

CONSTITUTIONAL LAW; TAX CREDITS: Use of tax credits as incentives to investors in venture capital. Iowa Const. art. VII, § 1. There is no violation of Iowa Const. art. VII, § 1, when tax credits are issued to taxpayers who purchase equity interests in a venture capital fund and when taxpayers are allowed to redeem those tax credits if these investments fail to produce scheduled profits. (Johnson to Vilsack, Governor, 1-18-02) #02-1-1

January 18, 2002

The Honorable Tom Vilsack
Governor, State of Iowa
State Capitol
L O C A L

Dear Governor Vilsack:

You have requested an Attorney General's opinion on the constitutionality of a program whereby the State issues tax credits to investors to promote investments in venture capital funds. The structure of this program can be summarized as follows:

(1) A limited partnership or limited liability company known as the "Iowa Fund of Funds" (hereinafter the "Iowa Fund") will be organized for purposes of soliciting investments from individual and institutional investors. The Iowa Fund will use any funds it obtains to invest in certain venture capital funds which will promote economic growth in the State of Iowa.

(2) Investors who invest in the Iowa Fund will receive an equity interest in the Iowa Fund. At the time of their investment, investors will receive a scheduled rate of return and scheduled redemption on their equity interests. This scheduled rate of return and scheduled redemption will be used to determine the amount and terms of payments back to investors by the Iowa Fund if its investments in venture capital funds generate sufficient return to make such payments. If the investments fail to generate sufficient returns to make the scheduled payments, this will not create an obligation or liability on the part of the Iowa Fund to pay the shortfall in the scheduled rate of return. It will be used only to determine whether tax credits, discussed below, can be redeemed.

(3) At the time of their investment, all investors will receive tax credits from the State. The tax credits will be allocated to investors by a State Board which will issue a Certificate with each tax credit specifying the terms upon which redemption of the tax credit can occur.

(4) The tax credits may only be redeemed in accordance with the terms of the Certificates. All Certificates will contain a provision that tax credits may be redeemed for an amount sufficient only to offset shortfalls occurring in the scheduled returns to the investors. The tax credits will not be used to secure debt or liability of any kind.

The specific question you have posed is whether this program violates Article VII, section 1 of the Iowa Constitution, which prohibits the state from giving or loaning its credit and from assuming or becoming responsible for the debts of another.

ANALYSIS

Presumption of Constitutionality

The venture capital program you have described, when implemented pursuant to validly enacted legislation, will carry a very strong presumption of constitutionality. Anyone challenging such a statute must negate every conceivable basis supporting its constitutionality and show that the statute violates the Constitution "beyond a reasonable doubt." *State v. Keene*, 629 N.W.2d 360, 364 (Iowa 2001). Every reasonable doubt will be resolved in favor of constitutionality. *Iowa Dep't of Transportation v. Iowa Dist. Court*, 592 N.W.2d 41, 43 (Iowa 1999). A statute will not be declared unconstitutional unless it "clearly, palpably, and without doubt infringes on the constitution." *Spersflage v. City of Ames*, 480 N.W.2d 47, 49 (Iowa 1992). Like a court, we are guided by these principles in analyzing the constitutionality of the legislative program you have described.

The Meaning of Article VII, Section 1, of the Iowa Constitution

The Iowa Constitution provides:

Credit not to be loaned. Section 1. The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the state shall never assume, or become responsible

for, the debts or liabilities of any individual, association, or corporation, unless incurred in time of war for the benefit of the state.

Iowa Const. art. VII, § 1.

The language of this constitutional provision is susceptible of different interpretations. However, a review of the history of events leading to the adoption of Article VII, as well as a review of Iowa Supreme Court cases from 1884 to the present, provides a reasonably clear interpretation of this provision.

The History of Article VII, Section 1

In construing a constitutional provision, the primary purpose is to ascertain the intent of the framers. *Howard v. Schildberg Construction Co.*, 528 N.W.2d 550, 553 (Iowa 1995). To do this, it is necessary to consider “the language used, the object to be obtained, or evil to be remedied, and the circumstances at the time of adoption” *Edge v. Brice*, 253 Iowa 710, 718, 113 N.W.2d 759 (1962). The history of this constitutional provision provides considerable insight into the intent of the framers.

Thirty-nine state constitutions contain prohibitions on lending or giving the credit of the state. Finlayson, *State Constitutional Prohibitions Against Use of Public Financial Resources in Aid of Private Enterprise*, 1 Emerging Issues in State Constitutional Law 177, 181 (1988). Most states adopted these provisions in reaction to problems that occurred in the nineteenth century when the states became involved in the expansion of railroads and other corporations to promote economic growth. Comment, *Washington State Constitutional Limitations on Gifting of Funds to Private Enterprise: A Need for Reform*, 20 Seattle U.L. Rev. 199-200 (1996). One commentator has explained the history as follows:

With the development of railroads in the early 1830s, there began an era of sharply increased public spending. Available private capital was generally considered insufficient to meet demands for the extension of transportation facilities, and it became common for state governments to extend aid to private corporations engaged in building railroads, canals, or turnpikes, or to undertake such enterprises themselves

As zeal for internal improvements grew, public debts reached dangerous dimensions. Inefficient management, defective planning, corrupt dealings, and the fact that some enterprises did not produce expected revenues caused many publicly subsidized ventures to fail. Faced with the problem of meeting staggering

debts, states either levied heavier taxes, or defaulted and tried to repudiate their obligations; and, as creditors were forced to resort to legal process to recover their investments, the public credit became badly scarred.

Note, *Legal Limitations on Public Inducements to Industrial Location*, 59 Colum. L. Rev. 617, 619-20 (1959) (footnotes omitted).

In *Grout v. Kendall*, 195 Iowa 467, 192 N.W. 529, 531 (1923), the Iowa Supreme Court acknowledged the above history as the reason that Article VII, section 1 was included in the Iowa Constitution. The Court explained that the states had freely loaned their credit to corporate enterprises “which had in them much seductive promise of public good.” *Id.* In each case, the “corporate body . . . was the primary debtor; the state . . . loaned its credit always with the assurance and belief that the primary debtor would pay. *Id.* Pursuant to these secondary liabilities, the state became overwhelmed with millions of dollars of indebtedness which never would have been undertaken as a primary indebtedness . . .” *Id.* Noting that “[t]he ultimate cry of the surety is: I would not have become surety if I had known or believed that I should have to pay the debt,” the Court explained that Article VII, section 1 of the Iowa Constitution was adopted “to remove this delusion of suretyship with its snare of temptation . . .” *Id.*

Iowa Supreme Court Decisions Interpreting Article VII, Section 1

In *Grout*, the Iowa Supreme Court considered a constitutional challenge under Article VII, section 1, to the Soldiers’ Bonus Act, which provided for the issuance of bonds to pay a bonus to veterans of World War I. The Court upheld the statute and provided what has been the definitive interpretation of Article VII, section 1 of the Iowa Constitution, explaining the meaning of this section in considerable detail:

It is important, therefore, that we discover and define clearly the field which is covered by this section and by the prohibitions thereof. The section does not in terms purport to deal with the creation of primary indebtedness by the state for any purpose whatsoever. The prohibition is that the state shall not lend its “credit” to any other being whatever and that it shall “never assume” the debts or liabilities of any other being whatsoever.

....

What is meant by a loan of “credit”? When one signs an accommodation note and delivers it to his neighbor, he loans his credit to his neighbor. He has not created a debt to him. The neighbor is authorized to use the credit with third parties; but he is also under obligation to the maker to protect him against liability

and ultimately to return the note. When one becomes surety for his neighbor and signs his promissory notes to third parties, he loans his credit. The liability of the surety is always secondary and not primary. It is a liability for the debt of another which such other is bound to pay.

....

[This section of the Constitution] withheld from the constitutional authorities of the state *all power or function of suretyship*. It forbade the incurring of obligations by the indirect method of secondary liability. This is the field and the full scope of this section. It does not purport to deal with the creation of a primary indebtedness for any purpose whatever.

Id. (Underlining added; italics in original).

The Iowa Supreme Court has considered constitutional challenges under Article VII, section 1 of the Iowa Constitution to state and local laws¹ on 12 occasions other than *Grout*. In all of those cases, the Court upheld the constitutionality of the law in question, consistently following the legal analysis in *Grout* and holding that Article VII, section 1 only prohibits the state and localities from incurring secondary indebtedness as sureties, without placing any limitations on the ability of the state or localities to create their own primary obligations. The Court has adhered to this view without wavering, even when facing complicated financial arrangements involving private enterprise and state or local government.

The complex nature of the arrangements considered by the Court is illustrated by the most recent case involving a challenge under Article VII, section 1. In *Stanfield v. Polk County*, 492 N.W.2d 648 (Iowa 1993), the county issued \$40 million of revenue bonds to be used to construct a private race track. The bonds were to be paid from revenues of the race track; they were not an indebtedness of the county and could not give rise to liability on the part of the county. The bonds proved to be unsalable because of a lack of credit backing. The county then agreed to lend "credit support" and to provide a "credit enhancement" for the bonds by entering into a lease-purchase agreement and management agreement with the track. *Id.* at 649. The bonds were sold and the track was built. The county used general tax revenues to pay its obligations to the owner under the lease-purchase agreement. Then, the owner of the track began to experience cash flow problems. The county agreed to lend the owner money to pay its obligations and provided the owner with a line of credit. The Court held that, by entering into this complex arrangement, "the

¹ In cases involving cities or counties, the Supreme Court has assumed for purposes of its analysis that Article VII, section 1, applies to municipalities as well as the state. *See, e.g., Richards v. City of Muscatine*, 227 N.W. 2d 48, 62 (Iowa 1975); *Sampson v. City of Cedar Falls*, 231 N.W. 2d 609, 613 (Iowa 1975); 1938 Iowa Op. Atty Gen. 80.

county [did not] loan its credit or assume the debts” of the race track owner within the meaning of Article VII, section 1. *Id.* at 653.

Several other cases illustrate the range of matters considered by the Court under Article VII, section 1. In *Train Unlimited Corporation v. Iowa Railway Finance Authority*, 362 N.W.2d 489, 495 (Iowa 1985), the Court held that it was constitutional for the Iowa Railway Finance Authority to acquire rail facilities, to pay for them by issuing bonds, and to pledge tax receipts as security for the bonds. In *John R. Grubb, Inc v. Iowa Housing Finance Authority*, 255 N.W.2d 89, 97 (Iowa 1977), the Court held that Article VII, section 1 did not prohibit the state from making loans to housing sponsors to provide financing to purchase housing because this did not place the state in the position of a surety and the state was not lending its credit. In *Richards v. City of Muscatine*, 237 N.W.2d 48, 62 (Iowa 1975), the city pledged city taxes to pay tax increment bonds. The Court held that this did not constitute lending of credit in violation of Article VII, section 1, because *Grout* made it clear that this constitutional provision merely “withheld from the constituted authorities of the State all power or function of suretyship.” The Court noted that the city’s liability “is primary. Section 1 of Article VII has no application.” *Id.* at 62. And in *Edge v. Brice*, 253 Iowa 710, 716, 113 N.W.2d 755, 758 (1962), the Court upheld the constitutionality of a statute authorizing the state to reimburse utilities for their costs of relocation caused by federal highway programs. The Court noted that the state was not paying a “secondary indebtedness” prohibited by Article VII, section 1 because the payment was “a primary obligation placed on the state by the statute”. *Id.*

The additional Supreme Court decisions upholding the constitutionality of state and local laws under Article VII, section 1 demonstrate the same, consistent interpretation of this constitutional provision. See *Sampson v. City of Cedar Falls*, 231 N.W.2d 609, 612-13 (Iowa 1975); *Stanley v. Southwestern Community College*, 184 N.W.2d 29, 34 (Iowa 1971); *Graham v. Worthington*, 259 Iowa 845, 865-66, 146 N.W.2d 626, 640-41 (1966); *Green v. City of Mt. Pleasant*, 256 Iowa 1184, 131 N.W.2d 5, 14-15 (1964); *Faber v. Loveless*, 249 Iowa 593, 88 N.W.2d 112, 114-15 (Iowa 1958); *State ex rel. Fletcher v. Executive Council*, 207 Iowa 923, 223 N.W. 737, 738-39 (1929); *McClelland v. Marshall County*, 199 Iowa 1232, 201 N.W. 401, 404-05 (1924); *Merchants’ Union Barb-Wire Co. v. Brown*, 64 Iowa 275, 20 N.W. 434, 435 (1884).

Since the Iowa Supreme Court first interpreted Article VII, section 1 in 1884 and later offered its definitive interpretation of this constitutional provision in *Grout*, the Court has not swayed from its interpretation of Article VII, section 1. The Court has consistently interpreted this provision narrowly, and in conformity with the historical purpose for which it was adopted: Article VII, section 1 only prohibits the state and localities from incurring secondary indebtedness by agreeing to act as sureties for the debts or liabilities of another.² A similar

²Article VIII, section 3 of the Iowa Constitution contains language similar to Article VII, section 1. Article VIII, section 3 provides that the “state shall not . . . assume or pay the debt or liability of any corporation” This constitutional provision has been interpreted in precisely

interpretation of Article VII, section 1 has been adopted by this office. *See* 1980 Op. Att'y Gen. 282, 283-84.

In light of the above analysis, the constitutionality of a program utilizing tax credits as an incentive to taxpayers to invest in venture capital depends upon whether the program puts the state in the position of a surety, i.e., paying or guaranteeing payment of the debts or liabilities of another. This involves a two-fold analysis. The first question is whether a tax credit constitutes a payment or guarantee of payment by the state within the meaning of Article VII, section 1. If a tax credit is a payment or guarantee of payment by the state, the second question is whether the state is satisfying a primary obligation of the state, or whether the state is in the position of a surety and satisfying a secondary indebtedness.

Tax Credits As Payments or Guarantees of Payment

The statutory provisions governing income taxes for individuals and corporations are primarily set forth in Iowa Code chapter 422 (2001), entitled "Income, Sales, Services, and Franchise Taxes." Although the state tax system is obviously intended to provide the state with revenue, the statutory scheme contains numerous instances where the state foregoes revenue it could otherwise collect. Certain individuals, organizations, and corporations are exempt from the provisions of chapter 422 and pay no income tax at all. *See* Iowa Code §§ 422.5(2); 422.34. Deductions from net income, which result in lower taxable income and taxes, are also allowed. *See, e.g.,* Iowa Code § 422.9 (2) (allowing deductions for contributions, losses, and miscellaneous expenses). Finally, to provide an incentive for taxpayers to engage in certain types of activities, the Iowa Code allows numerous tax credits which result in direct deductions from the amount of taxes due the state. *See, e.g.,* Iowa Code §§ 15A.9(4) (investment tax credit); 422.10, 422.33 (5) (research activities tax credits); 422.11 (franchise tax credits); 422.11A (tax credits for new jobs, property rehabilitation and assistive devices); 422.12 (tuition tax credits); 422.12(C) (child care tax credits); 422.120 (livestock production tax credit).

It is generally recognized that the use of these types of tax exemptions, tax deductions, and tax credits are legitimate tools by which the government can implement social and economic goals and encourage certain types of activities and organizations. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528-29 (1959); *Kotterman v. Killian*, 972 P.2d 606, 612 (Ariz.1999); 84 C.J.S. *Taxation* § 262, at 334 (2001); 85 C.J.S. *Taxation* § 1738, at 754 (2001); 71 Am. Jur. 2d, *State and Local Taxation*, § 484 at 754 (2001).

the same way as Article VII, section 1. *See Stanfield v. Polk County*, 492 N.W.2d 648, 653 (Iowa 1993); *Edge v. Brice*, 253 Iowa 710, 113 N.W.2d 755, 758 (1962); *Merchants' Union Barb-Wire Co. v. Brown*, 64 Iowa 275, 20 N.W. 434, 435 (1884); *see also Brady v. City of Davenport*, 498 N.W.2d 701, 708 (Iowa 1993).

