LCB Opinion Re 99-06

January 31, 2000

Senator Ann O'Connell
7225 Montecito Circle
Las Vegas, Nevada 89120-3118

Dear Senator O'Connell:

You have asked this office to address three questions relating to the practice of homeopathy in this state. Your questions arise from the interaction between Assembly Bill No. 286 of the 1997 Legislature, which amended the scope of homeopathic practice, the regulation adopted pursuant to that bill by the Board of Homeopathic Medical Examiners, and the February 11, 1999, opinion of the Attorney General which declared that regulation invalid. Specifically, you have asked (1) whether the Attorney General's opinion invalidating the regulation is correct; (2) whether the regulation is effective and valid, and if so, what authority homeopathic physicians possess to prescribe medications, including drugs, controlled substances and dangerous drugs; and (3) whether the authority to write prescriptions granted by this regulation is in conformity with the intent of the Legislature in enacting A.B. 286. The complexity of these issues makes it necessary to provide a significant amount of background information. After providing this information, we will answer each of your questions separately.

I. Background

A. Homeopathy in Nevada: 1983 to 1997

The licensed practice of homeopathy in this state began in 1983 when the Legislature authorized the practice and established the Board of Homeopathic Medical Examiners (Homeopathic Board) to regulate and license the practice. At that time, the Legislature defined homeopathy as a:

[S]ystem of medicine employing substances of animal, vegetable, chemical or mineral origin [most of which are g]iven in micro-dosage … and [p]repared according to homeopathic pharmacology by which the formulation of homeopathic preparations is accomplished by … dilution … and which is] in accordance with the principle that a substance which produces symptoms in a healthy person can eliminate those symptoms in an ill person, resulting in the elimination and prevention of illness utilizing classical methodology …

(Section 5 of chapter 524, Statutes of Nevada 1983, at page 1479.) To obtain a license as a homeopathic physician, an applicant must have graduated from either a conventional, that is, "allopathic," medical school or a school osteopathy and must have been licensed to practice allopathic or osteopathic medicine in some state, district, territory or possession of the United States or in a foreign country. (NRS 630A.230.) In 1983, as at present, it was possible, although not necessary, for a licensed homeopathic physician also to be licensed to practice conventional allopathic or osteopathic medicine. Thus, while every homeopathic physician must have received training in allopathic or osteopathic medicine, each homeopathic physician may choose whether to continue to practice both forms of medicine, in which case he must be "dually-licensed," or to choose to practice homeopathy exclusively, in which case he need only be "singly-licensed." The 1983 statute did not clearly establish the scope of the authority to write prescriptions that a license to practice homeopathic medicine conferred on its holder. On the one hand, the statutory definition had authorized homeopathic physicians to use "chemical" substances. On the other hand, however, the existing statutory scheme applicable to prescription medicines suggested that homeopathic physicians lacked the authority to write prescriptions. It authorized "physicians" to prescribe drugs, but defined that term in a manner that excluded homeopathic physicians. (NRS 0.040 (1983.)) On January 7, 1985, the Attorney General issued an "informal opinion" advising that a singly-licensed homeopathic physician could not "prescribe, possess, dispense, [or] administer controlled substances and dangerous drugs." (1993 Nev. Op. Att'y Gen. 131, September 20, 1993 (A.G.O. 93-21).) Apparently, this informal opinion precipitated an amendment of NRS 0.040 at the next session of the Legislature. (Id.) The Legislature expanded the definition of "physician" expressly to include homeopathic physicians wherever "physician" was used in the NRS. (Section 5 of chapter 82, Statutes of Nevada 1985, at page 221.)

This included those laws that conferred the authority to write prescriptions for pharmaceutical medicines or drugs generally, as well as for controlled substances and dangerous drugs. (Chapters 639, 453 and 454 of NRS.) It is not clear whether homeopathic physicians, or others, regarding this statute as conferring carte blanche authority on homeopathic physicians to prescribe allopathic drugs, but, at the next session in 1987, the Legislature imposed an explicit limitation on the authority of homeopathic physicians to write prescriptions. The Legislature amended the definition of homeopathy to make it plain that homeopathic physicians could only prescribe substances "according to the medicines and dosages in the Homeopathic Pharmacopoeia of the United States." (Section 10 of chapter 775, Statutes of Nevada 1987, at page 2056.)

In the fall of 1993, the Attorney General was asked to provide an opinion on the then present scope of homeopathic practice. Te Attorney General concluded that part of the 1985 informal opinion had been overtaken by circumstances and was no longer valid. She stated that "[i]t is clear . . . that a homeopathic physician practicing homeopathically [can] legally obtain, possess, and administer some dangerous drugs and controlled substances for the manufacture of homeopathic remedies." (1993 Nev. Op. Att'y Gen. 131, September 20, 1993.) (Emphasis added) In other words, a physician, practicing under his homeopathic license, could prescribe any medication, including allopathic medicines, controlled substances, and dangerous drugs, so long as it was found in the Homeopathic Pharmacopoeia and providing that he prescribed it in the dosages also found there. This might include the authority to prescribe many allopathic drugs, but it almost certainly did not include the authority to prescribe such drugs in allopathic doses. Rather, the Attorney Gene3ral concluded that a homeopathic physician might write a prescription for one pill of an allopathic drug if he did so for the purpose of obtaining it to use in preparing a homeopathic medicine in which the dose of the controlled substance actually administered to the patient would be so diluted that it would conform to homeopathic standards. This interpretation seems to have been accepted by the homeopathic, allopathic and pharmaceutical communities. It is sometimes referred to as the "one-pill rule" and it covers the "micro-dosage" portion of the authority of a homeopathic physician to write prescriptions. The Attorney General also concluded that homeopathic physicians possessed a limited power to prescribe administer certain substances in "macro-dosages," but that these substances, called "sarcodes," were unlikely to be a part of the stock of conventional or allopathic drugs regularly stocked by pharmacists in this state.

In the same 1993 opinion, however, the Attorney General formally adopted one of the conclusions endorsed by the earlier (1985) informal opinion. This was the conclusion that a physician who is dually licensed as both a homeopathic physician and as an allopathic (or osteopathic) physician could not use the authority to write prescriptions granted by his allopathic license to practice homeopathy. In other words, "when a dually-licensed practitioner is practicing allopathically or osteopathically, he can prescribe any dangerous drug or controlled substance, but when he is practicing homeopathically, he can only avail himself of the more narrow homeopathic pharmacopoeia . . . "(1993 Nev. Op. Att'y Gen. 131.) This restriction on the scope of practice, in conjunction with the "one-pill rule" (as modified by the exception for sarcodes), represents the status quo ante. Together, they constitute the background against which the subsequent legislation and regulation must be viewed.

