations that use the term "Nevada Institutional Review Board" or "NIRB" or any other words, letters or combination of words or letters in such a manner as to cause confusion among donors desiring to make contributions to support the NIRB. Specifically, depending upon the particular facts and circumstances of each case, we believe the Board may be able to seek legal redress for: (1) common-law unfair competition and trade name infringement; (2) fraudulent or illegal use of the name of a benevolent, humane, fraternal or charitable organization in violation of NRS 601.010 to 601.040, inclusive; or (3) deceptive trade practices in violation of chapter 598 of NRS.

A. Unfair Competition and Trade Name Infringement.

In Nevada, "[t]he common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the Constitution and laws of this state, shall be the rule of decision in all the courts of this state." NRS 1.030. Thus, unless a legal principle from the common law has been expressly abolished, the courts of Nevada will generally rely upon the common law in rendering a legal decision.

Under the common law, when an organization's identity, reputation or ability to conduct business or raise funds is jeopardized by the appropriation or misuse of its name, the organization may seek legal redress under principles of unfair competition and trade name infringement. See A.L.M.N., Inc. v. Rosoff, 104 Nev. 274, 277-82 (1988); Purcell v. Summers, 145 F.2d 979, 984-85 (4th Cir. 1944). Although the common-law principles of unfair competition and trade name infringement arose in the context of commercial businesses, courts have also applied these principles to disputes among charitable, social and other nonprofit organizations.[1]

In an action for unfair competition and trade name infringement, the plaintiff must prove that the trade name at issue is legally protectable and that the defendant's use of the same or a similar trade name creates the likelihood of confusion. A.L.M.N., 104 Nev. at 277-82. A trade name is legally protectable if the plaintiff can show that it had a prior right to the use of the trade name, even if the plaintiff did not register the trade name. Id.; Cancer Research Inst. v. Cancer Research Soc'y, 694 F. Supp. 1051, 1052 (S.D.N.Y. 1988); American Diabetes Ass'n v. National Diabetes Ass'n, 533 F. Supp. 16, 19 (E.D. Pa. 1981).

If the plaintiff proves that the trade name is legally protectable, the plaintiff must then prove that the defendant's use of the same or a similar trade name is likely to confuse or deceive an "appreciable number" of reasonable consumers. A.L.M.N., 104 Nev. at 281; see also Visa Int'l Serv. Ass'n v. Visa Hotel Group, Inc., 561 F. Supp. 984, 989 (D. Nev. 1983); American Diabetes Ass'n, 533 F. Supp. at 19-20; Mayo Clinic v. Mayo's Drug and Cosmetics, Inc., 113 N.W.2d 852, 855 (Minn. 1962). Generally, a court will find that there is a likelihood of confusion if: (1) the public has mistakenly assumed or is reasonably likely to assume that the plaintiff is associated with, sponsors, represents or in some way is connected to the defendant; (2) the reputation of the plaintiff has been or is reasonably likely to be damaged by the defendant's use of the trade name; or (3) the plaintiff has suffered or is reasonably likely to

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[1] See, e.g., American Gold Star Mothers v. National Gold Star Mothers, 191 F.2d 488, 489 (D.C. Cir. 1951); Purcell v. Summers, 145 F.2d 979, 985 (4th Cir. 1944); Hinckley Chamber of Commerce v. Hinckley, 501 N.E.2d 47, 50 (Ohio Ct. App. 1985); Missouri Fed'n of the Blind v. National Fed'n of the Blind of Mo., Inc., 505 S.W.2d 1, 5 (Mo. Ct. App. 1973); Mayo Clinic v. Mayo's Drug & Cosmetics, Inc., 113 N.W.2d 852, 855 (Minn. 1962); Golden Slipper Square Club v. Golden Slipper Rest. & Catering, Inc., 88 A.2d 734, 736-37 (Pa. 1952); Society of the War of 1812 v. Society of the War of 1812 in the State of N.Y., 62 N.Y.S. 355, 355-59 (N.Y. App. Div. 1900).

suffer financial losses because of the defendant's use of the trade name. See A.L.M.N., 104 Nev. at 281; Adolph Kastor & Bros. v. FTC, 138 F.2d 824, 825-26 (2d Cir. 1943); Metropolitan Opera Ass'n v. Metropolitan Opera Ass'n of Chicago, 81 F. Supp. 127, 132-33 (N.D. Ill. 1948); Golden Slipper Square Club v. Golden Slipper Rest. & Catering, Inc., 88 A.2d 734, 736-37 (Pa. 1952).