The venture capital program which you have described relies on tax credits to provide an incentive to taxpayers to invest in venture capital. The Iowa Supreme Court has not considered the question whether tax credits should be considered payments or guarantees of payment by the state within the meaning of Article VII, section 1. However, tax credits, like tax exemptions and deductions, are substantially different from outright appropriations or payments of money by the state. When the state issues a tax credit, it simply agrees to forgive an indebtedness owed to it by a taxpayer. The state is in the position of a creditor, not a debtor. A tax credit does not affirmatively obligate the state to appropriate money or extend its credit. Given the purpose of Article VII, section 1 -- to prevent the State from becoming a surety in situations where it might be required to make an appropriation of public funds to pay the debts of another -- it does not appear that this constitutional provision was intended to prohibit the use of tax credits as incentives, because tax credits do not involve the outright appropriation of state monies.

A few states from other jurisdictions have analyzed the constitutionality of tax credits. Those cases are informative. The Nebraska Supreme Court considered the constitutionality of a statute which provided tax credits to ethanol producers in *Callan v. Balka*, 536 N.W.2d 47 (Neb. 1995). The Nebraska Constitution contains a provision which states that: "The credit of the state shall never be given or loaned in aid of any individual, association, or corporation" *Id.* at 49. As in Iowa, this constitutional provision had been interpreted to prohibit the state from being the surety for the debts of another. *Id.* at 51. The Court explained that loaning state funds was different from loaning the state's credit. A loan of state funds places the state in the position of a creditor; a loan of credit, prohibited by the Constitution, places the state in the position of a debtor. *Id.* at 51. In light of this distinction, the court held that the key question in determining whether tax credits violated the prohibition against loaning the state's credit was whether the tax credits placed the state in the position of a debtor or creditor. The Court explained:

The redemption of the motor fuel tax credit requires the state to forego the collection of that portion of the motor fuel tax which is a debt owed to the state. The state is in the position of the creditor excusing the payment of the motor fuel tax by the debtor. The tax credit merely offsets a debt owed to the state. Although the motor fuel taxes collected are reduced because of the ethanol credits, the ethanol tax credit program does not place the state in the position of a debtor or guarantor The state forgives an indebtedness, but is never obligated to pay any money or extend a credit of the state The state always remains a creditor in relation to the motor fuel tax. We therefore conclude that the state is not a debtor, surety, or guarantor of the debt of another with respect to the tax credits authorized by [statute]. *Id.* at 53.³

³ There was one dissenting judge who felt that this statutory scheme was a utilization of the state's credit because "when the state forgoes the collection of levied motor fuel taxes, the credit of the state is implicated." 536 N.W. 2d at 54.

In *Associated General Contractors of South Dakota, Inc., v. Schreiner*, 492 N.W. 2d 916, 925 (S.D. 1992), the South Dakota Supreme Court held that the constitutional provision governing when the state could “loan or give its credit” simply did not apply to a statute authorizing tax credits for ethanol producers.

In *Kotterman v. Killian*, 972 P.2d 606, 621 (Ariz. 1999), the Arizona Supreme Court considered tax credits in the context of Arizona’s constitutional anti-gift clause which provided that the state shall not “give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation.” The statute in question granted tax credits up to \$500 for contributions to state tuition organizations. The court explained:

This constitutional provision was historically intended to protect against the “extravagant dissipation of public funds” by government in subsidizing private enterprises such as railroad and canal building in the guise of “public interest.” Such “evils” do not exist here. Neither do we agree . . . that a tax credit amounts to a “gift.” One cannot make a gift of something that one does not own.

Id. (citation omitted).

Although the *Kotterman* case answered a different question than the one being analyzed here, it is significant to the extent it notes the historical purpose of the constitutional provisions in question and also recognizes that a tax credit is not a “gift” or outright payment of state money to an individual. *But cf. Curchin v. Missouri Industrial Development*, 722 S.W.2d 930, 933 (Mo.1987) (equating tax credit with grant of public money or lending of credit because of drain on State’s coffers).

Although the legal authority on the issue is limited, we believe the correct view is that tax credits are legally distinguishable from outright appropriations or payment of money by the State. Because of the history and purpose of Article VII, section 1, and the distinctions between tax credits and outright appropriations of state funds, we do not believe that tax credits constitute a payment or guarantee of payment by the State within the meaning of Article VII, section 1.

Primary Obligation Versus Secondary Debt

Even if tax credits in a venture capital program were considered payments or guarantees of payment within the meaning of Article VII, section 1, that constitutional provision would only prohibit such a program if the tax credits were used to satisfy a secondary indebtedness incurred as a result of the state acting as a surety. If the tax credits are used to satisfy a primary obligation of the state, as opposed to a secondary indebtedness, there would appear to be no constitutional

problem. Indeed, there is generally no constitutional problem with the state making outright appropriations of money to pay primary financial obligations of the state. *Grout v. Kendall*, 192 N.W. at 531.

Under the venture capital program, taxpayers who receive tax credits will be investing in an equity position in the Iowa Fund. If the value of an investor's equity declines or the rate of return is less than the scheduled rate of return, there would be no "debt" owed to the investor or liability on the part of anyone. The program specifically provides that there will be no obligation or liability on the part of the Iowa Fund to pay the shortfall in the scheduled redemption or rate of return. In this respect, the investor would be in a position similar to the owner of stock or an investor in a mutual fund – what the investor is entitled to receive depends on how well the fund does. If the fund does not do well, the investor has no recourse against the fund.

Because of this lack of recourse against the Iowa Fund, there would appear to be no debt or liability involved within the meaning of Article VII, section 1. A "debt" is defined in ordinary parlance as "a sum of money due by express agreement", Black's Law Dictionary (4th Ed.), and as "an obligation to pay or return something." Webster's Twentieth Century Dictionary Unabridged (2d Ed.). For purposes of analyzing constitutional provisions limiting the ability of public bodies to incur "debt," the Iowa Supreme Court has suggested that the word be "given a meaning much less broad and comprehensive than it bears in general usage." *Swanson v. City of Ottumwa*, 118 Iowa 161, 91 N.W. 1048, 1051 (Iowa 1902).

Under the venture capital program you have described, the state has assumed primary responsibility for providing taxpayers with an incentive to invest by agreeing to honor tax credits for investors who fail to realize a scheduled redemption or rate of return on their investment. The state is not guaranteeing the payment of someone else's debt or liability because there is no debt owed or liability to the investors by the Iowa Fund if it fails to generate sufficient revenue to make scheduled payments.

Notably, the venture capital program issues tax credits to all investors, but restricts the redemption of tax credits to investors who fail to realize their scheduled redemption or rate of return on their investments. If all investors were allowed to redeem their tax credits simply because they invested, without regard to whether they incurred profits or losses, the tax credits would be similar to those created elsewhere in the Iowa Code. It would be very difficult to argue that such tax credits constitute a payment of someone else's debt or obligation in violation of Article VII, section 1, particularly regarding taxpayers who redeem tax credits while making a profit on their investment. By prohibiting investors from redeeming their tax credits when they realize the scheduled profits on their investments, the program you have described actually places less of the State's treasury at risk than it would if all investors in the program were allowed to redeem their tax credits.

The Honorable Tom Vilsack
Page 11

CONCLUSION

Given the strong presumption of constitutionality, it is our opinion that the use of tax credits to provide an incentive to taxpayers to invest in the venture capital program you have described is permissible under Article VII, section 1 of the Iowa Constitution.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Dennis W. Johnson", written over a horizontal line.

Dennis W. Johnson
Solicitor General

STATE OFFICERS AND DEPARTMENTS; SCHOOLS; PUBLIC RECORDS; HEALTH:
Record checks of students. Iowa Code §§ 135C.33, 235A.15, 235B.6, 692.2 (2001 & Suppl. 2001). Section 135C.33(1) does not require health care facilities to request record checks for nursing and health care students who will perform tasks in health care facilities as part of academically required clinical training requirements. Sections 235A.15(2)(f) and 692.2 limit disclosure to a health care facility or a community college of information relating to crimes and, under some circumstances, child abuse. Section 135C.33(3) does not preclude a health care facility from refusing to employ persons who have "non-abuse criminal convictions"; subject to its arrangement with a community college, a health care facility may refuse to permit students with such convictions from participating in academically required clinical training requirements. (Kempkes to Stilwill, Director, Department of Education, 2-13-02) #02-2-1

February 13, 2002

Director Ted Stilwill
Iowa Department of Education
Grimes State Office Bldg.
LOCAL

Dear Director Stilwill:

You have requested an opinion on nursing and health care students of community colleges who will perform tasks in health care facilities as part of academically required clinical training requirements. You primarily ask whether such students must, pursuant to statute, undergo criminal history and adult abuse record checks. This question requires an examination of Iowa Code chapter 135C (2001 & Suppl. 2001) and implicates the Iowa Departments of Human Services (DHS), Public Safety (DPS), and Inspections and Appeals (DIA).

I. Applicable law

Chapter 135C is entitled Health Care Facilities, which is defined in the singular as "a residential care facility, a nursing facility, an intermediate care facility for persons with mental illness, or an intermediate care facility for persons with mental retardation." Iowa Code § 135C.1(6). Among other things, chapter 135C purports to promote and encourage adequate and safe care and housing for persons admitted to health care facilities. Iowa Code § 135C.2(1)(a).

As amended in 2001, section 135C.33 now provides:

(1). Beginning July 1, 1997, *prior to employment of a person in a facility*, the facility shall request that the [DPS] perform a criminal history check and the [DHS] perform a

dependent adult abuse record check of the person in this state. In addition, the facility may request that the [DHS] perform a child abuse record check in this state. Beginning July 1, 1997, a facility shall inform all persons *prior to employment* regarding the performance of the records checks and shall obtain, from the persons, a signed acknowledgment of the receipt of the information. Additionally, a facility shall include the following inquiry *in an application for employment*: "Do you have a record of founded child or dependent adult abuse or have you ever been convicted of a crime, in this state or any other state?" If the person has been convicted of a crime under a law of any state or has a record of founded child or dependent adult abuse, the [DHS] shall upon the facility's request perform an evaluation to determine whether the crime or founded child or dependent adult abuse warrants prohibition *of employment in the facility*. . . . If a person owns or operates more than one facility, *and an employee of one of such facilities is transferred to another such facility without a lapse in employment*, the facility is not required to request additional criminal and dependent adult abuse record checks of that employee.

(2) If the [DPS] determines that a person has committed a crime *and is to be employed in a facility licensed under this chapter*, the [DPS] shall notify the licensee that an evaluation, if requested by the facility, will be conducted by the [DHS] to determine whether prohibition *of the person's employment* is warranted. If a [DHS] child or dependent adult abuse records check determines the person has a record of founded child or dependent adult abuse, the [DHS] shall inform the licensee that an evaluation, if requested by the facility, will be conducted to determine whether prohibition *of the person's employment* is warranted.

(3). In an evaluation, the [DHS] shall consider the nature and seriousness of the crime or founded child or dependent adult abuse *in relation to the position sought or held* The [DHS] has final authority in determining whether prohibition *of the person's employment* is warranted.

(4). A person *shall not be employed in a facility licensed under this chapter* unless an evaluation has been performed by the [DHS]. If the [DHS] determines from the evaluation that the

person has committed a crime or has a record of founded child or dependent adult abuse which warrants prohibition *of employment*, the person *shall not be employed in a facility licensed under this chapter*.

(5). Beginning July 1, 1998, this section shall apply to *prospective employees* of [specified health care providers].

In substantial conformance with the provisions of this section, *prior to the employment of such an employee*, the provider shall request the performance of the criminal and dependent adult abuse record checks and may request the performance of the child abuse record checks. The provider shall inform *the prospective employee* and obtain *the prospective employee's* signed acknowledgment. The [DHS] shall perform the evaluation of any criminal record or founded child or dependent adult abuse record and shall make the determination of whether *a prospective employee of a provider shall not be employed by the provider*.

(6). The [DIA], in conjunction with other departments and agencies of state government involved with criminal history and abuse registry information, shall establish a single contact repository for facilities and other providers to have electronic access to data to perform background checks *for purposes of employment*, as required of the facilities and other providers under this section. . . .

(emphasis added).

II. Analysis

(A)

Section 135C.33(1), which provides that a health care facility “shall request” criminal history and adult abuse record checks, imposes a duty. *See generally* Iowa Code § 4.1(30)(a) (unless otherwise defined, “shall” in statutes imposes a duty). You have asked whether section 135C.33(1) requires record checks for nursing and health care students who will perform tasks in health care facilities as part of academically required clinical training requirements. Regarding nurses, clinical training constitutes a “student learning [experience]” that may provide them with credit hours toward graduation. 655 Iowa Admin. Code 2.2(3)(c), 2.5(1)(g)(3), 2.8. *See generally* Iowa Code § 152.5(1)(b) (all nursing education programs must have “provisions for adequate . . . clinical facilities”).

Your question rests upon the scope of section 135C.33, which, in its entirety, speaks only to prospective employees of health care facilities. The question whether a person constitutes an “employee” may be one of fact, of mixed law and fact, or of law. We believe that we may answer your particular question as a matter of law. *See generally* 61 Iowa Admin. Code 1.5(3)(c).

Chapter 135C does not define “employee.” We must, therefore, construe this word according to context and approved English usage. *See* Iowa Code § 4.1(38).

An “employee” commonly means “a person *who works for salary or wages*” and “performs work subject to the control and direction and control” of another. 1982 Iowa Op. Att’y Gen. 496, 500 (emphasis added). *Accord* 1992 Iowa Op. Att’y Gen. 154, 164. An employment normally requires payment of wages or a salary. *Loughlin v. Cherokee County*, 364 N.W.2d 234, 236-37 (Iowa 1985); *Jackson County Public Hospital v. Iowa Public Employment Relations Bd.*, 280 N.W.2d 426, 431-32 (Iowa 1979); *Meredith Publishing Co. v. Iowa Employment Sec. Comm’n*, 232 Iowa 666, 6 N.W.2d 6, 12-14 (1942); Webster’s Ninth New Collegiate Dictionary 370 (1979). Accordingly, “employee” in section 135C.33 excludes students who receive no salary or wages while participating in academically required clinical programs at health care facilities. *Cf. Henderson v. Jennie Edmundson Hosp.*, 178 N.W.2d 429, 433 (Iowa 1970) (nurse’s aide trainee injured in hospital during course of training did not, as matter of fact, constitute an “employee” or “apprentice” for purposes of worker compensation coverage when, among other things, she received no wages or salary). Wages and salary usually take the form of money. Webster’s, *supra*, at 1012, 1305. *See generally* 1978 Iowa Op. Att’y Gen. 55, 57 (generally, “salary” compensates services, as distinguished from “wage,” which compensates labor).

A DIA administrative rule promulgated pursuant to chapter 135C supports our conclusion. *See generally* Iowa Code § 4.6(6) (statutory construction may take into account administrative construction of statute). It provides that an individual “employed in a facility” means “any individual *who is paid*, either by the health care facility or any other entity (i.e., temporary agency, private duty, Medicare/Medicaid or independent contractors), to provide direct or indirect treatment or services to residents in a health care facility.” (emphasis added). *See generally* Webster’s, *supra*, at 835 (“pay” means something paid for a purpose, especially a salary or wages).

We see nothing in the context of chapter 135C to suggest broader meanings for “employee” and the terms it embraces (wages, salary, and pay). Accordingly, section 135C.33 only applies to workers who will receive monetary compensation in return for their performing certain tasks at health care facilities, even though students (as well as volunteers) may perform the same or similar tasks. Had the General Assembly intended for section 135C.33 to encompass students in addition to employees, it presumably would have used the appropriate language. *See Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 685-86 (Iowa 2001). *See generally* Iowa R.

App. P. 14(f)(13) (statutory construction focuses upon what legislature actually wrote, not what it might or should have written).