B. Assembly Bill No. 286 of the 1997 Legislature

In 1997, the Nevada Association of Homeopathic Physicians offered a bill to expand the scope of the licensed practice of homeopathy and to repeal the "one-pill rule." The homeopathic community believed that since all licensed homeopathic physicians had received allopathic (or osteopathic) training and had satisfied, in some state or country, the requirements to prescribe allopathic drugs in allopathic doses, they should be allowed to do so in Nevada as well. Assembly Bill No. 286 of the 1997 Legislature (A.B. 286), as introduced, employed three statutory mechanisms to bring this about. First, it eliminated the language in NRS 630A.040 that limited the authority of homeopathic physicians to write prescriptions to the substances and dosages found in the Homeopathic Pharmacopoeia. Second, it increased the Homeopathic Board's power over licensing to permit the Board to determine on a case-by-case basis, "which allopathic pharmaceuticals and controlled substances, if any, the homeopathic physician or advanced practitioner of homeopathy may prescribe in conventional allopathic dosages." (Subsection 4 of section 1 of A.B. 286, as introduced). The Board was to base its decisions on an evaluation of each licensee's pharmacological expertise. Thus, if the Board was satisfied that an applicant for homeopathic licensure was as qualified to prescribe allopathic medicines in allopathic dosages as medical doctors licensed by the Medical Board, the Homeopathic Board would confer on him a license with equivalent authority. If it evaluated his pharmaceutical knowledge less favorably, it would issue a license that specified the particular allopathic drugs he was authorized to prescribe, or it could grant him a license that expressly disqualified him from prescribing conventional doses of any allopathic drug. Third, A.B. 286 expanded the definition of homeopathy to include the practice of "pharmaceutical medicine." Although this term was never defined with precision, it appears plain that it was intended to encompass the routine prescription of allopathic drugs in allopathic doses. (See Testimony of Robert F. Martin, Testimony of Michael J. Fischer, Hearing, Assembly Committee on Commerce, March 31, 1997.) One of the witnesses at the hearing before the Assembly Committee on Commerce provided the following example of what the supporters of A.B. 286 hoped to accomplish. Because relatively few states license homeopathic medicine, the practice of homeopathic physicians in this state includes the treatment of nonresidents who have traveled here for the express purpose of taking a course of homeopathic treatment. If, while undergoing this treatment, the patient manifested a disease that was easily treatable with simple antibiotics, for example, a strept throat, the supporters of A.B. 286 wished singly-licensed homeopathic physicians to have sufficient authority to write a prescription for the patient without having to refer him to an allopathically-licensed physician to obtain the antibiotic. (See Testimony of F. Fuller Royal, Testimony of Robert F. Martin, Hearing, Assembly Committee on Commerce, March 31, 1997.)

Besides this expansion in the authority to prescribe conventional allopathic medicines, the supporters of A.B. 286 hoped to expand the scope of homeopathic practice beyond its traditional or classical limits and to include what one witness called "complex homeopathy," but which might more accurately be described as a license for the practice of specific forms of alternative medicine. (Testimony of Robert F. Martin, Hearing, Assembly Committee on Commerce, March 31, 1997.) To accomplish this, the sponsors of A.B. 286 proposed amending the definition of homeopathy to include, in addition to the "non-invasive electrodiagnosis" that had formed part of the 1983 definition, the following alternative practice areas:

[C]ell therapy, neural therapy, herbal therapy, neuromuscular integration, orthomolecular therapy, nutrition, intravenous infusion, [and] chelation therapy . . .

(See A.B. 286, as introduced). None of these therapies fit within the traditional or "classical," non-statutory definition of homeopathy. The president of the Homeopathic Board testified that "when [A.B. 286] talks about neural therapy, you are not talking about homeopathy. When it talks about orthomolecular therapy and herbalist medications, you're not talking about homeopathy." (Testimony of F. Fuller Royal, Minutes, Legislative Commission, December 18, 1998.) He also stated that there was "no such thing" as homeopathic neuromuscular integration and that the purpose of enumerating those additional therapies had been to "expand the practice of homeopathy." (Testimony of F. Fuller Royal, Minutes, Legislative Commission Meeting, June 26, 1998.) Consequently, because none of these alternative therapies constituted part of homeopathy as traditionally or classically conceived, A.B. 286 deliberately did not subject those therapies to the earlier limitations imposed on classical homeopathy. Thus, the medications that a homeopathic physician might prescribe under the therapies need not be selected in conformity with the fundamental homeopathic principle that a substance that would make a healthy person ill would, if diluted correctly, make an ill person healthy. Similarly, the authority of a homeopathic physician to write a prescription, when practicing one of these alternative therapies, was not limited to the substances or dosages that were found in the Homeopathic Pharmacopoeia.

At the hearing on the bill before the Assembly Committee on Commerce, both supporters and opponents agreed that the net effect of all these provisions would be to significantly expand the ability of singly-licensed homeopathic physicians to practice allopathic medicine. Opponents of A.B. 286 objected to this expansion with an intensity that, apparently, would have been sufficient to prevent the entire bill from emerging from the Assembly Commerce Committee. Both the Chairman of that committee and another member recall informing the lobbyist for the homeopathic physicians that A.B. 286 would not pass unless certain objectionable elements were removed. Both legislators also recall that the lobbyist agreed to an amendment removing them. (See Comments of Assemblyman Richard Perkins, Comments of Assemblywoman Barbara E. Buckley, Minutes, Legislative Commission, June 28 and December 18, 1998.)

A.B. 286, as amended, considerably enhanced the power of the Homeopathic Board to regulate its own practitioners, but did not contain the language that would have authorized that board to "determine which allopathic pharmaceuticals and controlled substances, if any, the homeopathic physician . . . may prescribe in conventional allopathic dosages." Similarly, while the Assembly Committee on Commerce had accepted the Homeopathic Board's draft language establishing its right to discipline its own members, the committee amended that provision by adding an explicit declaration that if the conduct of a homeopathic physician concerned a practice that was within the jurisdiction of another licensing board, the Homeopathic Board was required to forward the complaint to the appropriate board for action. (See A.B. 286, First Reprint). Finally, the Committee edited the list of proposed alternative therapies. As previously mentioned, the Committee eliminated the general power to prescribe allopathic drugs in allopathic doses by removing the phrase "pharmaceutical medicine" from the list of alternative therapies. In its initial consideration of amendments to the bill, the committee retained the terms "intravenous infusion and chelation therapy." (See Exhibit C, Attachment B, Minutes, Assembly Committee on Commerce, May 5, 1997.) These two terms, however, were also subsequently removed. (See Floor Minutes of the Assembly Committee on Commerce, June 29, 1997, Assembly Journal, June 29, 1997, pp. 1777-78.)

With these changes in place, the Medical Board and State Board of Pharmacy (Pharmacy Board) withdrew their opposition to the legislation. The hearing on the amended bill before the Senate Committee on Commerce and Labor was relatively brief as there was no substantive opposition. One erstwhile opponent testified that in its present form the bill was "innocuous." (Testimony of Robert Barengo, Hearing, Senate Committee on Commerce and Labor, July 3, 1997.) However, the chairman of that committee recalls being informed that the terms "chelation therapy," "intravenous infusion," and pharmaceutical medicine" had been removed solely to eliminate redundancy or surplus language. He understood that it was agreed by all parties that those therapies were authorized by virtue of the remaining terms. For that reason alone, he recalls, the Senate committee did not conduct full hearings on the bill. (See Comments of Senator Randolph J. Townsend, Minutes, Legislative Commission, June 26, 1998; see also Comments of Senator Mark James, Minutes, Legislative Commission, December 18, 1998.)

Despite what now appears as an obvious difference in understanding between certain members of the Senate with some of their colleagues in the Assembly, there is nothing to suggest that members of either house were aware of these differences when they voted unanimously in favor of the amended bill. Although the new alternative therapies were each listed in the bill, they were not defined. Consequently, the Homeopathic Board attempted to supply these definitions by regulation.

C. The Regulation and the Legislative Commission

The Homeopathic Board adopted its first set of proposed definitions on May 5, 1998, after conducting the required workshop0s and public hearings. The Legal Division of the Legislative Counsel Bureau assigned the proposed regulation the file number R213-97. The Medical and Pharmacy Boards participated in the hearings and, therefore, had early notice of the proposed definitions. The bulk of the definitions excited no controversy, but the representatives of the allopathic community insisted that in its definitions of two of the alternative therapies---orthomolecular medicine and neural therapy---the Homeopathic Board had exceeded its statutory authority. As originally submitted, the regulation defined "orthomolecular medicine" to include "[t]he prescription of . . . pharmaceutical medicines, [and] the intravenous infusion of various substances, including . . . pharmaceutical medications [and] chelating agents . . ." The regulation also defined "neural medicine" to mean the "injection of local anesthetics . . . medicinal or pharmaceutical substances . . ." The allopathic physicians objected that the definitions purported to permit homeopathic physicians to prescribe pharmaceutical "medicines," "medications," and "substances" when the authorization to practice "pharmaceutical medicine" had been expressly removed by the Assembly Committee on Commerce. The same objection applied to the term "intravenous infusion" and the practice of chelation.