Finally, the plaintiff is not required to prove wrongful intent by the defendant. However, if the plaintiff proves that the defendant had knowledge of the plaintiff's trade name when the defendant adopted the same or a similar trade name, a court will presume that the defendant's use of the trade name is likely to cause confusion. See Wells Fargo & Co. v. Wells Fargo Exp. Co., 358 F. Supp. 1065, 1091 (D. Nev. 1973), vacated in part on other grounds, 556 F.2d 406 (9th Cir. 1977); Metropolitan Opera Ass'n, 81 F. Supp. at 129; Missouri Fed'n of the Blind v. National Fed'n of the Blind of Mo., Inc., 505 S.W.2d 1, 7 (Mo. Ct. App. 1973). Under such circumstances, the defendant's deliberate conduct indicates that the defendant expected confusion to occur and intended to take advantage of the identity, reputation or profits of the plaintiff. See Wells Fargo & Co., 358 F. Supp. at 1091; American Diabetes Ass'n, 533 F. Supp. at 20.

In light of the foregoing case law, it is the opinion of this office that the Board of Homeopathic Medical Examiners may be able to seek legal redress under the common-law principles of unfair competition and trade name infringement against individuals or organizations that use the term "Nevada Institutional Review Board" or "NIRB" or any other words, letters or combination of words or letters in such a manner as to cause confusion among donors desiring to make contributions to support the NIRB. However, it should be noted that actions for unfair competition and trade name infringement generally involve complex factual questions that depend upon the particular facts and circumstances of each case. See A.L.M.N., 104 Nev. at 277-86; Missouri Fed'n of the Blind, 505 S.W.2d at 6. Consequently, this office cannot predict with any certainty whether any legal action for unfair competition and trade name infringement would be successful against any particular individual or organization.

B. Fraudulent or Illegal Use of the Name of a Benevolent, Humane, Fraternal or Charitable Organization.

Pursuant to NRS 601.010 and 601.020, a person is prohibited from assuming, adopting or using the name of a benevolent, humane, fraternal or charitable organization without the authorization of the organization. A person is also prohibited by NRS 601.010 and 601.020 from assuming, adopting or using a name similar to the name of a benevolent, humane, fraternal or charitable organization if the similar name is a colorable imitation or is calculated to deceive. A person who violates the provisions of NRS 601.010 or 601.020 may be subject to a civil action for injunctive relief. NRS 601.030. In addition, a person who willfully commits such a violation may be subject to criminal prosecution. NRS 601.040.

Depending upon the particular facts and circumstances of each case, it is the opinion of this office that the Board of Homeopathic Medical Examiners may be able to seek legal redress pursuant to NRS 601.010 to 601.040, inclusive, against individuals or organizations that use the term "Nevada Institutional Review Board" or "NIRB" or any other words, letters or combination of words or letters in such a manner as to cause confusion among donors desiring to make contributions to support the NIRB. However, because the availability of such legal redress would depend upon the particular facts and circumstances of each case, this office cannot predict with any certainty whether any legal action pursuant to NRS 601.010 to 601.040, inclusive, would be successful against any particular individual or organization.

C. Deceptive Trade Practices.

Pursuant to NRS 598.0915, the Deceptive Trade Practices Act prohibits a person, in the course of the person's business or occupation, from knowingly making "a false representation as to affiliation, connection, association with or certification by another person." Pursuant to NRS 598.1305, the Deceptive Trade Practices Act also prohibits a person from engaging in fraudulent, misleading or deceptive charitable solicitation. Specifically, subsection 1 of NRS 598.1305 provides that:

> 1. A person, in planning, conducting or executing a solicitation for or on behalf of a charitable organization, shall not:
> (a) Make any claim or representation concerning a contribution which directly, or by implication, has the capacity, tendency or effect of deceiving or misleading a person acting reasonably under the circumstances; or
> (b) Omit any material fact deemed to be equivalent to a false, misleading or deceptive claim or representation if the omission, when considering what has been said or implied, has or would have the capacity, tendency or effect of deceiving or misleading a person acting reasonably under the circumstances.