(B)

You have asked whether the lack of a prospective employment relationship necessarily precludes requests for record checks regarding students who will perform tasks in health care facilities as part of academically required clinical training requirements.

Our conclusion on the limited scope of *the duty* imposed by section 135C.33 does not mean that health care facilities lack *the power* to request record checks on students who will participate in clinical training requirements. We do not view the commands of chapter 135C as limiting the ability of health care facilities to protect their residents, personnel, visitors, and property through record check requests. Indeed, such requests presumably would help further the underlying purpose of chapter 135C, which purports to promote and encourage adequate and safe care and housing for persons admitted to health care facilities. *See* Iowa Code § 135C.2(1)(a). *See generally* Iowa Code § 4.6(1) (statutory construction may take into account object legislature sought to attain).

Of course, such requests remain subject to statutory provisions limiting disclosure. Those provisions effectively limit disclosure to a health care facility of information relating to crimes and, under some circumstances, child abuse. *See generally* Iowa Code § 235A.15(2)(f) (child abuse), § 235B.6 (adult abuse), § 692.2 (criminal history). The DHS only has statutory authority to disclose the name of a person contained within a founded child abuse report if that person authorizes disclosure. *See* Iowa Code § 235A.15(2)(f). It currently has only limited statutory authority to disclose the name of a person contained within a founded adult abuse report even if that person authorizes disclosure. *See generally* Iowa Code § 235B.6.

(C)

Similarly, you have asked whether community colleges have authority to request record checks regarding students who will perform tasks in health care facilities as part of academically required clinical training requirements, and if not, the consequences resulting from making unauthorized requests.

The task of determining the consequences resulting from any action taken by community colleges properly belongs with their attorneys, not with this office. *See generally* 61 Iowa Admin. Code 1.5(1), 1.5(3). In any event, community colleges have broad powers. 1990 Iowa Op. Att’y Gen. 97 (#90-12-6(L)). *See, e.g.,* Iowa Code § 260C.14(5) (community college shall “[e]stablish policy and make rules . . . for its own government and that of the administrative, teaching, and other personnel, and the students of the college, and aid in the enforcement of such laws”). We believe that those powers permit requests for record checks of students who will

perform tasks in health care facilities as part of academically required clinical training requirements. *Cf.* Iowa Code § 235A.15A(2)(e)(16) (permitting access to child abuse report and disposition data to school district superintendent for purposes of volunteer or employment record check). Again, statutory provisions effectively limit disclosure to a community college of information relating to crime and, under some circumstances, child abuse. *See generally* Iowa Code § 235A.15(2)(f) (child abuse), § 235B.6 (adult abuse), § 692.2 (criminal history).

(D)

Our conclusion on the limited scope of section 135C.33 also does not preclude a health care facility from refusing to employ persons who have “non-abuse criminal convictions,” such as theft. Although you intimate otherwise by noting that section 135C.33(3) vests the DHS with “final authority in determining whether prohibition of [a] person’s employment is warranted,” despite the commission of child or dependent adult abuse, this language does not amount to a directive to a health care facility to employ any particular person. Like other private and public entities, health care facilities may adopt hiring policies reasonably designed to ensure the health and safety of persons and property on their premises. *Cf. Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (prisons “must be free to take appropriate action to ensure the safety of inmates and corrections personnel”). Thus, the Shelby County Treasurer need not hire a convicted embezzler, Meals on Wheels need not hire a convicted drag racer, and Drake University need not hire a convicted rapist. *Cf. Dixon v. McMullen*, 527 F. Supp. 711, 721 (N.D. Tex. 1981) (police department need not hire ex-felon). We view section 135C.33 as establishing a minimum threshold for employment.

Moreover, subject to the arrangement with the community college, a health care facility’s hiring policy could prevent students with “non-abuse criminal convictions” from participating in academically required clinical training requirements. Nothing in chapter 135C purports to require health care facilities to cooperate with community colleges, much less require them to allow any student on their premises for the purpose of participating in clinical training.

III. Summary

Section 135C.33(1) does not require health care facilities to request record checks for nursing and health care students who will perform tasks in health care facilities as part of academically required clinical training requirements. Sections 235A.15(2)(f) and 692.2 limit disclosure to a health care facility or a community college of information relating to crimes and, under some circumstances, child abuse. Section 135C.33(3) does not preclude a health care facility from refusing to employ persons who have “non-abuse criminal convictions”; subject to

Director Ted Stilwill
Page 7

its arrangement with a community college, a health care facility may refuse to permit students with such convictions from participating in academically required clinical training requirements.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Kempkes". The signature is written in a cursive, flowing style with some loops and flourishes.

Bruce Kempkes
Assistant Attorney General

PROPERTY TAX; COUNTY AND COUNTY OFFICERS; STATE OFFICERS AND DEPARTMENTS: Pollution-control property. Iowa Code §§ 421.17, 427.1 (2001). A county assessor does not have authority under county home rule to deny exemptions to taxpayers for pollution-control property when the Iowa Department of Natural Resources has certified their property as pollution-control property. (Kempkes to Bonnett, Taylor County Attorney, 5-1-02) #02-5-1

May 1, 2002

Mr. Ronald Bonnett
Taylor County Attorney
402 Main St.
Bedford, IA 50833

Dear Mr. Bonnett:

You have requested an opinion on taxation. You ask:

If the Iowa Department of Natural Resources (DNR) has certified that the primary use of certain pollution-control property is to control or abate pollution of any air or water of this state or to enhance the quality of any air or water of this state, does that taxpayer automatically qualify for [the] pollution control exemption [in the property tax statutes], or does the county assessor have the discretion to make an independent determination as to whether the exemption applies?

Pointing to county home rule, you posit that counties may impose standards for defining "pollution-control property" higher than those of the DNR and that county assessors may deny exemptions to taxpayers even after the DNR certifies their property as pollution-control property. Your request requires us to examine the state constitution in addition to Iowa Code chapters 331, 427, and 441 (2001).

I. Applicable law

The state constitution provides:

Counties . . . are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall

not have power to levy any tax unless expressly authorized by the general assembly. . . .

Iowa Const. art. III, § 39A (amend. 37).

Chapter 331 is entitled County Home Rule Implementation. Under section 331.301,

(1). A county may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents

. . . .

(3). The enumeration of a specific power of a county . . . or the failure to state a specific power does not limit or restrict the general grant of home rule power conferred by the Constitution and this section. A county may exercise its general powers subject only to limitations expressly imposed by a state law.

(4). An exercise of a county power is not inconsistent with a state law unless it is irreconcilable with the state law. . . .

. . . .

(6). A county shall not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.

Chapter 427 is entitled Property Exempt and Taxable. Section 427.1 identifies classes of property exempt from taxation. Section 427.1(19) defines “pollution-control property” and provides that such property

shall be exempt from taxation to the extent provided in this subsection, upon compliance with the provisions of this subsection.

. . . .

Application for this exemption shall be filed with the assessing authority . . . the first year for which the exemption is requested

The application for a specific pollution-control . . . property shall be accompanied by a certificate of the [DNR] certifying that the primary use of the pollution-control property is to control or abate pollution of any air or water of this state or to enhance the quality of any air or water of this state

A taxpayer may seek judicial review of a determination of the [DNR] . . . in accordance with the provisions of chapter 17A.

The [DNR] shall adopt rules relating to certification under this subsection and information to be submitted for evaluating pollution-control . . . property for which a certificate is requested. The department of revenue and finance shall adopt any rules necessary to implement this subsection, including rules on identification and valuation of pollution-control . . . property. All rules adopted shall be subject to the provisions of chapter 17A.

(emphasis added).

Chapter 441 is entitled Assessment and Valuation of Property. Section 441.1 creates the office of county assessor, and section 441.17 specifies the duties of the county assessor. Section 441.17(2) provides that the assessor “shall . . . [c]ause to be assessed . . . all the property in the assessor’s county . . . except property exempt from taxation”

II. Analysis

Pointing to county home rule, you have posited that counties may impose standards for defining “pollution-control property” higher than those of the DNR and that county assessors may refuse to grant exemptions to taxpayers even after the DNR certifies their property as pollution-control property under section 427.1(19).

In *Goodell v. Humboldt County*, 575 N.W.2d 486, 492-93 (Iowa 1998), the Supreme Court of Iowa explained that county home rule rests, among other things, on principles of preemption and that

[p]reemption may be express or implied. Both forms of preemption find their source in the constitution’s prohibition of the exercise of a home rule power “inconsistent with the laws of the

general assembly.” Iowa Const. art. III, § 39A . . . Chapter 331 further defines this limitation: “An exercise of a county power is not inconsistent with a state law unless it is irreconcilable with the state law.” Iowa Code § 331.301(4).

. . . .

. . . Implied preemption occurs in two ways. *When a [county either seeks to “prohibit] an act permitted by a statute [or to permit] an act prohibited by a statute,” the [county action] is considered inconsistent with state law and preempted.*

Implied preemption may also occur when the legislature has “covered a subject by statutes in such a manner as to demonstrate a legislative intention that the field is preempted by state law.” “The mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.” . . . Iowa law requires some legislative expression of an intent to preempt home rule authority, or some legislative statement of the state’s transcendent interest in regulating the area in a uniform manner.

(emphasis added) (citations and brackets omitted).

We believe that either form of implied preemption precludes county assessors from refusing to grant exemptions to taxpayers under section 427.1(19) when the DNR certifies their property as pollution-control property.

First: Section 427.1(19) requires DNR certification of property as pollution-control property as a condition to tax-exempt status. A DNR certification under section 427.1(19) functions as a type of permit and thus precludes imposition of additional requirements at the county level:

[A] situation that could give rise to inconsistent local laws is one where [the General Assembly] has conditioned pursuit of an activity upon compliance with certain requirements. *Any attempt by a local government to add to those requirements would conflict with the state law, because the local [action] would in effect prohibit what the state law permits.* Stated another way, the local [action] would prohibit an activity absent compliance with the additional requirements of local law, even though under state law the activity would be permitted because it complied with the

Mr. Ronald Bonnett

Page 5

requirements of state law. In this situation, the local [action] would be inconsistent with state law and preempted.

Goodell v. Humboldt County, 575 N.W.2d at 501 (emphasis added).

Second: Section 427.1(19) provides that pollution-control property “shall be exempt from taxation . . . upon compliance with the provisions of this subsection” Such mandatory, comprehensive language certainly does not suggest any additional input from or discretion on the part of counties. *Compare* Iowa Code § 427.1(19) *with* Iowa Code § 331.401(1)(i) (county supervisors “shall . . . [a]pprove or deny an application for a property tax exemption for impoundment structures, as provided in [section 427.1(20)]”). *See generally* Iowa Code § 4.1(30)(a) (unless otherwise defined, word “shall” in statutes imposes a duty). In addition, the General Assembly has expressed its desire for statewide regulation of pollution-control property *via* section 421.17(19), which provides that the Iowa Department of Finance and Revenue “shall . . . issue rules as are necessary . . . to provide for the uniform application of the exemptions provided in section 427.1 in all assessor jurisdictions in the state.”

III. Summary

County assessors do not have authority under county home rule to deny exemptions to taxpayers for pollution-control property when the DNR has certified their property as pollution-control property.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Kempkes", with a stylized, cursive script.

Bruce Kempkes
Assistant Attorney General

PUBLIC EMPLOYEES; GROUP INSURANCE: Continuance of group insurance for retirees under the age of sixty-five. Iowa Code §§ 509A.13, 509B.3(5), 509B.4(3) (2001). Retired public employees under the age of sixty-five who continue group insurance under Iowa Code section 509A.13 must be placed in the same risk pool as all other participants in the group plan for purposes of determining premiums. (Johnson to McCoy, State Senator, 5-14-02) #02-5-2

May 14, 2002

The Honorable Matt McCoy
State Senator
2421 E. Leach Avenue
Des Moines, IA 50320

Dear Senator McCoy:

You have requested an Attorney General's opinion on the interpretation of Iowa Code section 509A.13 (2001), which deals with continuation of group insurance for public employees who retire before the age of sixty-five. We have received information with your request indicating that certain retired municipal employees under the age of sixty-five have been allowed to continue their group health, dental, and prescription drug coverage at their own expense pursuant to section 509A.13. In the past, these retirees have paid substantially the same premiums as active employees in the group plan. According to your information, the municipality has now decided to place these retirees in a separate risk pool from active employees for purposes of computing premiums. This will cause the retirees' premiums for health and prescription drug insurance to more than double. Your specific question is whether placing retirees in a separate risk pool, thereby causing them to pay substantially higher premiums than active employees, is permissible under section 509A.13.

At the outset, we must caution you that we are not able to comment on whether any specific group insurance plan qualifies as "accident, health, or hospitalization insurance, or a medical plan" subject to the requirements of section 509A.13. This would require an analysis of the terms and conditions of the specific plan in question. Such a factual analysis is beyond the scope of an Attorney General's opinion. *See* 61 Iowa Admin. Code 1.5 (3) (c). We assume, however, for purposes of this opinion, that the group insurance plan or plans which are the subject of your request are covered by section 509A.13. On that basis, we will answer your specific question.

ANALYSIS

Iowa Code chapter 509A (2001) is entitled Group Insurance for Public Employees. Section 509A.13 provides in pertinent part:

If a governing body, a county board of supervisors, or a city council has procured for its employees accident, health, or hospitalization insurance, or a medical service plan, or has contracted with a health maintenance organization authorized to do business in this state, the governing body, county board of supervisors, or city council shall allow its employees who retired before attaining sixty-five years of age to continue participation in the group plan or under the group contract at the employee's own expense until the employee attains sixty-five years of age.

The statute does not address the question of whether retirees must be placed in the same risk pool as active employees for purposes of computing premiums for continued group coverage. Because of the lack of an express directive on this issue, it is necessary to engage in statutory construction to answer your question. *State v. McSorley*, 549 N.W.2d 807, 809 (Iowa 1996); *United Fire & Cas. Co. v. Acker*, 541 N.W.2d 517, 519 (Iowa 1995).

The primary purpose of statutory construction is to determine the intent of the legislature, which is gleaned from the words of the statute. *State v. McCoy*, 618 N.W.2d 324, 325 (Iowa 2000). Words of a statute should be given their common and ordinary meaning; reference to the dictionary is an acceptable manner of ascertaining this. *State v. Gant*, 597 N.W.2d 501, 505 (Iowa 1999). If there are statutes relating to the same subject or a related subject, they should also be considered to attempt to ensure a harmonious interpretation of all statutes. *Sup. Ct. Comm'n on Unauthorized Practice of Law v. A-1 Associates, Ltd.*, 623 N.W.2d 803, 807 (2001); *State v. Casey's General Stores*, 587 N.W.2d 599, 600 (Iowa 1998). Consideration must also be given to the underlying policies and purposes of the statute. *State v. Carpenter*, 616 N.W.2d 540, 542 (Iowa 2000).

The Language of Section 509A.13

In interpreting section 509A.13, the key language is that which gives the retired public employee the right "to continue participation in the group plan or the group coverage at the employee's own expense." The use of the word "continue" implies that participation in the group plan or group coverage will "remain unchanged." *Aberle v. Faribault Fire Dep't Relief Ass'n*, 41 N.W.2d 813, 817 (Minn. 1950). See Webster's Third New International Dictionary 493 (1993) ("continue" means "to be steadfast or constant in a course or activity: keep up or maintain . . . a particular condition, course, or series of actions."). In light of the ordinary and common meaning of the word "continue," the language of section 509A.13 suggests that the

terms and conditions of participating in the group plan, including the benefits and costs, will remain substantially the same for the employee when he retires. The word “continue” would not imply a substantial change in the terms or conditions of participation, nor would it imply placing the retired employee in a different risk pool with substantially higher premiums.

Section 509A.13 gives the retired public employee the right to continue participation in “*the* group plan or under *the* group coverage” which the employer “has procured for its employees.” (Emphasis added). This implies that the retired employee has the right to continue participation in the specific group insurance plan the employer has obtained for its employees, not just any group plan. See *Brooks v. Zabka*, 450 P. 2d 653, 654 (Colo. 1969) (In construing statute, definite article “the” particularizes the subject which it precedes and is a word of limitation as opposed to the indefinite or generalizing force of “a” or “an.”).

