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*Oliver L. Johnson*  
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11 Attorneys for Plaintiffs

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CLARK COUNTY, NEVADA

11 TRACY HURST, an individual; and AMBER  
12 TSANG, an individual;

13 Plaintiffs,

14 vs.

15 STATE OF NEVADA BOARD OF MEDICAL  
16 EXAMINERS; DOE Defendants I through X,  
17 inclusive; and ROE CORPORATIONS A through  
18 Z, inclusive,

19 Defendants.

Case No.: A-09-599687C

Dept. No.: XXV

**PLAINTIFFS' EMERGENCY  
MOTION FOR TEMPORARY  
RESTRAINING ORDER ON  
SHORTENED TIME**

Date of Hearing: 9/29/09

Time of Hearing: 9 AM

22 Plaintiffs TRACY HURST and AMBER TSANG, by and through their attorneys of  
23 record, the Law Offices of Jacob Hafter & Associates, having filed its complaint in this matter,  
24 and pursuant to Rule 65 of the Nevada Rules of Civil Procedure, moves this Court on shorten  
25 time for:

26 1. An order restraining the Defendants from enforcing the emergency regulations  
27 which were passed by the Defendants and filed with the Secretary of State on September 18,  
28 2009, and became effective upon filing. See Emergency Regulations Amending NAC 630.230

1 dated September 18, 2009, a true and certain copy of which is attached hereto as **Exhibit "A"**  
2 ("Emergency Regulations").

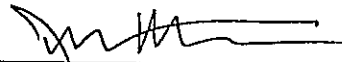
3 2. Any other relief which this Court may deem appropriate or equitable under the  
4 circumstances.

5 Plaintiff respectfully refers the Court to its Memorandum of Points and Authorities, the  
6 attached exhibits, affidavits filed herewith, the pleadings and papers on file herein, and any  
7 other material this Court may wish to consider.

8 Dated this 21<sup>st</sup> day of September, 2009.

9 LAW OFFICE OF JACOB HAFTER & ASSOCIATES

10  
11 By:



12 Jacob L. Hafter, Esq.  
13 Nevada Bar Number 9303  
14 Michael Naethe, Esq.  
15 Nevada Bar Number 11222  
16 7201 W. Lake Mead Blvd., Ste 210  
17 Las Vegas, Nevada 89128  
18 Attorneys for Plaintiff

19 **ORDER**

20 **IT IS SO ORDERED** that PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY  
21 RESTRAINING ORDER ON SHORTENED TIME, which was filed before this Court on  
22 September 21, 2009, shall be heard on shorten time.

23 DATED: Sept. 21, 2009

24  
25 KATHLEEN E. DELANEY  
26  
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**NOTICE OF MOTION**

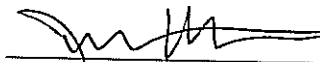
TO: ALL PARTIES AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTE THAT pursuant to Local Rule 2.20(d), Plaintiffs TRACY HURST and AMBER TSANG will bring the attached Motion for Preliminary Injunction on for hearing on the 29<sup>th</sup> day of Sept, 2009, at the hour of 9 AM, or as soon thereafter as the matter can be heard before the above-entitled Court in Department XXV.

Dated this 21 day of September, 2009.

LAW OFFICE OF JACOB HAFTER & ASSOCIATES

By:



Jacob L. Hafter, Esq.  
Nevada Bar Number 9303  
Michael Naethe, Esq.  
Nevada Bar Number 11222  
7201 W. Lake Mead Blvd., Ste 210  
Las Vegas, Nevada 89128  
Attorneys for Plaintiffs

**PLEASE NOTE**

DEPT 25 HEARINGS ARE HELD  
IN COURTROOM 110 ON THE  
11TH FLOOR OF THE PHOENIX BLDG.  
AT 330 S. THIRD STREET

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**ORDER**

**IT IS SO ORDERED** that, pursuant to Nevada Rule of Civil Procedure 65(b), as Plaintiffs have shown a probable success on the merits that the Emergency Regulations have been enacted in violation of the Open Meeting Law, NRS § 241, et. seq., and that there is a substantial likelihood of irreparable harm in that the immediate enforcement of the Emergency Regulations, PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER ON SHORTENED TIME, which was filed before this Court on September 21, 2009, shall be GRANTED. Effective as of 3:46 P.m, on September 18, 2009, the Defendant Board of Medical Examiners shall be enjoined from any enforcement of the emergency regulations amending NAC 630.230 effective September 18, 2009. This temporary restraining order shall

be valid for ~~15 days~~ until the date of the Preliminary Injunction hearing on 9/29/09. Plaintiff shall post security in the amount of \$100<sup>00</sup> upon filing of the TRO.