The Legal Division of the Legislative Counsel Bureau notified the Homeopathic Board of these objections, but the Homeopathic Board chose not to revise its regulation at that time. Consequently, when R213-97 was submitted to the Legislative Commission for approval at its June 26, 1998, meeting, representatives of the Homeopathic and Medical boards were on hand to present their arguments to the Commission. Under NRS 233B.067, the Commission has the authority to object to a regulation on two bases:

1. The regulation does not conform to statutory authority; or
2. The regulation does not carry out legislative intent.

The Commission heard extensive testimony and considered the matter at length. The majority of the testimony turned on the enhanced authority of homeopathic physicians to
write prescriptions that were perceived to be found in the references to "pharmaceutical medicines," "pharmaceutical medications" and "pharmaceutical substances" in light of the Assembly amendment's removal of the term "pharmaceutical medicine" from A.B. 286. In particular, opponents objected---as they had at the hearing before the Assembly Committee on Commerce---to any expansion in the power of singly-licensed homeopathic physicians to prescribe allopathic dosages of controlled substances, including narcotics, and dangerous drugs. The Commission concluded that, assuming that the definitions selected by the Homeopathic Board and incorporated into the regulation were in accordance with authoritative sources in the field of alternative medicine, the regulation was within that board's statutory grant of authority. Nevertheless, the Commission voted to object to the regulation on the ground that the increased authority it conferred on homeopathic physicians to prescribe allopathic drugs in allopathic doses violated the legislative intent behind A.B. 286. (See Minutes, Legislative Commission Meeting, June 26, 1998.) Accordingly, the Director of the Legislative Counsel Bureau returned the regulation to the Homeopathic Board with a note of the Commission's objections. (See letter from Lorne J. Malkiewich to F. Fuller Royal, June 30, 1998.)

In accordance with the procedures set forth in NRS 233B.0675, the Homeopathic Board revised R213-97. The revised regulation replaced the terms "pharmaceutical medicines," "pharmaceutical medications," and "pharmaceutical substances," with a single term, "pharmaceutical preparations." This term was then expressly limited to make plain that it did "not include narcotic drugs or opiates that are listed as schedule II controlled substances pursuant to chapter 453 of NRS, except as those substances may be described for use in the official Homeopathic Pharmacopoeia of the United States."

The revised regulation was resubmitted to the Legislative Commission for review at its December 18, 1998, meeting. Once again, the Commission heard extended testimony both for and against the regulation. The witness for the Homeopathic Board contended that inasmuch as the primary objection to the earlier regulation had been the expansion in the authority of homeopathic physicians to prescribe narcotics or other controlled substances in allopathic doses, the revised regulation eliminated that objection. In effect, it restated the "one-pill rule" as it applied to the substances. The Medical and Pharmacy Boards, however, continued to object to the regulation. While conceding that the revised version limited prescriptions by homeopathic physicians of certain schedule II controlled substances (opiates and other narcotics), the Boards contended that it conferred carte blanche authority on homeopathic physicians to prescribe, in allopathic doses, all other allopathic drugs, all controlled substances except the narcotics and opiates listed in schedule II, and all dangerous drugs. In particular, they objected that the revised regulation authorized homeopathic physicians to prescribe allopathic doses, certain enumerated chelating agents and to administer them by means of "intravenous infusion."
Operating on the assumption that these substances would be prescribed in the course of administering chelation therapy, a practice expressly authorized by the regulation's definition of orthomolecular therapy, the revised R213-07 permitted, by regulation, two practices---chelation and intravenous infusion---that had been expressly denied to homeopathic physicians by the Assembly amendments to A.B. 286.

Following this evidence and after full discussion, the Legislative Commission by a close vote failed to object to the revised regulation and it therefore became effective. Under NRS 233B.067 and 233B.0675, unless a majority of the Commission objects to a regulation, the Director of the Legislative Counsel Bureau is obliged to file the regulation with the Secretary of State and it becomes effective as of the date of filing. This was, accordingly, done and the regulation became effective on December 18, 1998. (See letter from Lorne J. Malkiewich to Dean Heller, December 18, 1998.)

D. The Attorney General Declares the Regulation Invalid

The 1999 session of the Legislature convened on February 2. Although numerous members of the Legislative Commission had indicated that the scope of the practice of homeopathy would be addressed at the session, in fact, no such legislation was passed or even requested. The Pharmacy Board, however, solicited the opinion of the Attorney General on the question of whether a singly-licensed homeopathic physician administering the alternative or non-traditional therapies described in the adopted regulation could prescribe controlled substances or dangerous drugs. The Attorney General responded on February 11, 1999. (See Nev. Op. Att'y Gen. 99-06 (A.G.O. 99-06).)

After a brief recapitulation of the amendment and passage of A.B. 286 of the 1997 Legislature and evolution of R213-97, the Attorney General concluded that the regulation was invalid. The Attorney General reached this conclusion because, during a Legislative Commission hearing, members of the Homeopathic Board had, in her opinion, expressed "an intent to interpret the phrase 'pharmaceutical preparations' as permitting a singly licensed homeopathic physician to prescribe some controlled substances and dangerous drugs . . . We believe this interpretation renders the regulation invalid . . ." The Attorney General also concluded that:

When the Legislature specifically deleted the term 'pharmaceutical medicine' from the definition of homeopathy, its clear intent in enacting the remainder of A.B. 286 was to prohibit singly licensed homeopathic physicians from having the ability to prescribe controlled substances and dangerous drugs in the same manner as an allopathic physician … We believe that our conclusion in Op. Nev. Att'y Gen. No. 93-21 (September 20, 1993), continues to accurately describe the limited ability of singly licensed homeopathic physicians to posses, dispense, and administer controlled substances and dangerous drugs.

Unlike the 1985 "informal" opinion, this opinion was issued publicly and was made public during the course of the Legislative session. Nevertheless, the Legislature took no further action and no further inquiries were made until you requested this opinion following the conclusion of the session.

II. Analysis

With the preceding background in place, we will now analyze each of your questions separately. Your first question is whether the Attorney General's opinion is correct. It is the opinion of this office that it is not.

A. The Attorney General's Opinion No. 99-06

As a preliminary matter, we note that the "opinions of the attorney general do not constitute binding legal authority or precedent." Goldman v. Bryan, 106 Nev. 30, 42 (1990). "The opinion of the state attorney general is advisory and not a binding interpretation of state law." Nevada Highway Patrol Ass'n v. State, F.2d 1549, 1554, n.6 (1990). See also Tahoe Regional Planning Agency v. McKay, 769 F.2d 534, 539 (9th Cir. 1985); Weston v. County of Lincoln, 98 Nev. 183 (1982); and Cannon v. Taylor, 88 Nev. 89 (1972). Consequently, even if A.G.O. 99-06 were correct, it would not be binding. In any event, however, the Attorney General possesses neither the statutory nor the constitutional power to invalidate regulations. Therefore, it is the opinion of this office the A.G.O. 99-06 is necessarily incorrect to the extent that it purports to claim that the Attorney General has the authority to invalidate a regulation after the regulation has been adopted in compliance with all the procedures required under chapter 233B of NRS and has been filed with the Secretary of State.