If retired public employees are placed in a separate risk pool which substantially increases their premiums, it is our opinion that they are not being allowed “to continue participation in the group plan” within the meaning of section 509A.13. Arguably, by being placed in a separate risk pool with higher premiums, the retired employees are not continuing in the same group plan they had when actively employed. However, even if retired employees technically remain in the same plan, entitled to the same benefits, an increase in premiums means less coverage for each premium dollar. In the example you provided us, the retired employees are receiving less than half the coverage for their premium dollar they received as active employees. This undermines the very essence of group insurance. “[T]he theoretical underpinning of [group] insurance is the fact that the inherent risk spreading . . . allows insurers to charge a smaller premium for the same coverage.” 1 Couch on Insurance 3d § 7:1, at 7-9 (2001). This office previously has recognized that one effect of chapter 509A is to allow the retired public employee to “obtain the benefit of a group rate, which is generally more favorable.” 1985 Iowa Op. Att’y Gen. 9 (#85-2-3).

The language of section 509A.13 stating that continued participation in group insurance must be “at the employee’s own expense” does not change this result. This language requires the retired employee to pay his entire premium, without any contribution by the employer. 1985 Iowa Op. Att’y Gen. 9, n. 2 (#85-2-3). We do not believe this language means that the retired employee must pay the expenses associated with his own individual risk rating, for that would be contrary to the purpose of group insurance discussed above.

Iowa Code Chapter 509B

It is helpful to consider the provisions of a related statute, Iowa Code chapter 509B, which is entitled Continuation and Conversion of Group Health Insurance. This statute provides for continued group insurance coverage for up to nine months for employees in the private and public sector whose employment has been terminated for any reason, and then addresses an employee’s right to convert the group policy to an individual policy upon expiration of the group

coverage. *See* Iowa Code §§ 509B.3 and 509B.4 (2001). The statute contains numerous requirements for group policies and individual policies subject to the chapter. The treatment of premiums is most informative.

For group policies, section 509B.3(5) provides:

An employee or member electing continuation shall pay . . .
*not more than the group rate otherwise due for the insurance being
continued under the group policy.* (Emphasis added).

Once the group policy is converted to an individual policy, section 509B.4(3) controls:

The premium for the converted policy shall be determined in
accordance with the insurer's table of *premium rates applicable to
the age and class risk of each person* to be covered under that
policy and to the type and amount of insurance provided.
(Emphasis added).

Chapter 509B requires that continuation of a group policy be at the group premium rate, and that premiums should be adjusted according to age and class risk only when the policy is converted to an individual policy. It seems reasonable to interpret chapter 509A in a similar manner, since that chapter also grants the right to continue group insurance to public employees. It would be incongruous to guarantee group insurance rates for continued group coverage under chapter 509B while allowing retired employees to be placed in a separate risk pool with substantially higher premiums for continued group coverage under chapter 509A.

The requirement that individuals who wish to continue group coverage be included in the group risk pool for purposes of computing premiums is consistent with the requirements of federal statutes. *See* Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), 29 U.S.C. § 1162(3)(a) (coverage must be made available at a cost of no more than 102% of the group rate, allowing a 2% increase for administrative expenses); Public Health Service Act, 42 U.S.C. § 300bb-2(3) (premium shall not exceed 102% of the group premium); 29 C.F.R. § 825.213 (e).¹

¹ The federal statutes contemplate a 2% increase in premiums for continuation of group insurance to cover increased costs of administration, but they clearly do not contemplate substantial increases in premiums caused by placing insureds in separate risk pools which deprive them of the benefits of group rates. We do not believe that section 509A.13, which allows retired employees to continue group insurance "at [their] own expense," prohibits similar adjustments for increased administrative costs incurred because employees have retired, provided that the retired employees are in the same risk pool as active employees for purposes of determining premiums.

The Underlying Policy and Purpose of Section 509A.13

We believe that one of the purposes of section 509A.13 is to ensure that retired employees who continue group insurance coverage will be able to enjoy the benefits of low group premiums. If they are placed in a separate risk pool and their premiums increase substantially, this would defeat the purpose of being part of a group plan. *See* 1985 Op. Att'y Gen. 9 (#85-2-3).

The policy considerations underlying such a statute were well explained by one court which had to decide whether dependents of a deceased employee, who had a statutory right to continue group coverage, were entitled to the group rate or whether they could be placed in a separate risk pool for purposes of determining premiums. The applicable statute did not address the question of premiums. The court stated:

The purpose of a group health insurance plan is to provide insurance protection at the lowest possible participant cost. The low participant cost is achieved by the efficiencies of administration inherent in issuing insurance to groups, and by the distribution of risk over the entire participating group.

. . . .

[I]f the Board creates a unique category of special risk for surviving spouses and dependents it substantially reduces, if not eliminates, the advantages of group insurance to those dependents in a manner which is not contemplated by the act. The statutes contemplate that spouses and dependents of deceased employees will be entitled to continue to participate in the insurance plan at the same average premium rate chargeable to the members of the pool of which their decedents were members. Otherwise the size of the dependents' class and the number of claims that can be expected from a group with its characteristics will raise their premium rate to such a level as to eviscerate the advantages that normally attend participation in a group insurance plan.

Nelson v. West Virginia Pub. Employees Ins. Bd., 300 S.E.2d 86, 89 (W.Va. 1982).

CONCLUSION

Retired employees under the age of sixty-five who continue group insurance under section 509A.13 must be placed in the same risk pool as all other participants in the group plan for purposes of determining premiums. The described alternative -- placing retired employees in

The Honorable Matt McCoy
Page 6

a separate risk pool and charging them substantially higher premiums -- is inconsistent with the language of the statute and defeats the purpose of group insurance, which is to allow people to obtain insurance coverage at low group rates. Moreover, interpreting section 509A.13 to require a single risk pool is consistent with chapter 509B, which requires group insurance to be continued at group rates and only allows premiums to be adjusted according to the age and risk class of the insured when the insured converts to individual insurance.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. W. Johnson", with a stylized flourish at the end.

DENNIS W. JOHNSON
Solicitor General

STATE OFFICERS AND DEPARTMENTS: Iowa Department of Natural Resources; validity of rules promulgated by Environmental Protection Commission on beverage container deposits. Iowa Code §§ 455C.1, 455C.2, 455C.3, 455C.4, 455C.6 (2001); 567 Iowa Admin. Code 107.4(3)(d), 107.4(4)(a), 107.9(2), 107.9(3), 107.14. The Commission did not exceed its authority in promulgating a new administrative rule relating to the Department's approval of redemption centers. The Commission exceeded its authority in promulgating new administrative rules relating to distributor pick up of empty beverage containers from dealer agents, distributor pick up of empty beverage containers from redemption centers, and distributor payment to dealer agents. (Kempkes to Rittmer, Chair, Administrative Rules Review Committee, 7-8-02)
#02-7-2

July 8, 2002

The Honorable Sheldon Rittmer, Chair
Administrative Rules Review Committee
Iowa General Assembly
L-O-C-A-L

Dear Chairman Rittmer:

The Beverage Container Control Act became effective on July 1, 1979, and purported to control litter along Iowa's roadways in Iowa. The Act implements a series of deliveries and payments. *See* "Issue Review: Overview of the Beverage Container Control Act," Iowa Legis. Fiscal Bureau (Dec. 6, 1999). A distributor of beer, soda pop, liquor, or wine delivers the product to a dealer and charges a five-cent deposit for each container. The dealer charges a customer a five-cent bottle deposit per container at the point of sale. The customer returns the empty container to the dealer, who refunds the deposit. The distributor picks up the empty container and pays the dealer six cents per container: five for the original deposit and one for handling. If the customer does not return the empty container, the distributor retains the unredeemed deposit.

You have asked for an opinion on some recent amendments to administrative rules promulgated by the Environmental Protection Commission to implement the Act, now codified at Iowa Code chapter 455C (2001). *See generally* Vol. 24 Iowa Admin. Bull. No. 21 (April 17, 2002). You ask whether these rules -- 567 Iowa Admin. Code 107.4(3)(d), 107.4(4)(a), 107.9(2), 107.9(3), 107.14 -- exceed the Commission's statutory authority.

The Commission has authority to promulgate rules "necessary to carry out the provisions of" the Act, Iowa Code § 455C.9, and to provide "for the effective administration of" the Act, Iowa Code § 455A.6(6)(a). The administrative rules will survive judicial review if they do not exceed the agency's statutory authority. *See* Iowa Code § 17A.19(10)(b). In 1981, we explained:

Agency rules must be consistent with the constitution and authorized by the statute creating the agency, and cannot alter the plain provisions of the statute. Phrased differently, administrative

rules must be reasonable and consistent with legislative enactments.

1982 Iowa Op. Att'y Gen. 93, 95-96 (citations omitted). More recently, we explained:

A fundamental principle of government prohibits an administrative body . . . from promulgating rules extending beyond the legislative grant of authority (known as "*ultra vires* rules") or rules conflicting with statutory provisions. Thus, to the extent that an administrative rule conflicts with [a statute], it would have no legal effect.

1998 Iowa Op. Att'y Gen. ____ (#97-11-1) (citations omitted).

Approval of redemption centers

You question the validity of new rules 107.4(3)(d) and 107.4(4)(a),¹ promulgated under

¹107.4(3): An application for approval of a redemption center . . . shall contain the following information:

- a. Name, address and telephone number of the person or persons responsible for the establishment and operation of the redemption center;
- b. The address and telephone number, if in service, of the redemption center;
- c. The kinds, sizes, and brand names of the beverage containers that will be accepted at the redemption center;
- d. The names and addresses of the dealers, if any, to be served by the redemption center;
- e. The names and addresses of the distributors whose beverage containers will be redeemed;
- f. The hours the redemption center is to be open;
- g. Whether metal, glass or plastic beverage containers will be crushed or broken and, if so, the written consent of the distributor or manufacturer to the crushing or breaking;
- h. Reasons why the dealer and redemption center believe that the center will provide a convenient service to consumers.

A redemption center shall be approved if it accepts all major brands of beverage containers and is open to the public at least 20 hours per week, 4 hours of which shall be on Saturday, Sunday, or a combination thereof.

107.4(4): Exempt dealers.

a. A dealer may request to be exempt from accepting returned containers if it has an agreement with an approved redemption center. The request . . . shall include:

- (1) Name and address of the dealer;
- (2) Name and address of the redemption center;

section 455C.6, which relate to the approval of a redemption center by the Iowa Department of Natural Resources (DNR). A “redemption center” is a facility at which consumers may return empty containers and receive payment for the refund value of the empty containers. Iowa Code § 455C.1(13). In the past, an application by a redemption center for DNR approval would have included the names and addresses of “dealers” with which an agreement had been executed. A dealer means “any person who engages in the sale of beverages in beverage containers to a consumer.” Iowa Code § 455C.1(5). The agreement with an approved redemption center would exempt a dealer from the obligation to accept empty containers: consumers would return empty containers to the redemption center rather than to the dealer.

The Commission’s new rules change this prior practice by allowing a redemption center to be approved by the DNR without submission of any agreement between the redemption center and any dealers in advance of approval. Instead, the redemption center may identify the dealers -- if any -- to be served by the redemption center. Dealers, in turn, must submit a separate application to be exempt from accepting empty containers and the application must include an agreement with a redemption center.

The Act provides for DNR approval of redemption centers:

An application for approval of a redemption center shall be filed with the [DNR]. The application shall state the name and address of the person responsible for the establishment and operation of the redemption center, the kind and brand names of the beverage containers which will be accepted at the redemption center, and *the names and addresses of the dealers to be served by the redemption center*. The application shall contain such other information as the [DNR] director may reasonably require.

Iowa Code § 455C.6(2) (emphasis added). The Act further authorizes dealers to refuse to accept empty containers under the following circumstances:

A dealer may refuse to accept and to pay the refund value of any empty beverage container *if the place of business of the*

-
- (3) Distance from the redemption center;
 - (4) Reasons why the dealer believes the redemption center will provide a convenient service to its customers;
 - (5) Kind, size, and brand names of beverages sold by the dealer; and
 - (6) Written consent of the approved redemption center.

dealer and the kind and brand of empty beverage containers are included in an order of the department approving a redemption center under section 455C.6.

Iowa Code § 455C.4(2) (emphasis added). Under this statutory scheme, a dealer must be included in an order approving a redemption center to exempt the dealer from the obligation to accept empty containers.

Evaluating the new rules in light of these statutes, we cannot conclude the rules are *ultra vires*. The Act requires the names and addresses of the dealers “to be served” by the redemption centers. See Iowa Code § 455C.6(2). The new rules allow -- but do not require -- agreements with dealers, so that redemption centers may operate independently. Eliminating these agreements as a requirement for approval is not inconsistent with the Act, which requires the names and addresses of dealers “to be served.” The Act does not require that dealers actually be served. If no agreements are in place, no names and addresses need to be provided.

Nothing in the new rules violates the Act’s requirement that DNR orders of approval include “the place of business of the dealer” to exempt a dealer from the responsibility to accept empty containers. See Iowa Code § 455C.4(2). New rule 107.4(4) requires a dealer to submit certain information to the DNR in order to claim this exemption: (1) name and address of the dealer; (2) name and address of the redemption center; (3) distance from the redemption center; (4) reasons why the dealer believes the redemption center will provide a convenient service to its customers; (5) kind, size, and brand names of beverages sold by the dealer; and (6) written consent of the approved redemption center. See n. 1, *ante*. The Commission’s broad authority to promulgate rules “necessary to carry out the provisions of” the Act and to provide “for the effective administration of” the Act permit rules soliciting this information from dealers. See Iowa Code §§ 455C.9, 455A.6(6)(a). When the redemption center has been approved without an agreement with a dealer, but the dealer later applies for exemption with an agreement with the redemption center executed after approval, the DNR must amend the order approving the redemption center to add the necessary information.

Distributor pick up from dealer agents

You question the validity of new rule 107.9(2)², promulgated under section 455C.3, which relates to the responsibility of distributors to pick up empties from dealer agents. A “distributor” means any person who engages in the sale of beverages in containers to a dealer in this state, including any manufacturer, Iowa Code § 455C.1(9), and a “dealer agent” means a

²107.9(2): A distributor shall accept and pick up all empty beverage containers of the kind, size and brand sold by the distributor from a dealer agent located in the distributor’s service area at least as often as the distributor delivers to the largest dealer served by the dealer agent, but may not be required to pick up the containers more than once per week.

person who solicits or picks up empty containers from a dealer for the purpose of returning them to a distributor or manufacturer, Iowa Code § 455C.1(6).

The Act provides that a distributor shall accept *and pick up* empty containers from *a dealer served by the distributor or a redemption center* for a dealer served by the distributor at least weekly. See Iowa Code § 455C.3(2). The Act also provides that a distributor shall *accept* empty containers from *a dealer agent*. See Iowa Code § 455C.3(4). New rule 107.9(2) provides that a distributor shall accept *and pick up* empty containers from *a dealer agent* at least as often as the distributor delivers to the largest dealer served by the dealer agent, but may not be required to pick them up more than once per week.

When the General Assembly originally drafted Chapter 455C in 1978, no provision related to dealer agents. See 1978 Iowa Acts, 67th G.A., ch. 1162. Ten years later, when the General Assembly amended chapter 455C, it included provisions relating to dealer agents. See 1988 Iowa Acts, 72nd G.A., ch. 1200. At that time, however, the General Assembly did not amend chapter 455C to require pick up of empty containers from dealer agents. This omission is significant:

Generally, when examining statutes we, like courts, are guided by the maxim *expressio unius est exclusio alterius*, or expression of one thing is the exclusion of another. This expresses the well-established rules of statutory construction that legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.