DATED: September 21, 2009

KATHLEEN E. DELANEY

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# MEMORANDUM OF POINTS AND AUTHORITIES

## I.

### INTRODUCTION

As all public bodies exist to aid in the conduct of the people's business, through the passing of NRS §241, et. seq., (the "Open Meeting Law"), the Legislature of the State of Nevada has taken action to ensure that their actions be taken openly and that their deliberations be conducted openly. NRS § 241.010. Outside of the Open Meeting Law, there are no other checks and balances to ensure that a public body is accountable to the people. Specifically, with respect to Defendant Board of Medical Examiners ("Board"), such body is appointed by the Governor, with each position being a four (4) year appointment. The Board members are not elected or accountable to the public through any other mechanism. Moreover, there is no mechanism for removing a person who has been appointed to a Board position by the Governor, even if cause exists. Accordingly, strict adherence to the Open Meeting Law is essential.

The instant action is simple in substance, yet its implications are crucial. In a rash action, within less than a week, the Board announced and enacted the Emergency Regulations. In doing so, they failed to adhere to a basic obligation under the Open Meeting Law, the obligation to ensure that members of the public shall be given an opportunity to speak during the public comment period. NRS § 241.020(2)(c)(3). Abruptly, in the middle of the meeting, Charles Held, M.D., president of the Board, interrupted the public comment session of the meeting and terminated the public comment. The Board then held their deliberations and passed the Emergency Regulations. This action was in clear violation of the Open Meeting Law. Accordingly, pursuant to NRS § 241.037(2)(a), any person denied a right conferred by the Open Meeting Law, may bring civil suit "to have an action taken by the public body declared void"; in this instant action, Plaintiff HURST is that person. Success on the merits is not a complicated issue.

As the Emergency Regulations are only valid for 120 days, Plaintiff is concerned that her ability to be heard in this instant action will not occur until after the Emergency Regulations expire. Given that the Defendant Board has already implemented the Emergency Regulation

1 and imminent enforcement there under is a significant concern. Accordingly, Plaintiff seeks  
2 immediate injunctive action by this Court to enjoin Defendant Board from enforcing the  
3 Emergency Regulations.

4 **II.**

5 **FACTUAL BACKGROUND**

6 1. On or about Tuesday, September 15, 2009, the Nevada State Board of Medical  
7 Examiners scheduled a meeting of the Board for September 18, 2009.

8 2. On or about Tuesday, September 15, 2009, the Board published an agenda for the  
9 September 18, 2009 meeting which included one item, the "discussion, deliberation and action  
10 regarding an emergency regulation pursuant to NRS 233B.0163 related to the regulation of  
11 medical assistants." See Agenda, a true copy of which is attached hereto as **Exhibit "B"**.

12 3. The proposed regulations were not publicly disseminated until the time of the meeting  
13 on September 18, 2009.

14 4. The proposed regulations were made available upon individual requests to either the  
15 Governor's office or the Board late Thursday afternoon, September 17, 2009.

16 5. The proposed regulations are overly broad, vague and ambiguous.

17 6. At the meeting on September 18, 2009, the executive director of the Board  
18 acknowledged that the proposed regulations may have been broad or vague or ambiguous.

19 7. The agenda for the September 18, 2009 meeting allowed for public comment.

20 8. There was no limitation for public comment set in the agenda except for a five minute  
21 time limit per speaker.

22 9. Abruptly, in the middle of the meeting, Charles Held, M.D., president of the Board,  
23 interrupted and terminated public comment.

24 10. The Board engaged in deliberations without allowing all people who attended the  
25 meeting on September 18, 2009 to speak.

26 11. The Board approved the regulations by a unanimous vote.

27 12. The Emergency Regulations were filed with the Secretary of State on September 18,  
28 2009, and became effective upon filing.

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III.