Section 2 of Article 3 of the Nevada Commission expressly provides for legislative review and nullification of administrative regulations. It states that:

If the legislature authorizes the adoption of regulations by an executive agency which binds persons outside the agency, the legislature may provide by law for: (a) The review of these regulations by a legislative agency before their effective date to determine initially whether each is within the statutory authority for its adoption;
(b) The suspension by a legislative agency of any such regulation which appears to exceed that authority, until it is reviewed by a legislative body composed of members of the Senate and Assembly which is authorized to act on behalf of both houses of the legislature; and
(c) The nullification of any such regulation by a majority vote of that legislative body, whether or not the regulation was suspended.

Acting pursuant to this constitutional grant of authority, the Legislature has amended chapter 233B of NRS, the Nevada Administrative Procedure Act. In chapter 233B of NRS, the Legislature provided, inter alia, the exclusive avenues for determining the pre-enforcement validity of a regulation. Under NRS 233B.110, "[t]he validity or applicability of any regulation may be determined in a proceeding for a declaratory judgment in the district court" by any plaintiff who alleges that "the regulation, or its proposed application, interferes with or impairs, or threatens to interfere with or impair [his] legal rights or privileges . . " Alternatively, "[a]n agency may institute an action for declaratory judgment to establish the validity of any one or more of its own regulations." In this proceeding, "[t]he court shall declare the regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency." A.G.O. 99-06 concluded that a regulation is invalid if it "exceeds the statutory authority delegated by the Legislature to an administrative agency." This is clearly correct, but as NRS 233B.110 makes clear, when the regulation exceeds its authority, it is the court, not the Attorney General, that is

required to "declare the regulation invalid." Chapter 233B of NRS expressly provides a role for the Attorney General in all actions to determine the validity of a regulation. The plaintiff in any such action is required to serve a copy of the complaint upon the Attorney General, who is "entitled to be heard." (Subsection 3 of NRS 233B.110.)

The statutory scheme embodied in chapter 233B of NRS assigns distinct functions to the judicial branch of government and to the Attorney General. It limits the Attorney General's role to "being heard" by the court. This assignment and limitation points up another objection to the Attorney General's assertion of the authority to declare administrative regulations invalid, which is the constitutional objection inherent in the doctrine of the separation of powers. Section 1 of Article 3 of the Nevada Constitution states that:

The powers of the Government of the State of Nevada Shall be divided into three separate departments,---the Legislative,---the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

The remainder of Article 3 confers on the Legislature the authority to nullify administrative regulations before they become effective. Similarly, the power to interpret statutes and regulations and to declare them invalid is entrusted to the courts in implicit reliance on the constitutional principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.). For the Attorney General to assert a power to invalidate regulations clearly violates the doctrine of the separation of powers by exercising functions appertaining to both of the other branches of government.

The Attorney General is obviously aware of her constitutional role and it is unlikely that she intended to exceed it. Rather, it is probable that her declaration of the invalidity of R213-97 contained in A.G.O. 99-06 merely represents her prediction of what a court of competent jurisdiction would be likely to declare if the question were posed to the court. Alternatively, the opinion could be meant to communicate the legal argument against the regulation's validity that the Attorney General would make in an action at law brought to determine that question. However, even regarded in this light, A.G.O. 99-06 is flawed in several particulars that make it unlikely to be a fully reliable guide to future judicial conduct on this issue.

First, A.G.O. 99-06 states that a "regulation cannot restore a power that the Legislature specifically took out of a piece of legislation." This principle is sound, but it does not apply to this case in the manner suggested by the Attorney General. The power specifically taken out of A.B. 286 by the Legislature---expansion of the definition of homeopathy to include the unlimited practice of "pharmaceutical medicine," i.e., complete authority to prescribe allopathic drugs in allopathic doses---is not the same as the authority granted by the regulation. This latter authority consists only of a limited power to prescribe or use certain "pharmaceutical preparations" in certain alternative therapies. Because these two grants of power are not identical, the regulation does not "restore" a power specifically removed from the legislation.

Moreover, A.G.O. 99-06 is internally inconsistent. The opinion declares that the regulation is invalid because it could be interpreted "as permitting a singly licensed homeopathic physician to prescribe some controlled substances and dangerous drugs." Nevertheless, A.G.O. 99-06 concludes by reaffirming A.G.O. 93-21 which declared that "[I]t is clear . . . that a homeopathic physician practicing homeopathically could legally obtain, possess, and administer some dangerous drugs and controlled substances for the manufacture of homeopathic remedies. Additionally, a homeopathic physician may also prescribe those dangerous drugs and controlled substances allowed by NRS 630A.040." Besides this obvious contradiction, A.G.O. 99-06 commits the non sequitur of concluding that an interpretation of the regulation that would permit singly-licensed homeopathic physicians to prescribe "some" controlled substances and dangerous drugs renders the regulation invalid because the Legislature clearly intended to prohibit singly-licensed homeopathic physicians from having the unlimited ability to prescribe any and all controlled substances and dangerous drugs "in the same manner as an allopathic physician."

In addition, A.G.O. 99-06 is, simultaneously, underinclusive as well as overbroad. It limits its consideration to the effect of the legislative deletion of the power to practice "pharmaceutical medicine" from A.B. 286. However, as previously noted, the Assembly Committee on Commerce also eliminated "chelation therapy" and "intravenous infusion" from A.B. 286. Moreover, A.B. 286 expanded the regulatory power of the Homeopathic Board over its licensees, but specifically rejected language that would have given that board the power to grant licenses to prescribe allopathic drugs. Finally, the bill expanded the scope of the practice of homeopathy to encompass seven alternative therapies, some of which require the administration of medicinal substances of one kind or another. The authority of licensed homeopathic physicians to write prescriptions under A.B. 286 and R213-97 cannot be adequately evaluated if all the powers granted and refused are not taken into consideration. On the other hand, A.G.O. 99-06 declares R213-97 invalid in its entirety, eliminating the authority of homeopathic physicians to practice noninvasive electrodiagnosis, cell therapy, herbal therapy, neuromuscular integration and nutrition, when these practices are expressly authorized by A.B. 286, and no opposition of any kind has been raised with respect to these therapies.

Finally, the Attorney General's invalidation of the regulation is premature A.G.O. 99-06 is not premised on a claim that the language of the regulation necessarily conflicts with its authorizing statute. Instead, A.G.O. 99-06 concludes that a particular "interpretation makes the regulation invalid." However, the Homeopathic Board has not in fact, issued any such interpretation. A.G.O. 99-06 rests on the Attorney General's perception that "Board members [of the

Homeopathic Board] clarified in the Legislative Commission an intention to interpret the phrase 'pharmaceutical preparations' as permitting a singly licensed homeopathic physician to prescribe some controlled substances and dangerous drugs . . ." Even if that were a valid basis for invalidating the regulation, which, as previously discussed, it is not, there were never more than two of the Homeopathic Board's five members present at either meeting of the Legislative Commission. * Assuming that the Attorney General correctly perceived the intended interpretation of those two members, only one of them spoke, they do not constitute a majority of the Board. Consequently, this seems a slender basis on which to invalidate even the portion of the regulation that could be subject to that hypothetical interpretation. When employed to invalidate all the other aspects of the regulation, even this tenuous basis of rationality is lost. Therefore, the Attorney General cannot declare the regulation invalid on the basis of a belief that the Homeopathic Board might at some future time choose to interpret its regulation in an offensive manner.