2000 Iowa Op. Att’y Gen. ____ n. 5 (#00-9-1) (citations and quotation marks omitted). The application of this principle would mean the General Assembly presumably intended to treat dealers and dealer agents differently in terms of distributor pick up.

Comments submitted to the Commission suggest that subsection 455C.3(2) only purports to impose a time deadline for distributors; that placing transportation costs upon dealer agents will put them out of business, that distributors for years have picked up empty containers from dealer agents without objection, and that the General Assembly would have no reason to distinguish between dealers and redemption centers on the one hand and dealer agents on the other. An agency’s longstanding interpretation of a statute, however, “[cannot] create a statutory requirement where none exists.” *State ex rel. Iowa Dep’t of Transp. v. General Elec. Credit Corp.*, 448 N.W.2d 335, 341 (Iowa 1989). Moreover, it remains clear that subsection 455C.3(2) does not expressly include dealer agents within its scope and that the General Assembly declined to amend subsection 455C.3(2) to place dealer agents on the same footing as dealers and redemption centers. We can only examine subsection 455C.3(2) as written, not as the General Assembly might or should have written it, *see* Iowa R. App. P. 14(6)(m), and, like a court, we

must defer to the General Assembly on the wisdom of its legislation, *see* 2000 Iowa Op. Att’y Gen. ___ n. 1 (#00-12-2); 1986 Iowa Op. Att’y Gen. 132 (#86-12-5(L)).

Moreover, we see nothing in the Act that would lead us to conclude that the General Assembly impliedly intended to include dealer agents within the scope of subsection 455C.3(2). Indeed, we find evidence to suggest that the General Assembly consciously decided to exclude them from the scope of section 455C.3(2) through its definition of “dealer agent” in subsection 455C.1(6): “a person who solicits or pick ups empty beverage containers from a dealer *for the purpose of returning the empty beverage containers to a distributor . . .*” (emphasis added).

We therefore conclude that new rule 107.9(2), which requires a distributor to pick up empty containers from dealer agents, contravenes section 455C.3(4). Nevertheless, if a distributor so chooses, a distributor may continue to pick up empty beverage containers from dealer agents.

Distributor pick up from redemption centers

You question the validity of new rule 107.9(3)³, promulgated under section 455C.3, which relates to the responsibility of distributors to pick up empty containers from redemption centers. This rule requires distributors to pick up empty containers “of the kind, size and brand sold by the distributor from a redemption center located in the distributor’s service area.” 567 Iowa Admin. Code 107.9(3).

The Act provides that a distributor shall accept and pick up empty containers from a redemption center *for a dealer served by the distributor*. *See* Iowa Code § 455C.3(2). Rule 107.9(3), by contrast, provides that a distributor shall accept and pick up empty containers from a redemption center *located in the distributor’s service area*. This rule requires a distributor to accept and pick up empty containers from all redemption centers, whether served by the distributor or not, within its service area. This requirement contravenes the Act’s express language that a distributor shall accept and pick up empty containers from “a redemption center *for a dealer served by the distributor*.” Iowa Code § 455C.3(2) (emphasis added).

In a 1988 opinion, we recognized that some unapproved redemption centers had entered into contracts with dealers and acted as pick-up services for them:

³107.9(3): A distributor shall accept and pick up all empty beverage containers of the kind, size and brand sold by the distributor from a redemption center located in the distributor’s service area at least as often as the distributor delivers to the largest dealer within five miles of the redemption center, but may not be required to pick up the containers more than once per week.

That is, [unapproved redemption centers] go out to dealers and pick up all their empty beverage containers. Distributors then deal with one unapproved redemption center rather than multiple dealers. Under those facts an unapproved redemption center could arguably be a “redemption center for a dealer” under [section] 455C.3(2). Thus we think *there could be situations* in which distributors would be required to accept and pick up empty containers from unapproved redemption centers and pay the refund value plus the one-cent handling fee.

1988 Iowa Op. Att’y Gen. 92 (#88-5-3(L)) (emphasis added).

It has been suggested that distributors have the best transportation capacity to pick up empty containers, that distributors sit in the best position to recoup the costs of transportation, and that any other interpretation of subsection 455C.3(2) will, as a practical matter, put virtually all redemption centers out of business. Like an agency’s longstanding interpretation of a statute, however, such policy matters “[cannot] create a statutory requirement where none exists.” *State ex rel. Iowa Dep’t of Transp. v. General Elec. Credit Corp.*, 448 N.W.2d at 341.

We therefore conclude that new rule 107.9(3), which requires a distributor to pick up empty containers from redemption centers located within its service area, contravenes section 455C.3(2). Nevertheless, if a distributor so chooses, it may continue to pick them up from redemption centers located within its service area.

Payment of refund values and handling fees

You question the validity of new rule 107.14⁴, promulgated under section 455C.3, which relates to the responsibility of distributors to pick up and pay refund values of empty containers. This rule requires a distributor to “issue to a dealer payment of the refund value and handling fee” and to “issue to a redemption center or dealer agent payment of the refund value and handling fee within one week of pickup unless otherwise agreed to by both the distributor and the redemption center.”

The Act sets forth the duty of distributors to accept and pick up empty containers: subsection 455C.3(2) provides that a distributor “shall accept and pick up from a dealer . . . or a

⁴107.14: Payment of refund value. A distributor shall issue to a dealer payment of the refund value and handling fee within one week following pickup or when the dealer pays the distributor for the beverages, if less frequently than weekly.

A distributor shall issue to a redemption center or dealer agent payment of the refund value and handling fee within one week of pickup unless otherwise agreed to by both the distributor and the redemption center.

redemption center . . . any empty beverage container . . . and shall pay . . . the refund value of a beverage container and the reimbursement . . . to *a dealer or a redemption center* within one week following pickup of the containers . . . or when the dealer or redemption center normally pays the distributor . . . if less frequent than weekly.” Subsection 455C.3(4) further provides that a distributor “shall accept from a dealer agent any empty beverage container of the kind, size and brand sold by the distributor and which was picked up by the dealer agent from a dealer . . . and shall pay the dealer agent the refund value of the empty beverage container and the reimbursement.” Subsection 455C.3(4), unlike subsection 455C.3(2), does not identify when payment shall occur.

Juxtaposed to these statutes, new rule 107.14 provides that a distributor shall pay the refund value of empty containers to a redemption center *or a dealer agent* within one week of pick up unless otherwise agreed to by both the distributor and the redemption center. Because a distributor under section 455C.3 is required to accept, but is not required to pick up, empty containers from a dealer agent, new rule 107.9(2) contravenes subsection 455C.3(4). A rule requiring distributor payment to a dealer agent “within one week after pick up” rests upon the unauthorized premise that the distributor must “pick up” empty containers from a dealer agent.

In our view the rule would be within the Commission’s rule-making authority with only minor changes. The rule could require payment of the refund value and handling fee “within one week” after the distributor accepts empty containers from a dealer agent “unless otherwise agreed to by both the distributor and the redemption center” and, if the distributor voluntarily picks up the empty containers from a dealer agent, the rule could require payment of the refund value and handling fee “within one week of pick up unless otherwise agreed to by both the distributor and the redemption center.”

In summary, the Commission did not exceed its statutory authority in promulgating rule 107.4(3)(d), but exceeded its statutory authority in promulgating rules 107.4(4)(a), 107.9(2), 107.9(3) and 107.14.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Kempkes", with a stylized, cursive script.

Bruce Kempkes
Assistant Attorney General

GAMBLING; ADMINISTRATIVE RULES: Video gambling devices at racetrack enclosures. Iowa Code §§ 99F.1, 99F.4, 99F.17A (2001). The Iowa Racing and Gaming Commission rule authorizing video slot machines at race track enclosures, 491 Iowa Admin. Code 11.5 is consistent with Iowa Code section 99F.1(9), and is within the Commission's rulemaking authority pursuant to that section and section 99F.4. (Davis to Raecker, State Representative, 9-10-02) #02-9-1

September 10, 2002

The Honorable J. Scott Raecker
State Representative
9011 Iltis Drive
Urbandale, Iowa 50322

Dear Representative Raecker:

You have requested an opinion of the Attorney General on the following questions:

- 1) Whether the language of Iowa Code § 99F.1(9) prohibits all forms of video gambling devices at a racetrack enclosure?
- 2) Whether the Iowa Racing and Gaming Commission administrative rule 11.5 was properly promulgated and within the Commission's statutory authority?

For the reasons set out below, we conclude that the Commission's rule found at 491 IAC 11.5 was properly promulgated, is within the Commission's statutory authority, and represents an appropriate interpretation of the statute. These conclusions are based upon a review of relevant sections of the Iowa Code, prior appellate court decisions concerning slot machines, prior opinions of the Attorney General concerning slot machines and electronic gaming devices, and the legislative history of a 1994 amendment to Iowa Code chapter 99F.

Iowa Code chapter 99F authorizes the use of gambling games at racetrack enclosures and excursion gambling boats. However, the legislation distinguishes between the types of gambling devices that can be used at racetracks versus the devices that can be used on gambling boats. The distinction is set forth in the definitions section as follows: "'*Gambling game*' means any game of chance authorized by commission. However, for racetrack enclosures, '*gambling game*' does not include table games of chance or video machines. '*Gambling game*' does not include sports betting." Iowa Code § 99F.1(9) (2001). The legislature has not defined "video machines" in the statute.

The Iowa Racing and Gaming Commission has broad rulemaking authority to approve gambling games pursuant to section 99F.1(9) and section 99F.4(3) (providing authority to adopt standards under which gambling boat operations shall be held). Pursuant to its rulemaking authority, the commission has adopted rules governing the types of gambling games that may be operated at licensed race tracks and gambling boats. The current version of the rule pertinent to your request is as follows:

11.5 Gambling games authorized.

11.5(1) Dice, craps, roulette, twenty-one (blackjack), big six-roulette, red dog, baccarat, and poker are authorized as table games.

11.5(2) Slot machine, video poker, and all other video games of chance, both progressive and nonprogressive, shall be allowed as slot machine games, subject to the administrator's approval of individual slot machine prototypes and game variations. For racetrack enclosures, "video machines" as used in Iowa Code § 99F.1(9) shall mean video keno and any video machine game version of a table or card game, including but not limited to those listed in subrule 11.5(1).

491 Iowa Admin. Code 11.5(1), 11.5(2).

Section 99F.1(9) was adopted pursuant to a 1994 bill which "allowed race track facilities to operate expanded, casino-style gaming such as slot machines." In Re National Cattle Congress, 179 B.R. 588, 591 (Bankr. N.D. Iowa 1995); see 1994 Iowa Acts, 75th G.A., ch. 1021. This bill resulted in significant changes to both pari-mutuel wagering and river boat gambling. In particular, the 1994 legislation allows pari-mutuel race tracks to begin operating some forms of gambling games. The bill was promoted as specifically allowing race tracks to operate slot machines, and there is no dispute that the language accomplishes that purpose. However, section 99F.1(9), on its terms, does not specifically mention "slot machines," and the term "slot machines" is not otherwise defined by the statute.

The void in statutory definitions creates ambiguity as to the meaning of the term "video machine," which has no common meaning under Iowa law and is not defined elsewhere in the Iowa Code. Further, the matter is complicated by the indirect manner in which the legislature authorized the operation of slot machines, and the lack of definition of "slot machine." Notwithstanding the fact that the Legislature failed to define the terms "video machine" or "slot machine," some guidance as to the meaning of these terms may be found in the history of gambling in Iowa, relevant case law, prior opinions of the Attorney General, and the legislative history of the 1994 legislation.

Prior to 1972, nearly all gambling was outlawed in Iowa. See, e.g., Iowa Code chapter 725. In 1972, Iowa voters amended the Iowa Constitution to permit social gambling and in 1973

the Iowa General Assembly created permissible forms of social and charitable gambling. Iowa Const. amend. 34 (repealing Iowa Const. art. III, § 28); 1973 Iowa Acts, 65th G.A., ch. 153; see also Iowa Code chapter 99B.¹ All other permissible forms of gambling were statutorily created thereafter. Unlike other states which have narrowly legislated permissible forms of gambling, Iowa has liberally authorized multiple forms of gambling, namely: river boat gambling; parimutuel wagering; a state run lottery; Native American gambling; social and charitable gambling; and certain permissible forms of sports betting in places where beer and liquor are sold.

As enacted, Iowa Code chapter 99B authorized games of skill, games of chance, excluding slot machines, and also authorized the permissible use of mechanical or electronic amusement devices. See Iowa Code §§ 99B.1(14) and (15), 99B.7, and 99B.10 (1975). Iowa Code chapter 99B in its original form expressly excluded slot machines from the forms of permissible mechanical and electronic devices but lacked a definition for the term “slot machine.” Iowa Code § 99B.1(2) (1975). In addition, at the time Iowa Code chapter 99B was enacted, Iowa Code chapter 726, now chapter 725, prohibited the possession of certain specified gambling devices, including slot machines, but also lacked a definition for the term “slot machine.” See Iowa Code § 726.5 (1973). Similarly, Iowa Code chapter 99A, in authorizing gambling devices, merely cited back to Iowa Code chapter 726 without defining the term “slot machine.” See Iowa Code § 99A.11 (1975). Thus, even though Iowa Code Chapter 99B created permissible forms of social and charitable gambling and uses of mechanical or electronic devices, the Iowa Code remained silent as to the definition of the term “slot machine.”

In the first case involving permissible forms of gambling under Iowa Code chapter 99B, the Iowa Supreme Court held that casino type devices such as roulette, blackjack, and craps could lawfully be used by a qualified organization for purposes of conducting gambling games. Chwirka v. Audino, 260 N.W.2d 279, 283 (Iowa 1977). Following the Chwirka case, this office opined that the term “slot machine,” as used in Iowa Code chapter 99B, was not intended to cover the entire field of coin operated gaming devices. Rather, this office reasoned that the legislature intended it to cover only the traditional “one-armed bandit.” 1980 Iowa Op. Att’y

¹ The impetus for the constitutional amendment and subsequent legislation was the “bingo raids” of 1971 and 1972, during which bingo at a Northeast Iowa Catholic Church and carnival games at the Iowa state fair were shut down. Iowa’s actions received national media attention and accounts of these events may be found in The New York Times, January 24, 1975 at 15, col. 1; and “Fat City Iowa,” Newsweek, April 28, 1975, at 10. The 1973 legislative amendments creating certain types of permissible forms of social gambling also resulted in reports that Iowa had become a haven for gamblers and it was estimated that the new gambling industry handled an estimated \$37,000,000 in 1974. The New York Times, January 24, 1975, at 15, col. 1.

Gen. 544 (#79-12-24(L)).² This opinion also concluded that a qualified organization could legally use any coin operated devices so long as that device was not a “one-armed bandit” type of slot machine.

The “one armed bandit” definition of slot machine was again referenced in 1980 Iowa Op. Att’y Gen. 626 (#80-3-12). This opinion reviewed questions involving electronic gaming devices such as “video blackjack” and “21 machines.” In resolving the questions presented, the opinion concluded that a qualified organization could use such devices as long as the organization complied with all of the enumerated restrictions of Iowa Code § 99B.10. This opinion reasoned that “for a qualified organization licensee, it is the manner of conducting rather than the type of game conducted which is crucial.” 1980 Iowa Op. Att’y. Gen. 626, 628.

The Iowa Supreme Court was called upon to craft a definition for the term slot machine in 1993. The Court noted that the term was not defined in the Code and determined that the term “embraces any coin-operated amusement device designed to facilitate gambling.” In the Matter of Property Seized from Brown, 501 N.W.2d 472, 473 (1993). See also H & Z Vending v. Iowa Department of Inspections and Appeals, 593 N.W.2d 168, 170 (Iowa 1999).³

The brief history of gambling, case law, and prior opinions of this office outlined above establishes that the term slot machine has been construed to be inclusive of the now outdated “one-armed bandit” machine and “any coin-operated amusement device designed to facilitate gambling.” The Commission rule at issue here is consistent with the aforementioned case law and opinions of this office.