LEGAL ARGUMENT

A. **A TEMPORARY RESTRAINING ORDER IS APPROPRIATE IN THIS MATTER**

1. **The Legal Standard for a Temporary Restraining Order**

A temporary restraining order is a form of preliminary injunctive relief that can be issued, under narrow circumstances, without notice to the opposing party or that party's attorney. Its sole purpose is to preserve the status quo pending hearing on the moving party's application for preliminary injunction. *Granny Goose Foods Inc. v. Brotherhood of Teamsters and Auto Truck Drivers*, 415 U. S. 423, 439 (1974). A prohibitory injunction restrains a party from further action. In order to obtain a temporary restraining order, Nevada Rule of Civil Procedure 65(b) requires that "(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required."

An injunction is an equitable remedy. With some exceptions, injunctive relief is not available in the absence of actual or threatened injury, loss or damage. NRCP 65; Carroll v. Associated Musicians of Greater New York, 206 F.Supp. 462 (1962), *affirmed*, 316 F.2d 574 (2.Cir.,1963). There should exist the reasonable probability that real injury will occur if the injunction does not issue. Sherman v. Clark, 4 Nev. 138 (1868). The basis for injunctive relief (preliminary or permanent) has always been irreparable injury and the inadequacy of legal remedies. Weinberger V. Romero-Barcelo, 456 U. S. 305, 312 (1982); Stanley v. University of Southern California, 13 F.3d 1313, 1320 (9th Cir. 1994). An injunction never issues as a matter of course; "In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." Amoco Production Company the Village of Gambell, Alaska, 480 US 531, 107 S.Ct. 1396 , 1402 (1987).

1                   **2. Plaintiff is about to Suffer Immediate and Irreparable Injury, Loss, or Damage**

2                   Temporary restraining orders may be issued if specific facts show “immediate and  
3 irreparable injury, loss, or damage”. See NRCP 65(b); see also, Dixon v. Thatcher, 103 Nev.  
4 414, 415-16, 742 P.2d 1029, 1029-30 (1987) (concluding that a preliminary injunction to stop a  
5 foreclosure is proper where there is a reasonable likelihood of success and a threat of irreparable  
6 harm). Any loss that may be suffered must exceed ordinary economic damages; Hamm v.  
7 Arrowcreek Homeowners Ass’n, 124 Nev. 28, 183 P.3d 895 (2008).

8                   In the instant action, Plaintiff seeks this Court’s intervention to void a regulation which  
9 was enacted in violation of the Open Meeting Law. The Emergency Regulation is valid for 120  
10 days. Accordingly, without granting injunctive relief, the matter in controversy may not be  
11 adjudicated before the sunset of the Emergency Regulations. All the while, Defendant Board  
12 would be entitled to enforce a set of regulations which were enacted in violation of the Open  
13 Meeting Law. The risk that Plaintiff, or, to that regard, the physicians under whom Plaintiffs  
14 associate, or, for that matter, any physician or other health care entity in Nevada may be subject  
15 to enforcement under the Emergency Regulations creates an immediate and irreparable injury,  
16 loss or damage. Moreover, as will be discussed herein, since the Emergency Regulations are  
17 overly broad and ambiguous, the ability for the Plaintiffs, yet alone, the entire health care  
18 industry, to implement necessary changes to their practices in conformance with the Emergency  
19 Regulations to avoid liability there under is minimal at best. Since violation of the Emergency  
20 Regulation may lead to the revocation of a physician’s license, the potential harm that may  
21 occur is irreparable.

22                   **3. Time is of the Essence in this Matter.**

23                   Plaintiff respectfully requests that this Court take immediate action to grant the  
24 temporary restraining order, due to the imminent need to prevent the enforcement of a  
25 regulation which is limited in duration.

26                   Nevada Rule of Civil Procedure 65(b) state that a temporary restraining order may be  
27 granted without notice to the adverse party if (1) it clearly appears that immediate and  
28 irreparable injury, loss, or damage will result to the applicant before the adverse party can be

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1 heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if  
2 any, which have been made to give the notice and the reasons supporting the claim that notice  
3 should not be required. In this instant action, Plaintiff's counsel stated, on the record at the  
4 September 18, 2009 meeting where the Emergency Regulations were enacted, that it was  
5 Plaintiffs' counsel's belief that the Defendants' actions were in violation of the Open Meeting  
6 Law. Plaintiffs' counsel requested that the Board vacate its action and comply with the Open  
7 Meeting Law. When Defendants refused to do so, Plaintiffs' counsel warned of this instant  
8 action and the filing of this instant motion. Defendants were represented by counsel at the  
9 meeting. Accordingly, Defendants have notice of this instant action and the instant motion.