A.G.O. 99-06, does, however, achieve one valuable insight. It concludes that in enacting A.B. 286, the Legislature evidenced the clear intent that homeopathic physicians were not to enjoy the same unlimited authority to prescribe allopathic drugs in allopathic doses that is possessed by allopathic or osteopathic physicians. This insight, however, requires further evaluation. A.G.O. 99-06 states that "[w]hen the Legislature specifically deleted the term 'pharmaceutical medicine' from the definition of homeopathy, its clear intent in enacting the remainder of A.B. 286 was to prohibit the singly licensed homeopathic physician from having the ability to prescribe controlled substances and dangerous drugs in the same manner as an allopathic physician." As previously pointed out, the correct from of reference for determining legislative intent should be the act taken as a whole, including parts adopted, as well as all of the powers eliminated, during the amendment process. It is the opinion of this office that a more accurate way of characterizing the legislative intent behind A.B. 286 is that the Legislature, even while significantly expanding the authority of homeopathic physicians to practice alternative medicine and while enlarging the autonomy of the profession to regulate itself, ultimately refused to alter the status quo that declares that a license to practice homeopathic medicine does not confer the authority to prescribe allopathic drugs in allopathic doses in the same manner as an allopathic physician. We will return to this discussion of the correct determination of legislative intent in our response to your third question. Before doing so, however, we turn to your second question. Is the regulation effective, is it valid, and if so, what authority at present do homeopathic physicians have to prescribe allopathic medications, including controlled substances and dangerous drugs?

B. Effectiveness, validity and resulting authority of R213-97

1. Effectiveness

It is the opinion of this office that the regulation R213-97 is currently effective. The statutory scheme of chapter 233B of NRS is unambiguous in this regard. A permanent regulation becomes effective as of the date the Legislative Counsel files it with the Secretary of State, unless a later date is specified in the regulation. (NRS 233B.070.) The Legislative Counsel has a non-discretionary duty to file such regulations once certain procedural requirements were fulfilled. In this instance, all the statutory procedural requirements were satisfied. The Legislative Commission failed to object to the regulation before it was filed with the Secretary of State and it may not do so now. By the same token, the 1999 Legislature could only have nullified the regulation if the Legislative Commission had voted to suspend the filing of the regulation. (NRS 233B.0675.) The Legislative Commission's failure to object deprived the full Legislature of its opportunity to nullify the regulation directly. In the absence of a constitutional amendment or new legislation, the regulation is beyond the reach of the legislative branch. Accordingly, it is the opinion of this office that, pursuant to NRS 233B.0675, the regulation became effective on December 18, 1998, and until a court of competent jurisdiction enjoins its enforcement or declares it invalid or the Homeopathic Board adopts an amendment, it remains in effect and has the force of law. (See NRS 233B.040.) This brings us to the second part of your question, is the regulation valid?

2. Validity

Like a statute, an effective regulation must be presumed to be valid until a court of competent jurisdiction determines that it is not. (1A Sutherland Statutory Construction, §31.02 (5th ed. 1993 & Supp. 1999); see also Immigration and Naturalization Ser4vice v. Chada, 103 S. Ct. 2764, 2784 (1983).) Therefore, presuming, as we must, that R213-97 is valid, this brings us to the third part of your question. Under the statutes and regulations currently in effect, what authority does a homeopathic physician have to possess, administer, dispense or prescribe allopathic drugs, controlled substances and dangerous drugs?

3. The authority to write prescriptions

As a preliminary matter, we note that a dually-licensed homeopathic physician has the authority to write prescriptions, including prescriptions for allopathic drugs in allopathic doses, that he enjoys under his allopathic (or osteopathic) license. However, it remains the opinion of this office, as we advised you in 1998, that the powers and accountability of dually-licensed homeopathic physicians can only be determined with reference to the capacity in which they are practicing at any given time. (See letter from Brenda J. Erdoes and Eileen O'Grady to Senator Ann O'Connell, March 19, 1998.) A licensed homeopathic physician, when practicing homeopathically, is not accountable to the Medical Board because he is not exercising any of the rights or privileges conferred by virtue of an allopathic license issued by that Board. This conclusion, although in conflict with Attorney General's Opinion No. 98-01, is in complete accord with her earlier A.G.O. 93-21. So, we do not believe that there is any difference between the authority of singly- and dually-licensed homeopathic physicians

to write prescriptions when they are practicing homeopathically. The definitions of R213-97 concern only the nontraditional, alternative therapies recently incorporated into homeopathic medicine by virtue of A.B. 286. Nothing in that regulation changes, or purports to change, any aspect of traditional practice. Consequently, it is the opinion of this office that a homeopathic physician, practicing traditionally, does so with the same authority and under the same limitations that he has since 1987. The limits of this practice are fully and competently set out in the Attorney General's Opinion No. 93-21. Having said this, it must be remembered that A.B. 286 bifurcated the practice of homeopathy into what we have called "traditional" or "classical" homeopathy and "complex homeopathy" or, more accurately, certain "alternative therapies." These practices consist of "[n]oninvasive electrodiagnosis, cell therapy, neural therapy, herbal therapy, neuromuscular integration, orthomolecular therapy and nutrition" as these practices have been defined in R213-97. As with the earlier distinction between allopathic and homeopathic licenses, we believe that it is possible to determine the authority of a homeopathic physician to write prescriptions only after determining which homeopathic therapies---"tradition" or "alternative"---he is engaged in.

(a) Traditional

Little additional needs to be said about the authority of a homeopathic physician to write prescriptions when practicing traditional or classical homeopathy. The limits of this power are contained in NRS 0.040 and chapters 453, 454, and 639 of NRS, as well as in NRS 630A.040. As we previously indicated, it is the opinion of this office that A.G.O. 93-21 accurately interpreted the statute, the operative portion of which has not been amended in a way that significantly alters this conclusion. Thus, homeopathic physicians may prescribe, dispense and administer traditional homeopathic remedies as medically appropriate according to the standards applicable to the homeopathic tradition. With respect to allopathic medications, including controlled substances or dangerous drugs, homeopathic physicians may write prescriptions for a single pill of such substances, but only for the purpose of diluting it and compounding it into a homeopathic preparation, only if the allopathic drug is found in the Homeopathic Pharmacopoeia and only if the resulting diluted dosage is in accordance with dosages found in that pharmacopoeia.

(b) Alternative therapies

Homeopathic physicians, when practicing one of the alternative therapies authorized by A.B. 286 and defined in R213-97, have some additional authority to write prescriptions for allopathic drugs. It should be re-emphasized, however, that we believe this power to be practice-specific. For example, in the hearing on A.B. 286, the representatives of the homeopathic physicians expressed a desire to be able to prescribe antibiotics to patients suffering from Strept throat. A homeopathic physician who desires to prescribe antibiotics, that is, allopathic drugs in allopathic doses according to allopathic principles, is not practicing classical homeopathy. Neither, as far as we can tell from the definitions contained in R213-97, is he practicing one of the alternative therapies. Consequently, nothing in the statute or regulation confers any increased authority to prescribe antibiotics. A homeopathic physician with an allopathic or osteopathic license may prescribe antibiotics under these circumstances, but when he does so, he is practicing under his medical license, his authority to write prescriptions is determined by that license, and he is accountable to the Medical, not the Homeopathic Board for any complaints arising from that treatment. A singly-licensed homeopathic physician did not have the authority to prescribe antibiotics in these circumstances before the passage of A.B. 286 and the adoption of R213-97. Such a physician has not gained any power to do so under either measure. Therefore, a homeopathic physician, by virtue of his homeopathic license, does not have a general or unlimited power to practice allopathic medicine, including the prescription of allopathic drugs in allopathic doses. However, when practicing a legislatively sanctioned alternative therapy, it is the opinion of this office that a homeopathic physician, so long as he complies with all state and federal laws and regulations applicable to prescription drugs, may prescribe in allopathic doses:

1. Any Controlled substance listed in schedule I, II, III, IV or V as set forth in chapter 453 or NRS, so long as both administration and dosage are medically appropriate according to the standards applicable to that alternative therapy, except that a homeopathic physician may not prescribe "narcotic drugs and opiates that are listed as schedule II controlled substances pursuant to chapter 453 of NRS, except as those substances may be described for use in the official Homeopathic Pharmacopoeia of the United States." (R213-97.)