² In a criminal case involving prosecution for the willful failure to pay an occupational tax on certain coin-operated, slot machine gaming devices the term “one-armed bandit” was described as a machine in “which the insertion of a coin releases a lever or handle which, in turn, when pulled activates a series of spring-driven drums or reels with various insignia painted thereon, usually bells and fruit, and which automatically dispense coins to a player when certain combinations of these insignia are aligned.” United States v. Korpan, 354 U.S. 271, 274 (1957).

³ The H and Z Vending Court specifically reviewed and referenced an applicable administrative regulation promulgated by the Iowa Department of Inspections and Appeals. H & Z Vending, 593 N.W.2d at 170. This rule defines the term “slot machine” as any “mechanical, electronic, or video gambling device into which a player deposits coins, tokens, or currency and from which certain credits, tickets, tokens, or coins are paid out when a particular, random configuration of symbols appear on the reels, simulated reels, or screen of the device.” 481 Iowa Admin. Code 104.1. This definition, promulgated by the agency which serves as the umbrella agency for the Iowa Racing and Gaming Commission, is consistent with the rule promulgated by the Commission.

Additional guidance as to the intended definition of the term video machine may also be found in the legislative history of the 1994 amendments. As introduced, House File 2179 merely provided for a reduction in the number of days of live racing at racetrack enclosures. Several amendments to that bill were later introduced, including an amendment to permit gambling games at racetrack enclosures and an amendment to create a new form of permissible gambling using special types of video lottery machines which simulated the play of table games of chance such as black jack and keno. These amendments defined this new form of video machine as an electronic video game which would play or simulate the play of video poker, keno, and blackjack.

As House File 2179 progressed, the new form of video gambling was deleted, as was the definition of what constituted a video machine. However, the language which became Iowa Code § 99F.1(9) was retained and passed. 1994 Iowa Acts, ch. 1021, § 8. This history and the express prohibition regarding table games of chance strongly suggest that in limiting the permissible gambling games at racetrack enclosures, the Legislature was concerned about ensuring a prohibition on table games of chance or video games which simulated table games of chance.

Following the enactment of Iowa Code section 99F.1(9), the Iowa Racing and Gaming Commission was presented with a Petition for Rulemaking filed by the Racing Association of Central Iowa urging the Commission to promulgate a rule authorizing video poker, video blackjack and other similar video games of chance at racetrack enclosures. The Commission's consideration of this Petition included statements from Representative Dennis Renaud indicating that the legislature intended that tracks be permitted the same types of machines as the boats and further indicating that the primary concern had historically been a prohibition against video machines which simulated table games of chance. See Minutes of the Racing and Gaming Commission, June 20, 21, 1994. Following further discussion of the Petition, the Racing Commission denied the Petition and directed staff to draft a rule defining the term video machine "to include video blackjack and video poker." Id.

The Commission then promulgated a rule defining video machine to include any video poker, video black jack, video keno, or similar games requiring a decision on the part of the player after a wager has been made but prior to completing the game. See 491 Iowa Admin. Code 25.11(2)(b) (effective 12/14/94); XVII Iowa Admin. Bull. 765, ARC 5214A (Nov. 9, 1994). This rule continued in operation until the Commission moved to amend the rule in November 1999. XXII Iowa Admin. Bull. 804, 806, ARC 9488A (Nov. 17, 1999). At that time, the Commission filed a Notice of Intended Action regarding its then current rule 25.11(2), now found at 491 Iowa Admin. Code 11.5(2), about which your questions pertain. The Commission's proposed amendment defined the term video machine to mean video keno and any video version of a table or card game of chance, including but not limited to those listed in subrule 11.5(1). Id.

Noting that slot machine technology had changed significantly since the 1994 amendments, and that video screens were now used to display the old multi-reel insignia, the Administrative Rules Review Committee referred the Commission's proposed rule to the Legislature for review. See Memo from Joe Royce, Administrative Rules Review Committee Staff to the Honorable Mary Kramer, President of the Iowa Senate, dated December 16, 1999. The Legislature took no action on the Commission's proposed rule and the rule became effective March 15, 2000.

The void in statutory definitions creates ambiguity as to the meaning of the term "video machine," which has no common meaning under Iowa law and is not defined elsewhere in the Iowa Code. Thus, it is necessary to interpret the statute and to review the legislative history to determine legislative intent. See State v. Baker, 293 N.W.2d 568, 572 (Iowa 1980); Maguire v. Fulton, 179 N.W.2d 508, 510 (Iowa 1970). In construing a statute, other pertinent statutes and other controlling legal authority may be considered. Maguire, 179 N.W.2d at 510. The provisions of the Iowa Code are to be liberally construed so as accomplish the purpose of the act. Iowa Code § 4.2 (2001). In addition, statutes should be accorded a logical, sensible construction which give harmonious meaning and accomplishes legislative purposes. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 188 (Iowa 1980).

Additionally, Iowa Code chapter 17A provides that a reviewing court "[s]hall give appropriate deference to the view of the agency with respect to particular matters that have been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(11) (2001). Iowa Code sections 99F.4 and 99F.17A provide the Iowa Racing and Gaming Commission with express authority to approve all gambling games prior to being placed in operation and sole jurisdiction over racing and gaming in Iowa. Accordingly, 491 Iowa Admin. Code 11.5, creating a definition for the term "video machine," constitutes a valid exercise of statutory rulemaking authority and represents the agency's interpretation of a matter entrusted to the agency by the legislature. See Dubuque Casino Belle, Inc. v. Blair, 562 N.W.2d 605, 606 (Iowa 1997), citing Staceyville Community Nursing Home v. Department of Inspections and Appeals, 528 N.W.2d 557, 559 (Iowa 1995).

Administrative rules which contravene statutory authority are invalid. Dunlap Care Center v. Iowa Department of Social Services, 353 N.W.2d 389, 397 (Iowa 1984). In analyzing whether a particular rule contravenes statutory provisions or exceeds an agency's statutory authority, courts apply the "rational agency test." Dunlap Care Center, 353 N.W.2d at 397. "A rule is within the agency's authority if a rational agency could conclude that the rule is within the statutory mandate." Id.; see also Loftis v. Iowa Dept. of Agriculture and Land Stewardship, 460 N.W.2d 868, 872 (Iowa App. 1990).

Using the rational agency test, Commission rule 11.5 represents a rational response to the legislature's prohibition of video machines at race track enclosures. There is no practical difference between a traditional reel-based slot machine and a video machine that depicts a

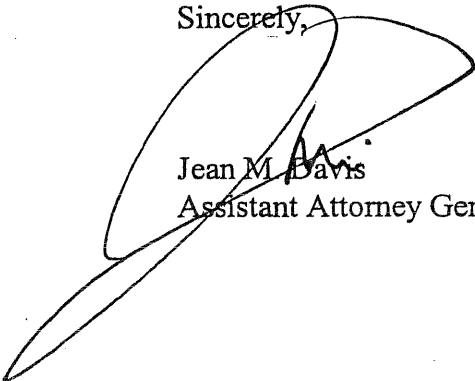
Representative J. Scott Raecker

Page 7

traditional reel-based slot machine. The games are the same. On the other hand, the Commission has distinguished video games that depict black jack, poker, and other traditional table games on the basis that the legislature clearly intended to exclude table games at race tracks. The prohibition against video machines has been rationally interpreted to prevent race tracks from attempting to offer traditional table games through a video means.

Upon review of relevant statutory provisions and legislative history, we conclude that the Iowa Racing and Gaming Commission rule authorizing video slot machines at race track enclosures, 491 Iowa Admin. Code 11.5, is consistent with Iowa Code section 99F.1(9), and is within the Commission's rulemaking authority pursuant to that section and section 99F.4.

Sincerely,



Jean M. Davis
Assistant Attorney General

PROFESSIONAL LICENSING BOARDS; CONSTITUTIONAL LAW: Validity of administrative rule adopted by the Board of Dental Examiners. Iowa Const. art I, § 7, Iowa Code §§ 153.34, 272C.10 (2001). 650 Iowa Admin. Code subrule 27.7(8) is designed as a restriction on commercial speech. Whether the rule infringes upon a dentist's free speech rights largely rests on resolution of the factual question of whether the restricted speech is false, deceptive, or misleading. An Attorney General's opinion is not the proper forum in which to weigh the strength of competing views on whether the removal of restorations from nonallergic patients may free the body of toxic substances. Having codified a specific standard of care, the Dental Board has the corresponding responsibility to monitor continued support for its position. Dentists do not have a free speech right to practice incompetent dentistry or recommend to prospective or current patients treatment regimens which are deceptive or which fall substantially below an acceptable standard of care. Dentists do have a free speech right to voice a personal opinion and to in good faith counsel patients free of unwarranted governmental intervention. The Dental Board must be cautious in the application of this or a similar rule to avoid encapturing fully-protected speech. (Griebel to Rittmer, State Senator, 12-10-02) #02-12-1

December 10, 2002

The Honorable Sheldon Rittmer
State Senator and Chair
Administrative Rules Review Committee
Iowa General Assembly
State Capitol
LOCAL

Dear Senator Rittmer:

On behalf of the Administrative Rules Review Committee, you have requested an opinion of the Attorney General on the constitutionality of an Iowa Board of Dental Examiners' administrative rule. Subrule 27.7(8), which appears within the Dental Board's rules on standards of practice, dental ethics, and unprofessional conduct, provides:

Recommending removal of restorations or removing said restorations from the nonallergic patient for the alleged purpose of removing toxic substances from the body, when such activity is initiated by the dentist, is an improper and unacceptable treatment regimen.

650 Iowa Admin. Code 27.7(8). Opponents of the rule claim that it improperly imposes a singular viewpoint on a dentist's practice and infringes on a dentist's free speech right to express a personal opinion. The Board defends the rule as a scientifically-based standard of care in the practice of dentistry and a permissible restriction on commercial speech which is false or misleading and therefore not protected.

You ask whether the Dental Board's rule infringes on a dentist's state constitutional right to liberty of speech:

Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech.

Iowa Const. art. I, § 7 (1857). *Compare id. with* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech").

History of the Dental Board's Rule

The Board of Dental Examiners "is a professional licensing board created by statute and charged with the responsibility of regulating the practice of dentistry in Iowa to insure that the public health, safety, and welfare are protected." Board of Dental Examiners v. Hufford, 461 N.W.2d 194, 196 (Iowa 1990), *citing*, Iowa Code chapters 147, 153 and 258A [now 272C]. The Dental Board, comprised of five licensed dentists, two licensed dental hygienists, and two public members, is granted broad authority to initiate disciplinary investigations, conduct disciplinary hearings, impose discipline, and promulgate rules as necessary to protect the public interest and regulate the practice of dentistry in Iowa. Iowa Code §§ 147.14(4), 147.76, 153.33 - .35, 272C.3 - .6 and 272C.10 (2001). Of particular relevance to the question you pose, the Dental Board is empowered to adopt rules regarding and to discipline dentists based on one or more of the following practices:

- (1) Professional incompetency. Iowa Code § 272C.10(2).
- (2) Knowingly making misleading, deceptive, untrue or fraudulent representations in the practice of the profession or engaging in unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established. Iowa Code § 272C.10(3).
- (3) Fraud in representation as to skill or ability. Iowa Code §§ 153.34(3) and 272C.10(6).
- (4) Use of untruthful or improbable statements in advertisements. Iowa Code § 272C.10(7).
- (5) Willful and gross malpractice or willful and gross neglect in the practice of dentistry. Iowa Code § 153.34(2).
- (6) Unprofessional conduct in the practice of dentistry. Iowa Code § 153.34(7).
- (7) Failure to maintain a reasonably satisfactory standard of competency in the practice of dentistry. Iowa Code § 153.34(9).

In 1988, the Dental Board adopted a new chapter of rules entitled, "Principles of Professional Ethics," covering such topics as incompetent treatment, emergency service, unethical conduct, and the handling of patient records. IAB, 9/21/88, ARC 9236, pp. 651-52 [codified at 650 Iowa Admin. Code chapter 27 (1988)]. Within the provisions governing a dentist's representation of care, the Board established the following standard:

Removal of restorations from the nonallergic patient for the alleged purpose of removing toxic substances from the body, when the treatment is performed solely at the recommendation or suggestion of the dentist, is an improper and unacceptable treatment regimen.

650 Iowa Admin. Code 27.7(8) (1988). This rule codified the treatment standards the Board applied to Ronald Hufford, D.D.S., in a disciplinary proceeding which was subsequently affirmed by the Iowa Supreme Court in 1990. Hufford, 461 N.W.2d at 199-202.

Hufford, using a procedure he called "applied kinesiology," advised a patient with multiple sclerosis (M.S.) that she was allergic to the mercury in her amalgam fillings, and that removal of the fillings would improve her health and stop the progress of her M.S. 461 N.W.2d at 196-198. Because the patient could not afford the \$9,252 cost of removing all fillings and replacing them with costly restorative materials, Hufford extracted all of the patient's teeth and placed full upper and lower dentures at a cost of \$3,530. Id. at 197. A month after this "physically and psychologically" traumatic treatment, the patient was hospitalized for several days as her M.S. condition worsened. Id. at 198. Concluding that the full mouth extraction of the patient without an independent diagnosis of mercury toxicity or other valid diagnosis caused patient injury and fell well below the standard of care for dentists in Iowa, the Board found that Hufford failed to perform within a reasonably-satisfactory standard of competence, committed willful and gross malpractice, made false and misleading representations, and fraudulently misrepresented his skill and ability. Id. at 198.

The Court, praising the Board for "admirably perform[ing] its duty to uphold the high standards of [the dental] profession," affirmed the Board. 461 N.W.2d at 202. In upholding the Board, the Court found "considerable" evidentiary support, including clear, satisfactory and convincing evidence of all indicia of fraud. Id. at 199, 202. Key evidence cited by the Court included expert testimony that "there is no evidence to suggest that multiple sclerosis is due to mercury toxicity," "[t]here have been no documented cases of mercury toxicity due to amalgam restorations," and "[e]xcept in individuals sensitive to mercury, there is no justification for the removal of serviceable amalgams." Id. at 197, 199. While the Board did not find his testimony credible,

Hufford denied he removed the amalgams to treat mercury toxicity, because he believed such treatment would be "fraud and quackery." Id. at 199.

In 1994, the Dental Board was faced with a situation where a dentist recommended that three patients remove amalgams due to mercury toxicity, but where the patients declined the advice after receiving second opinions. In the Matter of Larry J. Hanus, Findings of Fact, Conclusions of Law, Decision and Order, Sept. 1, 1994. The Board suspended Hanus, in part based on his advice to remove "unsafe" amalgams, for failing to maintain a reasonable standard of competency and knowingly making misleading statements in the practice of dentistry. Id. at 12-15. Expert testimony established that Hanus's advice on the removal of amalgams due to mercury toxicity was contrary to the curriculum at the University of Iowa College of Dentistry, inconsistent with the standards adopted by the American Dental Association, and otherwise at odds with the overwhelming weight of scientific evidence. Id. at 13-15. Additionally, the Board concluded that the removal and replacement of amalgams "puts patients at risk for other dental problems." Id. at 13.

The Board found that Hanus did not violate any law or rule enforced by the Board with respect to conversations he had with two other patients who were referred to Hanus by a physician who had already spoken with the patients about mercury in dental amalgam. Id. at 13, 15. The Board distinguished Hanus's conversations with these patients about mercury toxicity from his unsolicited warnings to other patients about the need to remove "unsafe" amalgam. Id. The Iowa Board of Medical Examiners later suspended the medical license of V. Thomas Riley, M.D., in part based on his referral of patients to Hanus. In the Matter of V. Thomas Riley, M.D., Final Order of the Board, March 20, 1998, at 19-21. The Medical Board concluded that:

The overwhelming scientific evidence supports the safety of dental amalgam materials. There is no scientific evidence supporting the theory that dental amalgams contribute to systemic disease in nonallergic patients. This was established through expert testimony, articles from peer reviewed journals, and published decisions of the Iowa Board of Dental Examiners. The American Dental Association, the National Institute of Health, the Food and Drug Administration, and the U.S. Department of Health and Human Services have all taken public positions supporting the use of dental amalgams. All of the evidence cited by [Dr. Riley] or his expert witness was based solely on anecdotal reports of patient improvement. Anecdotal reports are an inadequate basis upon which to base professional medical advice.