To date, the Nevada Supreme Court has not interpreted NRS 598.0915 or 598.1305 in a case involving fraudulent, misleading or deceptive charitable solicitation. However, courts in other jurisdictions have found that statutes similar to NRS 598.0915 and 598.1305 prohibit a nonprofit organization from engaging in acts of charitable solicitation which create confusion on the part of contributors or which mislead contributors into thinking that they are contributing to another organization with a similar name. See, e.g., Commonwealth ex rel. Preate v. Cancer Fund of Am., Inc., 620 A.2d 647, 653-54 (Pa. Commw. Ct. 1993); see also Illinois ex rel. Madigan v. Telemarketing Assocs., 123 S. Ct. 1829, 1833-43 (2003); Kent D. Wittrock, Note, The End of Fraudulent Solicitation-Really?: The Supreme Court in *Madigan v. Telemarketing Associates* Provides That Fraudulent Statements in Charitable Solicitation are not Protected Speech, 72 U. Mo. Kan. City L. Rev. 275, 294 n.166 (2003).

In Nevada, a person who violates the Deceptive Trade Practices Act may be subject to a civil action for injunctive relief and the payment of civil penalties. NRS 598.096 to 598.0999,

inclusive; State ex rel. Att'y Gen. v. NOS Commc'ns, Inc., 120 Nev. 65, 84 P.3d 1052, 1053-55 (2004); State ex rel. List v. AAA Auto Leasing & Rental, Inc., 93 Nev. 483, 486-87 (1977). In addition, a person who violates the Deceptive Trade Practices Act may be subject to criminal prosecution. NRS 598.0999.

The Attorney General, the Director of the Department of Business and Industry, the Commissioner of Consumer Affairs and local district attorneys have been given the authority to administer and enforce the provisions of the Deceptive Trade Practices Act. NRS 598.096 to 598.0999, inclusive. However, the Attorney General has been given primary jurisdiction to investigate and prosecute persons who engage in fraudulent, misleading or deceptive charitable solicitation in violation of NRS 598.1305.

Depending upon the particular facts and circumstances of each case, it is the opinion of this office that the Board of Homeopathic Medical Examiners may ask the Attorney General to seek legal redress under the Deceptive Trade Practices Act against individuals or organizations that use the term "Nevada Institutional Review Board" or "NIRB" or any other words, letters or combination of words or letters in such a manner as to cause confusion among donors desiring to make contributions to support the NIRB. However, because the availability of such legal redress would depend upon the particular facts and circumstances of each case, this office cannot predict with any certainty whether any legal action pursuant to the Deceptive Trade Practices Act would be successful against any particular individual or organization.

CONCLUSION

Because the members appointed to the NIRB by the Board of Homeopathic Medical Examiners serve at the pleasure of the Board pursuant to section 6 of A.B. 208, it is the opinion of this office that those members of the NIRB may be removed at the will of the Board, and that such a removal may occur without notice, without the necessity of providing a formal procedure for the removal and without any reason being given for the removal. Accordingly, it is the opinion of this office that the Board may remove and replace at its pleasure the members it has appointed to the NIRB.

Furthermore, it is the opinion of this office that the Board is not required by section 7.3 of A.B. 208 to approve the permanent regulations proposed by the NIRB before the NIRB holds public workshops concerning the regulations and before the regulations are submitted to the Legislative Counsel for examination and review in accordance with the APA. However, it is also the opinion of this office that the Board is required by section 7.3 of A.B. 208 to approve the permanent regulations proposed by the NIRB before the NIRB takes final action on the regulations in accordance with the APA.

It is the opinion of this office that the NIRB and its officers are not authorized to create a nonprofit tax exempt organization that would act as the official entity authorized by section 10 of A.B. 208 to solicit and receive grants, gifts and donations to assist the NIRB. However, it is

also the opinion of this office that section 10 of A.B. 208 does not prohibit nonprofit tax exempt organizations created by entities other than the NIRB and its officers from soliciting money and donating that money to the NIRB, so long as such organizations do not represent themselves as the official entity authorized by section 10 of A.B. 208 to solicit and receive grants, gifts and donations to assist the NIRB.

Finally, if individuals or organizations were to use the term "Nevada Institutional Review Board" or "NIRB" or any other words, letters or combination of words or letters in such a manner as to cause confusion among donors desiring to make contributions to support the NIRB, it is the opinion of this office that the Board may be able to seek legal redress for: (1) common-law unfair competition and trade name infringement; (2) fraudulent or illegal use of the name of a benevolent, humane, fraternal or charitable organization in violation of NRS 601.010 to 601.040, inclusive; or (3) deceptive trade practices in violation of chapter 598 of NRS. Because the availability of such legal redress would depend upon the particular facts and circumstances of each case, this office cannot predict with any certainty whether any legal action taken by on or behalf of the Board would be successful against any particular individual or organization.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Very truly yours,

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