2. Any dangerous drug that is defined in chapter 454 of NRS so long as both administration and dosage are medically appropriate according to the standards applicable to that alternative therapy.

3. Any other allopathic drug available by prescription so long as both administration and dosage are medically appropriate according to the standards applicable to that alternative therapy.

Finally, this brings us to your third question, is the authority to write prescriptions
granted by R213-97 in conformity with the intent of the Legislature in enacting A.B. 286?

C. Legislative intent

We believe that the best way of addressing the question of whether R213-97 conforms to legislative intent is to examine how a court would be likely to rule if this regulation were challenged in a legal action, whether brought as an action for a declaratory judgment, a suit for a writ of mandamus or an action for damages. According to NRS 233B.110, a court in such a position "shall declare the regulation invalid if it finds that [the regulation] violates constitutional or statutory provisions or exceeds the statutory authority of the agency."

Courts determining whether a particular regulation is beyond the power granted to an administrative agency, "must not only interpret the statute to determine the powers conferred but also the regulation to determine whether its provisions comply with the statute." 1A Sutherland Statutory Construction, §31.06. In doing so, judges apply standard principles and rules of statutory construction, as well as special rules applicable to regulations only. 1A Sutherland Statutory Construction, §31.06. These rules, however, are not absolutes and do not permit us to predict with certainty what outcome any particular judge might reach. Consequently, we will present first the considerations that militate in favor of the regulation's validity. We will then present the countervailing considerations and, finally, our opinion as to which outcome is the more likely.

1. Arguments in favor of validity

The first applicable principle on rule of statutory construction accords to regulations the same presumption in favor of their validity that applies to statutes. 1A Sutherland Statutory Construction, §31.02. A corollary of this presumption is that the party challenging the validity of the regulation bears the burden of proving its invalidity. Any interpretation of the regulation must take place against the backdrop of these presumptions favoring the validity of the regulation.

In addition, the rules of statutory construction provide that "[w]hen presented with a question of statutory interpretation, the intent of the legislature is the controlling factor and, if the statute under consideration is clear on its face, a court cannot go beyond the statute in determining legislative intent. If, however, the statute is ambiguous, it can be construed "in line with what reason and public policy would indicate the legislature intended . . ." Robert E. v. Justice Court of Reno Township, 99 Nev. 443, 445, 664 P.2d 957, 959 (1983) (internal citation omitted). Moreover, the court may also examine the legislative history of a provision if doing so would be "useful" in determining legislative intent. Del Papa v. Board of Regents of the University and Community College System of Nevada, 114 Nev. Adv. Op. 50, at p. 5, 956 P.2d 770 (1998). "A statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses." Robert E. v. Justice Court, 99 Nev. at 445, 664 P.2d at 959 (internal citation omitted); see also McKay v. Board of Supervisors, 102 Nev. 644, 649, 730 P.2d 438, 442 (1987).

It can be argued that A.B. 286 is ambiguous as many of the terms used in the bill are capable of being understood in two or more senses. For example, as previously mentioned, none of the alternative therapies added to the definition of homeopathy would be considered "homeopathic" as that term has been traditionally used. Thus, the chief witness in favor of expanding the definition of homeopathy to include these alternative therapies testified that "when [A.B. 286 talks about neural therapy, you are not talking about homeopathy. When it talks about orthomolecular therapy and herbalist medications, you're not talking about homeopathy." He also stated that there was "no such thing" as homeopathic neuromuscular integration. (Testimony of F. Fuller Royal, Minutes, Legislative Commission, December 18, and June 26, 1998.) Besides this inherent ambiguity, a particular ambiguity attaches to the most controversial of the contested terms, "orthomolecular therapy." This term has a definition in conventional medical dictionaries that does not correspond in every particular with the manner in which that therapy is conducted by the alternative medical community. (See Testimony of Robert Barengo, Minutes, Legislative Commission, June 28, 1998.) However, Dr. Royal testified, and it was conceded, that the definitions of these alternative therapies adopted in the regulations employed correctly the meaning of these practices bear in the sources regarded as authoritative by the alternative medicine community. (See Testimony of F. Fuller Royal, Minutes, Legislative Commission, June 28 and December 18, 1998; Testimony of Robert Barengo, Minutes, Legislative Commission, June 28, 1998.) In light of these ambiguities, a court would not be able to rely solely on the language of the statute to determine the Legislative intent behind A.B. 286 as a predicate to determining whether R213-97 conforms with that intent. Instead, the court would be fully justified in examining all the extrinsic sources available, including the legislative history of A.B. 286, to attempt to discern the intent of the Legislature.

Moreover, when doubt arises as to the proper interpretation of a statute affecting an administrative agency, the Nevada Supreme Court has found that the interpretation of the agency that is charged with the administration and enforcement of the statute is persuasive evidence of its meaning. Nev. Power Co. v. Public Serv. Comm'n, 102 Nev. 1, 4 (1986); see also Dep't of Human Resources v. UHS of the Colony Inc., 103 Nev. 208, 211 (1987) (stating that an administrative construction that is within the language of the statute will not readily be disturbed by the courts); Roberts v. State, 104 Nev. 33, 39, 752 P.2d 221, 225, (1988). The theory behind this interpretation is that the Legislature is charged with having knowledge of the manner in which the statutes it enacts are carried out. Where the legislature "has had ample time to amend an administrative agency's reasonable interpretation of a statute, but fails to do so, such acquiescence indicates the interpretation is consistent with legislative intent." Hughes Properties v. State of Nevada, 100 Nev. 295, 298, 680 P.2d 970, 972 (1984) (citation omitted). "[N]early contemporaneous constructions of state statutes by administrative agencies charged with their implementation are entitled to great weight, especially when, as in the present case, the legislature fails to repudiate the agency's construction." Roberts v. State, 104 Nev. at 39, 752 P.2d at 225 (citations omitted). This citation is particularly applicable inasmuch as the final decision of the Legislative Commission failing to object to the regulation took place less than 6 weeks before the opening of the next session of the legislature. Numerous members of the Legislative Commission had

suggested during their discussions that the matter be referred to the Legislature. However, the fact that the Legislature not only did not pass, but did not even request, a bill to modify the scope of the practice of homeopathy may well justify a conclusion that the Legislature did not believe that the regulation violated its intent in amending chapter 630A of NRS. And "[a]lthough not controlling, the legislature's construction of its own act is persuasive in ascertaining the act's meaning." Roberts, 104 Nev. at 40, 752 P.2d at 225.

Standard rules of statutory construction direct that statutes should be read and interpreted as a whole. 2A Sutherland Statutory Construction § 46.05; K.J.B., Inc. v. Second Judicial Dist. Court, 103 Nev. 473, 476 (1987). "'Courts must construe statutes. . . to give meaning to all of their parts and language . . . The court should read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.'" Del Papa v. Reagents, 114 Nev. Adv. Op. 50, at p. 3, quoting Board of County Comm'rs v. CMC of Nevada, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983) (citations omitted). Taken as a whole, it seems clear that the intent of the Legislature was to expand the scope of homeopathic practice, but not to increase it so far that it became an independent license to engage in the unlimited practice of allopathic medicine. It is evident that the alternative therapies defined by R213-97 are limited in scope and do not constitute the unlimited practice of allopathic medicine. Consequently, it can be argued that the regulation is consistent with legislative intent and is, therefore, valid.