Id. at 19-20. By telling patients their amalgam fillings were toxic and should be replaced, the Medical Board found that Dr. Riley knowingly made misleading, deceptive or untrue statements, engaged in unethical conduct and a practice harmful or detrimental to the public, demonstrated a substantial lack of knowledge or ability to discharge his professional obligations to a patient, and deviated from the standards of learning or skill ordinarily possessed and applied by other physicians in Iowa acting in the same or similar circumstances. Id.

In 1995, as a result of the Dental Board's holding in Hanus, the Board amended subrules 27.7(7) and 27.7(8), as follows:

A dentist who recommends or performs unnecessary dental services or procedures is engaged in unprofessional conduct. . . .

~~Removal~~ Recommending removal of restorations or removing said restorations from the nonallergic patient for the alleged purpose of removing toxic substances from the body, ~~when the treatment is performed solely at the recommendation or suggestion of the dentist, when such activity is initiated by the dentist,~~ is an improper and unacceptable treatment regimen.

IAB, 2/15/95, ARC 5428A, p. 1266 [codified at 650 Iowa Admin. Code 27.7(7) and 27.7(8) (1995)]. The Board described the purpose of the amendment as including "the recommendation of unnecessary dental services as unprofessional conduct" and "the recommendation of removal of restorations as [an] improper and unacceptable treatment regimen." Id.

Liberty of Speech

With this background we can now turn to your question on whether the Dental Board's rule offends the state constitutional guarantee to liberty of speech. The Iowa appellate courts have generally equated the state constitutional guarantee to "liberty of speech" with the First Amendment guarantee of "freedom of speech." See City of West Des Moines v. Engler, 641 N.W.2d 803, 804-05 (Iowa 2002); State v. Milner, 571 N.W.2d 7, 12 (Iowa 1997); Iowa Supreme Court Bd. Of Professional Ethics & Conduct v. Kirlin, 570 N.W.2d 643, 645 (Iowa 1997), *cert. denied*, 523 U.S. 1095, 118 S. Ct. 1561, 140 L. Ed. 2d 793 (1998); Des Moines Register & Tribune Co. v. Osmundson, 248 N.W.2d 493, 498 (Iowa 1976). In concluding that negligence rather than actual malice should be the standard in a state defamation action concerning private individuals, the Iowa Supreme Court observed that the phrase "being responsible for the abuse of that right" in Article I, section 7 of the Iowa Constitution does not appear in

the First Amendment. Jones v. Palmer Communications, Incorporated, 440 N.W.2d 884, 898 (Iowa 1989), *disavowed on other grounds by*, Schlegel v. Ottumwa Courier, 585 N.W.2d 217 (Iowa 1998). However, the First Amendment prohibition on the making of any law abridging free speech applies to the states through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940). We have no reason to believe that in the context of the regulation of a professional's speech the Iowa Constitution would afford any less (or more) protection than the First Amendment. See State v. Milner, 571 N.W.2d at 12 ("the Iowa Constitution generally imposes the same restrictions on the regulation of speech as does the federal constitution"). Accordingly, cases interpreting the First Amendment constitute persuasive authority for interpreting the state constitutional guarantee.

Commercial v. Noncommercial Speech

A key issue in addressing your question is whether the Dental Board's rule regulates commercial or noncommercial speech. The rule is unquestionably a content-based regulation. A content-based regulation of noncommercial speech which is entitled to full First Amendment protection is only valid "if it can withstand strict scrutiny, which requires that the regulation be narrowly tailored (that is, the least restrictive means) to promote a compelling government interest." Kasky v. Nike, Inc., 27 Cal. 4th 939, 952, 45 P.3d 243, 251, 119 Cal. Rptr. 2d 296, 305 (2002) (citations omitted). In contrast, content-based regulation of commercial speech is subjected to less rigorous review because the protection afforded commercial speech is "less than afforded other forms of expression such as political speech." Iowa Supreme Court Bd. of Professional Ethics & Conduct v. Wherry, 569 N.W.2d 822, 825 (Iowa 1997), *cert. denied*, 523 U.S. 1021 (1998), *citing* Board of Trustees v. Fox, 492 U.S. 469, 477, 109 S. Ct. 3028, 106 L. Ed. 388 (1989). Indeed, commercial speech has only been afforded any degree of First Amendment protection since 1976 when the United States Supreme Court held that a state's complete ban on advertising prescription drug prices violated the First Amendment. Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770-71, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

The distinction is critical because unlike political or other forms of fully-protected speech, commercial speech which is false or misleading is not entitled to protection and can be completely banned. In re R.M.J., 455 U.S. 191, 201, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982) (commercial speech which is false or misleading "may be prohibited entirely"); Edenfield v. Fane, 507 U.S. 761, 768, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) ("the State may ban commercial expression that is fraudulent or deceptive without further justification"). Protected commercial speech (which is true or only potentially misleading) may be regulated, but the regulation may not overreach its goal by improperly restraining truthful or fully-protected speech. Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557, 565-66, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980); Commodity Trend Service Inc. v. Commodity Futures Trading

Comm'n, 233 F.3d 981, 992-93 (7th Cir. 2000). Commercial speech "by members of the learned professions, because it poses special problems, may justify more restrictions than would be appropriate for other commercial speech." Wherry, 569 N.W.2d at 825, *citing In re R.M.J.*, 455 U.S. at 202. Additionally, the overbreadth doctrine has minimal applicability to the regulation of commercial speech.¹ MRM, Inc. v. City of Davenport, 290 N.W.2d 338, 346 (Iowa 1980), *citing Bates v. State Bar of Arizona*, 433 U.S. 350, 380, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 463, fn. 20, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978); Central Hudson, 447 U.S. at 565, fn. 8; Garner v. White, 726 F.2d 1274, 1277 (8th Cir. 1984); Desnick v. Department of Professional Regulation, 171 Ill.2d 510, 665 N.E.2d 1346, 1353, 216 Ill. Dec. 789 (Ill. 1996), *cert. denied*, 519 U.S. 965 (1996).

While commercial speech is afforded considerably less protection than noncommercial speech, no clear boundaries exist between these categories of speech. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993) (acknowledging difficulty of drawing bright line that will clearly cabin commercial speech in a distinct category); Ohralik, 436 U.S. at 455-56 (conceding that no categorical definition of the difference between commercial and noncommercial speech exists and maintaining that application of common sense will decide the issue). At its core, commercial speech "does no more than propose a commercial transaction." Virginia Pharmacy Bd., 425 U.S. at 762. The fact that commercial speech may be informational or contain discussions of important public issues, however, will not alter its character as commercial speech. Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 67-68, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983) (commercial solicitations for sale of condoms constitute commercial speech, even though they contain discussions of important public issues); Porpous Media Corp. v. Pall Corp., 173 F.3d 1109, 1121 (8th Cir. 1999) (the nobler concerns that may drive speakers to inform of public health dangers allegedly posed by a product does not render such speech noncommercial in nature, because commercial speech "need not originate solely from economic motives"); National Commission on Egg Nutrition v. Federal Trade Commission, 570 F.2d 157, 159 (7th Cir. 1978), *cert. denied*, 439 U.S. 821 (1979) (statements regarding the scientific

¹ While the Iowa Supreme Court in MRM, Inc. cited with approval the broad principle that the overbreadth doctrine "applies weakly, if at all, in the ordinary commercial speech context" [298 N.W.2d at 346], the Court nevertheless has analyzed the doctrine in a dentist's challenge to discipline based on misleading commercial speech. Wettach v. Iowa Board of Dental Examiners, 524 N.W.2d 168, 171-72 (Iowa 1994). The Court concluded that given the State's legitimate public interest in the regulation of dentist conduct in relation to the very small potential for improper application of the regulation, any "overbreadth" which might exist should be cured on a case-by-case basis. *Id.* at 172.

evidence connecting eggs and heart disease were commercial speech subject to FTC regulation).

In Bolger, the United States Supreme Court identified three factors, the combination of which would provide strong support for characterizing particular speech as commercial speech: advertising format, product references, and commercial motivation. 463 U.S. at 67. The Court cautioned in a footnote, however, that each of these factors need not be present in order for speech to be commercial. Id. at 67, fn. 14. Justice Stevens has more recently observed that the distinction between commercial and noncommercial speech cannot rest solely on the form or content of the statement, or the motive of the speaker, but instead should rest on the connection between the speech at issue and the justification for affording lesser protection to commercial speech. Rubin v. Coors Brewing Co., 514 U.S. 476, 494, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995) (Stevens, J., concurring) ("any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead.")

Three reasons form the basis for distinguishing between commercial and noncommercial speech: First, the veracity of commercial speech is more readily verifiable by its disseminator than news reporting or political commentary. Virginia Pharmacy Bd., 425 U.S. at 772, fn. 24; *accord*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 499, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996) (Stevens, J., plurality opinion). Second, because commercial speakers have an economic interest, there is little chance that the proper regulation of commercial speech will have a chilling effect. Virginia Pharmacy Bd., 425 U.S. at 772, fn. 24. Third, governmental authority to regulate commercial transactions to prevent commercial harms justifies governmental regulation of speech which is "linked inextricably" with those transactions. 44 Liquormart, 517 U.S. at 499 (Stevens, J., plurality opinion); City of Cincinnati, 507 U.S. at 426.

Both the United States Supreme Court and the Iowa Supreme Court have consistently characterized a licensed professional's solicitations to current and prospective clients as commercial speech. Bates v. State of Arizona, 433 U.S. at 365 (attorney advertising); Ibanez v. Florida Dept. of Business and Professional Regulation, 512 U.S. 136, 142, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994) (attorney/CPA letterhead); Virginia Pharmacy Bd., 425 U.S. at 760-61 (pharmacist advertising); Wherry, 569 N.W.2d at 825 (attorney advertising); Wettach, 524 N.W.2d at 172 (Iowa 1994) (dentist communication with patients); *see also* Cambiano v. Neal, 342 Ark. 691, 35 S.W.3d 792, 798 (2000), *cert. denied*, 539 U.S. 1009 (2001) (lawyer's speech with commercial purpose of representing a client is commercial speech); Leoni v. State Bar of Calif., 39 Cal. 3d 609, 704 P.2d 183, 191-92, 217 Cal. Rptr. 423 (1985), *appeal dismissed by*, 475 U.S. 1001 (1986) (attorney's letter writing campaign properly analyzed pursuant to commercial speech concepts).

Regulation of Commercial Speech

We construe subrule 27.7(8) as regulating commercial speech under these guidelines. On its face, subrule 27.7(8) refers to a dentist initiated recommendation of a specific treatment regimen to a specific category of patient (nonallergic). The rule is included within the Dental Board's provisions on standards of practice, dental ethics, and unprofessional conduct as they relate to the practice of dentistry. 650 Iowa Admin. Code 27.1(1) ("The following principles relating to dental ethics . . . provide a basis for board review of questions concerning professional ethics. The dentist's primary professional obligation shall be service to the public with the most important aspect of that obligation being the competent delivery of appropriate care within the bounds of the clinical circumstances presented by the patient, with due consideration being given to the needs and desires of the patient.") (emphasis added). Subrule 27.7(8) is listed in a grouping of rules entitled "[r]epresentation of care and fees." 650 Iowa Admin. Code 27.1.

The portion of subrule 27.7(8) relating to speech is inextricably linked with a highly-regulated dental practice (removal of restorations), the incompetent performance of which subjects a dentist to discipline. Iowa Code §§ 272C.10(2) (professional incompetency) and (3) (unethical conduct and practice harmful or detrimental to the public); and 153.34(2) (willful and gross malpractice or neglect in the practice of dentistry), (7) (unprofessional conduct), and (9) (failure to maintain a reasonably satisfactory standard of competency in the practice of dentistry).

The statutory authority for the Dental Board to discipline a dentist based on false or misleading speech is firmly tied to the practice of the profession. Iowa Code §§ 272C.10(3) ("[k]nowingly making misleading, deceptive, untrue or fraudulent representations in the practice of a profession"); 272C.10(7) and 153.34(3) ("[f]raud in representation as to skill or ability"); and 272C.10(7) ("[u]se of untruthful or improbable statements in advertisements"). Neither the statutory basis for subrule 27.7(8) nor the wording of the rule supports extending the Dental Board's reach into forums of "pure" speech. See Bailey v. Huggins Diagnostic & Rehabilitation Center, Inc., 952 P.2d 768, 769, 772-73 (Co. App. 1997), *cert. denied* (Colo. 1998) (dentist who published book which was covered on a television program regarding the dangers of mercury in amalgam fillings owed no legal duty to a patient whose actual restoration removal was recommended and performed by another dentist in the partnership).

The regulated speech at issue (a dentist's recommended treatment regimen) is factual in nature, in that it is subject to scientific study and verification. The potential for public harm stemming from false, deceptive or misleading recommendations of patient treatment is substantial. The State's interest in regulating such speech is strong. See Hufford, 461 N.W.2d at 196.

As worded and in the context of the regulations in which it is codified, subrule 27.7(8) targets a dentist's communications with patients in which a regulated treatment regimen is recommended. 650 Iowa Admin. Code 27.7(8) (emphasis added) ("Recommending removal of restorations . . . from the nonallergic patient for the alleged purpose of removing toxic substances from the body . . . is an improper and unacceptable treatment regimen."). The rule does not expressly extend the Dental Board's reach to the expression of general opinions in political or news commentary or otherwise to circumstances outside the scope of the practice of dentistry.² The rule does not directly address truthful discussions, whether in general discourse or directly with a patient, about the materials in restorations, possible allergies to restoration materials, or related topics.³ The only "speech" which is restricted is the "recommend[ation of] removal" when connected to a treatment regimen the Board has by rule defined as improper and unacceptable since 1988. Indeed, the rule does not address so called "mercury-free" advertising at all as it relates to a dentist's future use of mercury-free materials.

Subrule 27.7(8) does not establish grounds for discipline based on all recommendations of restoration removal. Such a construction would absurdly preclude a dentist from recommending removal of cracked or defective restorations, or recommending treatment regimens which are within acceptable standards of care. However, in light of the history of the amendment adding "recommending" to the Board's long-standing regulation on restoration removal, the Board clearly does intend the rule to cover dentist recommendations even where the dentist does not actually remove the restorations. 650 Iowa Admin. Code 27.7(8)(emphasis added) ("Recommending removal of restorations or removing said restorations. . .").

There are sound justifications for the general proposition that a licensing board need not await actual patient injury to intercede. See Iowa Code § 272C.10(3) (establishes as a ground for discipline, "[k]nowingly making misleading, deceptive, untrue or fraudulent representations in the practice of a profession or engaging in

² The "practice of dentistry" includes persons who "perform examination, diagnosis, treatment, and attempted correction by any medicine, appliance, surgery, or other appropriate method of any disease, conditions, disorder, lesion, injury, deformity, or defect of the oral cavity and maxillofacial area . . . which methods by education, background experience, and expertise are common to the practice of dentistry." Iowa Code § 153.13(2) (2001).

³ The Board's more general advertising rules prohibit communications to the public which are inaccurate "by inclusion or omission," but assert the policy that dentists may engage "in any form of truthful, nondeceptive advertising. . ." 650 Iowa Admin. Code 26.1.

unethical conduct or practice harmful or detrimental to the public. Proof of actual injury need not be established.”(emphasis added)). The Medical Board, for example, is not required to await actual patient injury before taking action against a doctor who fraudulently advises patients to send in family photographs for cancer diagnosis. However, some speech which may loosely be characterized as a “recommendation” would have only a remote nexus with potential patient harm, and would not form a credible basis for discipline. There undoubtedly is a line which must be drawn on a case-by-case basis when applying the rule beyond which the Dental Board may steer into protected speech. This sheer potential does not necessarily shift the overall legal test of the rule’s validity from the standards applicable to commercial speech to those involving noncommercial speech. See Kasky, 45 P.3d at 260-61 (fact that Nike intertwines commercial and noncommercial speech in its public relations campaign does not remove the speech from the category of commercial speech); Wettach, 524 N.W.2d at 172 (“We have no reason to believe the Board will discipline dentists who engage in professionally appropriate criticism of its decisions.”).

We have no information suggesting the Dental Board has attempted to use subrule 27.7(8) to prevent critique of the standard codified in the rule or to otherwise discipline a dentist merely for holding or expressing personal opinions on the merits of the rule, or for conducting research on the scientific basis for the rule or competing views. In both Hufford and Hanus, for instance, the Dental Board disciplined a dentist for communications (and actions) recommending treatment regimens to patients within the context of a series of competency issues. Any attempt by the Board to discipline a dentist merely for holding the personal opinion that the Board’s rule is wrong would violate the First Amendment and, in our view, be beyond the intended scope of the rule. See Wettach, 524 N.W.2d at 172.

In sum, subrule 27.7(8) addresses communications by dentists with current or prospective patients concerning a commercial transaction (restoration removal) in which the dentist has an economic interest. The rule is intended to protect patients from unnecessary, expensive and potentially harmful restoration removal.

Regulation of Professional Advice

Subrule 27.7(8) does not distinguish between mass advertising solicitations and private communications between a dentist and a patient. Three points are relevant to your inquiry because they demonstrate that while such private communications are not afforded special status in a First Amendment analysis placing them outside the reach of proper regulation, at least one construction of the rule may implicate protected speech.

First, medical professionals may not assert the constitutional rights of their patients simply to avoid discipline. While patients have a “fundamental right to seek or reject medical treatment generally it does not follow that there is a fundamental

right to select a particular treatment or medicine.” Hufford, 461 N.W.2d at 201, *citing* State ex rel. Iowa Department of Health v. Van Wyk, 320 N.W.2d 599, 606 (Iowa 1982). A “medical practitioner may not rely on a patient’s right of privacy in seeking unconventional treatment to escape discipline for acts that are harmful to the patient.” 461 N.W.2d at 202.

Second, a medical professional’s First Amendment rights in the practice of a profession are subject to reasonable licensing and regulation by the State. Planned Parenthood v. Casey, 505 U.S. 833, 884, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *see generally* Rust v. Sullivan, 500 U.S. 173, 200, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991) (Congress may silence a physician’s discussion of a lawful medical option through control of funding as least where such intervention does not significantly impinge upon the doctor-patient relationship); Shea v. Board of Medical Examiners, 81 Cal. App. 3d 564, 576-77, 146 Cal. Rptr. 653, 661-62 (1978) (First Amendment is not an umbrella shielding a physician from disciplinary action based on speech directed privately to a patient). The State “does not lose the power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.” Ohralik, 436 U.S. at 456. To hold otherwise would elevate even fraudulent medical advice to the level of protected speech.

Finally, while the First Amendment does not offer a safe haven to incompetent or fraudulent practitioners, the public does have a significant interest in protecting medical professionals from the threat of discipline merely for offering in good faith unpopular or unconventional advice. To chill the mere expression of professional judgment raises the specter of improper content-based restriction of particular viewpoints. Indeed, a medical professional’s good faith, nonfraudulent recommendation of even an illegal treatment regimen may be entitled to free speech protection if the recommendation is unconnected to actions on the professional’s part to aid, abet or commit illegal activity. *See* Conant v. Walters, 309 F.3d 629 (9th Cir. 2002).

In Conant, a three-judge panel of the Ninth Circuit Court of Appeals upheld an injunction against the federal government intended to protect the First Amendment rights of California physicians and patients to make and receive medical recommendations of marijuana use. By 1996 referendum, California decriminalized marijuana use for limited medical purposes involving seriously ill patients. Marijuana use remained unlawful, however, under federal law. In response, the federal government notified physicians that a physician attempting to implement California law by recommending marijuana use to a patient would risk losing the physician’s license to prescribe controlled substances. *Id.* at 632. The district court enjoined the federal government from taking adverse action against physicians in sole reliance on a physician’s recommendation of marijuana use which was unconnected to any action on the physician’s part to aid, abet or commit illegal activity. *Id.* at 633-34. In upholding the injunction, the appellate panel condemned the government’s threat as improper viewpoint regulation and an

unwarranted invasion into confidential physician-patient relationships. Id. at 637-38. The Court noted, for instance, that one possible outcome of a physician's recommendation could be patient pressure on politicians to legalize marijuana use -- political activity which would be chilled if patients were uninformed by their physicians. Id. at 634-35.

There are significant differences in the circumstances underlying the Conant decision. Given that the recommended treatment in Conant was illegal, this case involved only the purest forms of speech. Physicians acting on the recommendations would violate criminal laws. Id. at 635 ("If, in making the recommendation, the physician intends for the patient to use it as the means for obtaining marijuana, as a prescription is used as a means for a patient to obtain a controlled substance, then a physician would be guilty of aiding and abetting the violation of federal law."). Further, the case did not involve allegations of incompetent or deceptive practice.

Despite these factual distinctions, the Conant case does address the important interest that medical professionals and their patients have in shielding private medical advice from unwarranted governmental intervention. The Dental Board's rule, in its present form, broadly uses the terms "recommending" and "removing" in the disjunctive. To avoid any implication that an expression of personal opinion, standing alone, could subject a licensee to discipline, the rule should be redrafted.⁴ This would avoid any potential future application of the rule in a manner which would violate the principles discussed in Conant.

Application of Central Hudson Test

The well-established four-prong test for determining the validity of a content-based regulation of commercial speech was first summarized in Central Hudson:

At the onset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted government interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the government interest

⁴There are, of course, situations where a medical professional's advice, recommendations, or opinions may be so faulty as to raise significant issues of incompetency, even if unconnected with overt action. Depending upon the factual circumstances, merely expressing a personal belief in the absence of deception, incompetency, or patient harm is likely protected speech.

asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

As described above, the Dental Board has twice decided contested cases in which it found misleading, and even fraudulent, a dentist's unsolicited recommendation that a nonallergic patient remove restorations to rid the body of toxins. In the Board's view, subrule 27.7(8) codifies restrictions on speech which are accordingly unprotected by either the state guarantee of "liberty of speech" or the federal guarantee of "freedom of speech." The Iowa Supreme Court concluded in 1990 in Hufford that substantial evidence supported the Board's view. 461 N.W.2d at 198-201.

The Board's position continues to receive support in the district and appellate courts of other states. See Bailey, 952 P.2d at 769, 772-73 (while treating dentist was found to have committed malpractice in connection with the removal of amalgam – a decision not appealed – the dentist's partner did not have a legal duty merely through publication of a book or television interview concerning the topic of amalgam fillings generally); Georgia Board of Dentistry v. Pence, 223 Ga. App. 603, 478 S.E.2d 437, 443-44 (Ga.App. 1996) (discipline against dentist was based on failure to conform to minimum standards to practice and not board opposition to removal of amalgam fillings); Fecteau v. State Employee Health Commission, 690 A.2d 500, 502 (Maine 1997) (insured not entitled to coverage for removal of amalgam because contract did not provide for removal generally and medical evidence was, at best, conflicting on whether amalgam fillings are injurious); McReynolds v. Mindrup, 32 S.W.3d 163, 165 (Mo. App. 2000) (while not the issue on appeal, the procedural matter on appeal arose after a district court refused to permit a plaintiff to support her claim of mercury poisoning due to amalgam fillings based on the lack of admissible expert testimony to support plaintiff's position), *appeal after remand*, ___ S.W.2d ___, 2002 WL 31162729 (Mo. App. 2002) (held order to exclude all expert testimony from trial on malpractice claim was overbroad, but recognized that testimony regarding the practice and beliefs of a limited number of professionals who believe that the standard of care accepted by the profession is inappropriate may be excluded as irrelevant); Berger v. Board of Regents, 178 A.D.2d 748, 750-51, 577 N.Y.S.2d 500 (1991), *cert. den.*, 507 U.S. 1018 (1993) (dentist guilty of misconduct for removing amalgam fillings without the medical evidence that the procedure was warranted and by performing toxicity tests beyond the scope of the practice of dentistry).

Opponents of the Dental Board's rule argue strenuously that the Board is in error and that there is sufficient scientific basis for a dentist, consistent with prevailing standards of care, to recommend removal of amalgam to remove toxic mercury from the body. See generally Consumer Cause, Inc. v. Smilecare, 91 Cal. App. 4th 454, 110 Cal. Rptr. 2d 627, 630-33 (2001) (summarizes the debate about the safety of mercury in

amalgam and discusses reports concerning views on both sides of the issue); Bailey, 952 P.2d at 769-70; Breiner v. State Dental Commission, 57 Conn. App. 700, 750 A.2d 111 (2000).

An Attorney General's opinion is not the proper forum in which to weigh the strength or veracity of competing views on appropriate dental care. Because resolution of this factual issue is at the heart of the controversy, we cannot offer an opinion on whether the restricted speech is false, fraudulent or misleading, and accordingly unprotected by the free speech provisions of the Iowa or United States Constitutions.

Having codified a specific standard of care, however, the Dental Board has a corresponding responsibility to monitor scientific support for its position. If the rule accurately codifies the standard of care for dentists in Iowa, it serves the dual purpose of (1) informing dentists of actions which will subject them to discipline⁵ and (2) protecting patients from receiving false or misleading advice. If, however, circumstances exist under which a dentist could violate the rule and remain compliant with minimum standards of care, even if in a minority position, the rule would improperly impose one out of multiple permissible viewpoints. In that circumstance the Board would be far better advised to rely on other more general rules to initiate disciplinary action in appropriate cases. See, e.g., 650 Iowa Admin. Code 27.7(7) ("A dentist who recommends or performs unnecessary dental services or procedures is engaged in unprofessional conduct.").

The United States Supreme Court refined the first prong of the Central Hudson test in In re R.M.J., 455 U.S. at 203. While states may entirely prohibit misleading commercial speech, they may not absolutely prohibit potentially misleading commercial speech if the information may be presented in a manner which is not deceptive. Id. In other words, if the Dental Board determined that a dentist could properly on an unsolicited basis recommend restoration removal to nonallergic patients to rid the body of toxins under some conditions, an absolute prohibition of such recommendations may violate the First Amendment. The rule may violate both a dentist's and patient's free speech rights if, for example, public safety could be adequately protected through a required disclosure process, including written informed consent,⁶ or a more refined

⁵Agencies shall, "[a]s soon as feasible and to the extent practicable, adopt rules . . . embodying appropriate standards . . . that the agency will apply to the law it administers." Iowa Code § 17A.3(1)(c) (2001).

⁶ See, e.g., Md. Code Ann. 10.44.23.02 (2002) (prior to removal of serviceable mercury amalgam restorations dentist must obtain informed consent including advice to patient that: "A. The National Institute of Health has determined that there are no verifiable systemic health benefits resulting from the removal of mercury amalgam

description of the conditions under which a dentist could properly recommend that restorations be removed and replaced.⁷ Government may not suppress only potentially misleading speech, broadly encapturing both truthful and misleading speech, in a paternalistic attempt to substitute government's judgment for informed decision making by the public. Thompson v. Western States Medical Center, 535 U.S. 357, 122 S. Ct. 1497, 1507-08, 152 L. Ed. 2d 563 (2002).

Application of the Central Hudson four-prong test to the commercial speech at issue hinges on resolution of the first prong. To reach the second, third or fourth prongs, a court would need to determine that the restricted speech at issue is not deceptive or misleading. Unlike most cases applying the Central Hudson test, the Dental Board's rule directly codifies what the Board considers substandard care in the profession. More typically, First Amendment challenges are made to restrictions on truthful, but potentially misleading information. See e.g. Thompson, 535 U.S. 357 (government restrictions improperly prohibited pharmacies from advertising prescriptions for compounded drugs which pharmacies could lawfully provide). The entire premise for the Dental Board's rule would evaporate if a court found the underlying support to be factually in error.

Ironically, by attempting to codify specific contested case precedent in just a few words rather than relying in future enforcement based upon the precedent and more general prohibitions (e.g., false advertising, unprofessional conduct, practice harmful or detrimental to the public), the Board raised free speech issues which otherwise would not exist in two respects: First, the law flexibly permits very general regulation of medical professionals because "the limits between good and bad professional conduct can never be marked off by a definite line of cleavage." Fisher, 510 N.W.2d at 876, citing, Eaves v. Board of Medical Examiners, 467 N.W.2d 234, 236 (Iowa 1991); see also Wettach, 524 N.W.2d at 171-72 (upheld statutory prohibition on "dishonorable conduct" in face of vagueness challenge under the due process clauses of the Iowa and United States Constitutions). Effective Board enforcement accordingly could rest on

restorations; and B. The removal of sound or serviceable mercury amalgam restorations may significantly affect the integrity of the tooth."); see also Cal. Bus. & Prof. Code § 1648.10 (2002) (fact sheet required); Me. Rev. Stat. 32 §1094-C (2001)(brochure/poster required); N.H. Rev. Stat. Ann. § 317-A:38 (2002)(disclosure required).

⁷ See e.g. 49 Pa. ADC § 33.213 (2002)(administrative rule establishes guidelines Dental Board will rely on in determining whether dentist has committed unprofessional conduct, incompetence, negligence, or malpractice in connection with the replacement of dental amalgams); see also Policy 4.A. of the Colorado State Board of Dental Examiners on the removal of amalgam dental fillings (adopted 1996).

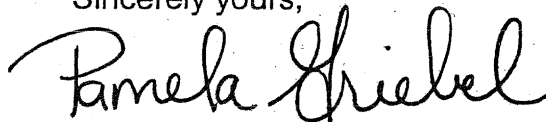
well-established, undeniably constitutional prohibitions. Second, by using so few words to codify contested case precedent, the Board may have inadvertently caused more confusion than would exist by a simple reading of the cases themselves.

Conclusions

We conclude that subrule 27.7(8) is designed as a restriction on commercial speech. Whether the rule infringes upon a dentist's free speech rights largely rests on resolution of the factual question of whether the restricted speech is false, deceptive, or misleading. An Attorney General's opinion is not the proper forum in which to weigh the strength of competing views on whether the removal of restorations from nonallergic patients may free the body of toxic substances. Having codified a specific standard of care, the Dental Board has the corresponding responsibility to monitor continued support for its position. As long as a Board rule accurately codifies the standard of care for dentists in Iowa, it serves the dual purpose of (1) informing dentists of actions which will subject them to discipline and (2) protecting patients from false or misleading advice. In contrast, a rule imposing one out of a range of acceptable viewpoints would inappropriately interfere in the dentist-patient relationship, chilling both a dentist's advice to a patient and a patient's exercise of informed choice.

Dentists do not have a free speech right to practice incompetent dentistry or recommend to prospective or current patients treatment regimens which are deceptive or which fall substantially below an acceptable standard of care. Dentists do have a free speech right to voice a personal opinion and to in good faith counsel patients free of unwarranted governmental intervention. The Dental Board must be cautious in the application of this or a similar rule to avoid encapturing fully-protected speech. In light of the law summarized in this opinion, we advise the Board to reassess the continued viability of subrule 27.7(8), giving due consideration to rescinding the rule and relying on more general grounds for discipline, or expanding the rule to more precisely describe the contours of speech which will and will not subject dentists to discipline.⁸

Sincerely yours,



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⁸The Dental Board has commenced a formal rulemaking process to rescind subrule 27.7(8) and may consider whether a rule devoted specifically to restoration removal is necessary.