2. Arguments against validity

The strongest arguments against the validity of R213-97 originate in the legislative history of A.B. 286. Standard rules of statutory construction permit the use of legislative history to establish legislative intent when a statute is ambiguous. The legislative history of A.B. 286 reveals that the Assembly Committee on Commerce deliberately removed the terms "intravenous infusion, chelation therapy, and pharmaceutical medicines" from the bill. This is consistent with the notion that it was the intent of the Legislature that homeopathic physicians were not to be authorized to engage in these practices. It is well settled that "[a]dminstrative regulations cannot contradict or conflict with the statute they are intended to implement." Roberts v. State, 104 Nev. at 37, 752 P.2d at 223. As the Attorney General argued, a regulation "cannot restore a power that the Legislature specifically took out of a piece of legislation." (A.G.O. 99-06.) Thus, to the extent that R213-97 authorizes homeopathic physicians to practice intravenous infusion and chelation, and to prescribe some pharmaceutical preparations, it can be argued that it violates legislative intent and is, necessarily, invalid.

It must be noted, however, that some problems occur with this argument. First, the Nevada Supreme Court has expressly proscribed the use of legislators' statements of opinion as a means of determining legislative intent. "'[I]n construing a statute we do not consider the motives or understands of individuals who cast their votes in favor of it.. . . [Even if] the legislator whose motives are proffered actually authored the bill in controversy; no guarantee can issue that those who supported this proposal shared his view of its compass.'" A-NLV Cab Co. v. State Taxicab Authority, 108 Nev. 92, 95

(1992), quoting Cal. Teachers Ass'n v. San Diego Com. College, 621 P.2d 856, 860 (Cal. 1981) (citations and internal quotations omitted). "A legislator's statement is entitled to consideration, however, when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments, rather than merely an expression of personal opinion." See also Khoury v. Maryland Casualty Co., 108 Nev. 1037, 1040 (1992). In this instance, however, even assuming that the Legislators' recollections were entitled to consideration, they appear to be offsetting. Members of the Assembly recall that the three therapies were removed by amendment for the deliberate purpose of excluding them from the scope of homeopathic practice. Members of the Senate recall that the intent behind their removal was merely to eliminate redundancy and that the eliminated terms were available therapies already included within the other approved therapies.

A second difficulty was referred to earlier. It is not readily apparent that the authority to engage in the unlimited practice of allopathic medicine that may have been removed by elimination of the term "pharmaceutical medicine" from the statute is the same as the limited authority to prescribe some chemical substances that is granted by virtue of the regulation's use of the term "pharmaceutical preparation." This is especially so because the authority to prescribe these latter substances is constrained by the requirement of medical appropriateness in the context of a specific authorized alternative therapy. In any event, it is undeniable that the two other statutory terms eliminated by the Assembly Committee on Commerce---"intravenous infusion" and "chelation therapy"---are the same as the two terms restored by the regulation. The two terms are related. Chelation therapy is recognized in conventional medical circles as a technique for treating victims of heavy metal poisoning. The most common example, apparently, involves miners whose blood and bones show unusually high concentrations of lead. Certain drugs (chelating agents) with the chemical property of binding to heavy metals at the molecular level are introduced, commonly by means of intravenous infusion, into the body of the miner. The heavy metals abandon their chemical bonds with the body's tissues and fluids in favor of combining with the chelating agents. When these chelating agents are subsequently eliminated from the body, the heavy metals are eliminated as well. Practitioners of alternative medicine contend that chelation can be used to remove other harmful substances from the bodies of patients. Apparently, the most common example of this alternative practice is the treatment of arteriosclerosis by chelating the harmful plaque build-up in arterial walls. The efficiency of this treatment for its alternative purpose has not been demonstrated to the satisfaction of the allopathic medical community. Nevertheless, in 1998, the Medical Board refused to adopt a regulation that would have prohibited any allopathically licensed physician, including any dually-licensed homeopathic physician, from using chelation therapy except to remove heavy metals from a patient's body. (See "Nevada doctors battling," Las Vegas Review Journal,

December 3, 1997; "Continued use of alternative medicine to treat hear bypass surgery OK'd," Las Vegas Review Journal, January 30, 1998.) In any event, chelation therapy, even when practiced alternatively, requires the use of allopathic dosages of allopathic substances. Moreover, any allopathic physician, including a dually-licensed homeopathic physician, may perform chelation in its conventional or alternative mode. For this reason, it would not be unreasonable for a court to find R213-97 invalid to the extent that it authorized a singly-licensed homeopathic physician to perform chelation, especially by means of intravenous infusion.

3. On balance

It is the opinion of this office that when A.B. 286 and its legislative history are examined as a whole, the legislative intent behind the bill was to extend the scope of the licensed practice of homeopathic medicine and to increase the power of the Homeopathic Board to regulate that practice, but that it was not the intent to authorize singly-licensed homeopathic physicians the unlimited right to practice allopathic medicine in the same manner as allopathic physicians. More particularly, the Legislature intended homeopathic physicians to enjoy expanded authority to write prescriptions with regard to certain allopathic medicines, but only to the extent required in practicing certain enumerated alternative therapies. In general, the definitions contained in the regulation of the Homeopathic Board, R213-97, do not exceed the Board's statutory authority and are consistent with legislative intent. We think it highly likely that a court of competent jurisdiction, if asked, would agree. We believe, however, that with respect to the definition of one alternative therapy, orthomolecular medicine, particularly that branch of it that concerns chelation or other forms of detoxification by means of intravenous infusion, there is a significant question whether that portion of the regulation is consistent with legislative intent. Nevertheless, assuming that a court would grant the regulation its presumption of validity, would take into consideration: (1) that the Legislative Commission did not object to the regulation on the grounds that it violated legislative intent; and (2) that the Legislature as a whole, with knowledge of the existence of the controversy over this provision, took no corrective action during the 1999 session, we are inclined to believe that the court would be more likely than not to uphold the validity of this element of the regulation as well. In any event, we conclude that such a court would not invalidate the regulation in its entirety.

III. Conclusions

It is the opinion of this office that the declaration of the invalidity of R213-97 contained in Attorney General Opinion No. 99-06 is legally null. Only a court of competent jurisdiction may invalidate a regulation and until such a court does so, R213-97, having satisfied all the procedural requirements of the Nevada Administrative Procedure Act, remains in effect and must be presumed to be a valid regulation.

It is the further opinion of this office that licensed homeopathic physicians may practice all of the therapies defined in R213-97, including chelation therapy and other forms of detoxification by means of intravenous infusion. A reasonable interpretation of the statutes and regulations, currently in effect, including R213-97, establishes that homeopathic physicians possess the following authority to write prescriptions by virtue of their homeopathic licenses:

1. When practicing traditional or classical homeopathy, they may prescribe, dispense and administer traditional homeopathic remedies as medically appropriate according to the standards applicable to the homeopathic tradition. With respect to allopathic medications, including controlled substances or dangerous drugs, homeopathic physicians may write prescriptions for a single pill of such substances, but only for the purpose of diluting it and compounding it into a homeopathic preparation, only if the allopathic drug is found in the Homeopathic Pharmacopoeia and only if the resulting diluted dosage is in accordance with dosages found in that pharmacopoeia.

2. When practicing one of the alternative therapies expressly authorized by A.B. 286 and defined in R213-97, homeopathic physicians may prescribe:

(a) Any controlled substance listed in schedule I, II, III, IV or V as set forth in chapter 453 of NRS, so long as both administration and dosage are medically appropriate according to the standards applicable to that alternative therapy, except that a homeopathic physician may not prescribe "narcotic drugs and opiates that are listed as schedule II controlled substances pursuant to chapter 453 of NRS, except as those substances may be described for use in the official Homeopathic Pharmacopoeia of the United States." (R213-97.)

(b) Any dangerous drug that is defined in chapter 454 of NRS so long as both administration and dosage are medically appropriate according to the standards applicable to that alternative therapy.

(c) Any other allopathic drug available by prescription so long as both administration and dosage are medically appropriate according to the standards applicable to that alternative therapy.

Finally, it is the opinion of this office that, in general, the definitions contained in the regulation of the Homeopathic Board, R213-97, do not exceed the Board's statutory authority and are consistent with legislative intent. However, with respect to the definition of one alternative therapy, orthomolecular medicine, particularly that branch of it that concerns chelation or other forms of detoxification by means of intravenous infusion, there is a significant question

whether the regulation is consistent with legislative intent. Nevertheless, in light of the presumption of validity that accompanies every regulation and taking into consideration that the Legislative Commission did not object to the regulation and that the Legislature took no corrective action during the 1999 session, we are inclined to believe that a court of competent jurisdiction would be more likely than not to find the portion of the regulation consistent with legislative intent. In any event. we conclude that such a court would not invalidate the regulation in its entirety.

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

Very truly yours,

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Legislative Counsel

By_____
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By_____
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1. This definition also included the use of "noninvasive electrodiagnosis," even though it is unlikely that this represented part of "classical" or traditional homeopathy.

2. Both osteopathic and allopathic physicians are licensed and regulated by the State Board of Medical examiners (Medical Board). Moreover, doctors osteopathy have the same authority to prescribe allopathic prescription drugs, controlled substances and dangerous drugs as do doctors of medicine. For the remainder of this memo, therefore, when speaking of the authority to write prescriptions, we will use "allopathic" as inclusive of "osteopathic," except when it is necessary to distinguish between the two practices.

3. According to the 1991 edition of the Homeopathic Pharmacopoeia of the United States, sarcodes are "homeopathic attenuations of wholesome organs, tissues, or metabolic factors obtained from healthy specimens . . . prepared according to homeopathic specifications [in which] the basic substance is not altered and the FINAL PRODUCT is not adulterated by any pathogen or other deleterious substance." The Attorney General concluded, "No known allopathic drugs regularly stocked by Nevada pharmacists would be 'sarcodes.'" (1993 Nev. Op. Att'y Gen. 131, September 20, 1993.)

4. This clause also contained the expansion of homeopathy to include the practice of "pharmaceutical medicine," discussed above.

5. These two terms will be discussed in greater detail in our response to your third question.

6. The revised regulation also eliminated the term "local anesthetics" from the definition of neural therapy on the ground that such substances were included in the broader category of "pharmaceutical preparations."

7. Any person who is actually harmed by the enforcement of a regulation or by a state officer acting pursuant to the regulation may bring an action for damages against the state or the officer, during the course of which the validity of the regulation may be brought into issue and resolved by the court. The Legislature's intent in enacting NRS 233B.110 was to permit the validity of regulations to be determined even before they are enforced.

8. It could be argued that the Attorney General is not asserting a power to declare a regulation invalid, but is merely expressing that which is evident---a regulation that exceeds its authorizing statute is void. Without disputing the accuracy of this conclusion, it is the opinion of this office that because chapter 233B of NRS provides detailed procedures for establishing the validity of regulations, it cannot reasonably be suggested that the Legislature intended chapter 233B of NRS to be self-executing.

9. Although chapter 233B of NRS gives the sole means for declaring a regulation invalid, NRS 233B.100 provides that "[a]ny regulation of any agency is subject to amendment or suspension by the governor pursuant to the provisions of NRS 416.060." This latter section, however, becomes effective only "[u]pon the proclamation of a water or energy emergency," and limits the amendment or suspension power to the extent necessary to lessen the adverse impact of that emergency.

10. To the extent that A.G.O. 99-06 is intended as a prediction of judicial behavior, rather than an advocate's brief, it commits additional errors of omission in that it fails to consider fundamental principles and rules of statutory construction that a court would be bound to apply. We discuss these principles and rules in response to your third question.

11. This regulation does, however, present a field for the application of the Attorney General's principle. The alternative practices of "chelation therapy" and "intravenous infusion" were deliberately amended out of the statute by the Assembly Committee on Commerce, but are restored by regulation as constituent parts of the practice of orthomolecular therapy. We will discuss this aspect of the regulation's validity subsequently.

12. Before July 1, 1999, the Legislative Counsel's responsibilities concerning the regulatory process were vested in the Director of the Legislative Counsel Bureau. (See sections 43 to 49, inclusive, of chapter 463, Statutes of Nevada 1999, at pages 2203-07.)

13. In any event, NRS 233B.0675 required the Legislature to nullify the regulation before the 30th day of the Legislative session. Even if the extension of this deadline to the final day of the session that was enacted in 1999 (section 1 of chapter 182, Statutes of Nevada 1999, at page 903, effective May 20, 1999) could be made to apply to apply to R213-97, that date has also long since passed.

14. It may be helpful to remind you of the circumstances surrounding the Attorney General's Opinion No. 98-01. In August, 1997, the Medical Board asserted that A.B. 286 had granted it exclusive disciplinary power over all licensed homeopaths who were also licensed by the Medical Board. This drew a formal protest from Senator Townsend as a misinterpretation of A.B. 286. (See letter from Senator Randolph J. Townsend to Attorney General Frankie Sue Del Papa, November 4, 1997.) Shortly thereafter, the Homeopathic Board requested an opinion from the Attorney General as to the proper relationship between the two boards, which was issued on January 13, 1998. (See Nev. Op. Att'y Gen. 98-01 A.G.O. 98-01).) The primary focus of that opinion concerned the obligations of a dually-licensed physician when one board forbade a medical procedure that was condoned by the other. The Attorney General concluded that the Legislature had intended the Medical Board's disciplinary jurisdiction to be exclusive. Thereafter, Senator O'Connell, you requested the opinion of this office as to the soundness of A.G.O. 98-01. We concluded that the Attorney General had overstated the powers of the Medical Board and suggested, instead, that "the Medical Board may not regulate the practices of a person who is licensed to practice both allopathic and homeopathic medicine while that person is actually practicing homeopathy within the scope of chapter 630A of NRS." (Letter from Brenda J. Erdoes and Eileen O'Grady to Senator Ann O'Connell, March 19, 1998.) More generally, we suggested that the clear intent of the legislative scheme had been to require that questions regarding dually-licensed physicians could only be answered after establishing in which capacity ---allopathic or homeopathic---the physician was practicing. Note that this conclusion is consistent with the Attorney General's earlier opinion that each license confers its own separate set of powers and limitations, and that at any given moment a dually-licensed physician is practicing one form of medicine or the other, and not some hybrid or intermediate form. (See A.G.O. 93-21.) Thus, both the Attorney General and the Legislative Counsel have endorsed the proposition that a dually-licensed homeopathic physician cannot use his allopathic license to prescribe allopathic drugs in allopathic doses if his intention is to effect a homeopathic treatment. The factual context for A.G.O. 93-21 concerned the practice of chelation therapy, a form of medicine that we will examine in more detail in response to your third question.

15. As suggested previously, if A.G.O. 99-06 were considered in the nature of a brief submitted to a court by the Attorney General as provided in NRS 233B.110, we believe that the opinion would be insufficient to overcome this presumption of validity.

Top