10 Notwithstanding, because of the fact that the Emergency Regulations have already been  
11 filed with the Secretary of State and, thus, have been deemed effective, Plaintiff respectfully  
12 requests that the Court consider this action as an emergency action, even if such requires it to be  
13 considered ex parte.

14  
15 **B. OVERALL, INJUNCTIVE RELIEF IS APPROPRIATE IN THIS MATTER**

16 **1. The Legal Standard for Injunctive Relief**

17 Whether injunctive relief should be granted or refused is a question addressed to the  
18 discretion of the district court. Rhodes Min. Co. v. Belleville Co., 32 Nev. 230, 106 P. 561, 118  
19 P. 813 (1910). A party seeking injunctive relief must meet one of two tests: traditional or  
20 alternative. Stanley v. Univ. of S. Cal. 12 F.3d 1313, 1319 (9<sup>th</sup> Cir. 1994). The traditional test  
21 requires a plaintiff to show the following: (1) it will probably prevail on the merits; (2) it will  
22 suffer irreparable injury if injunctive relief is not granted; (3) in balancing the equities, the  
23 defendant will not be harmed more than plaintiff is helped by the injunction; and (4) granting  
24 the injunction is in the public interest. Id.

25 In the alternative, a court may issue injunctive relief if the plaintiff shows either (1) "a  
26 combination of probably success on the merits and the possibility of irreparable injury," or (2)  
27 that serious questions are raised, and the balance of hardships tips sharply in his favor." Id.  
28 Although phrased as such, the alternative test is less an either/or formulation as it is a type of

1 sliding scale. The two prongs represent “ ‘extremes of a single continuum,’ rather than two  
2 separate tests.” Sun Microsystems, Inc. v. Microsoft Corp., 188 F.3d 1115, 1119 (9<sup>th</sup> Cir. 1999)  
3 (*quoting* Sega Enters. V. Accolade, Inc., 977 F.2d 1510, 1517 (9<sup>th</sup> Cir. 1992)). That is, the more  
4 the balance of hardships tips in favor of the plaintiff, the less probability of success must be  
5 demonstrated. Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9<sup>th</sup> Cir.1999). Whichever test  
6 is applied, a preliminary injunction should only be granted if the movant does not have adequate  
7 remedy at law. Stanley, 13 F.3d at 1320.

## 8 **2. Plaintiff is Likely to Succeed on the Merits**

9 In Nevada, the Open Meeting Law requires that all members of the public shall be given  
10 an opportunity to speak during the public comment period of a meeting. NRS §  
11 241.020(2)(c)(3). The Office of the Attorney General believes that any practice or policy that  
12 discourages or prevents public comment, even if technically in compliance with the law, may  
13 violate the spirit of the Open Meeting Law. *See* Nevada Attorney General Opinion OMLO 99-  
14 11 (August 26, 1999).

15 On September 18, 2009, the Board held a public meeting pursuant to the Open Meeting  
16 Law. During the meeting, the Board scheduled time for public comment and published such  
17 through its agenda. At the meeting, knowing that there were additionally members of the public  
18 who desired to make public comment, Charles Held, M.D., president of the Board, interrupted  
19 the public comment period and terminated it.

20 As a result of such termination, Plaintiff Hurst was unable to make a public comment.  
21 As a result of such termination, there were others at the meeting who were unable to speak.  
22 Under NRS § 241.037(2)(a), any person denied a right conferred by the Open Meeting Law,  
23 may bring civil suit “to have an action taken by the public body declared void.” Because  
24 Plaintiff Hurst was unable to speak, she was denied a right conferred by the Open Meeting Law.  
25 Plaintiff Hurst seeks to exercise her remedy under NRS 241.037(2)(a), and have this Court  
26 declare the Emergency Regulations passed by the Board void.

27 ///

28 ///

1                   **3. Plaintiff will Suffer Irreparable Injury if Injunctive Relief is not Granted.**

2                   Plaintiffs HURST and TSANG are involved in the operations of medical spas which  
3 provides various cosmetic, aesthetic and medical treatments to the public. In doing so, they  
4 work under the licenses of physicians. The Emergency Regulations create prohibitions on  
5 certain practices which interfere with Plaintiffs' ability to operate their businesses. Should  
6 Plaintiffs fail to comply with the Emergency Regulations, they may be liable for the practice of  
7 medicine without a license and the physicians with whom they work may lose their medical  
8 licenses.

9                   Moreover, due to the ambiguity of the Emergency Regulations, as delivery of health  
10 care, in general, throughout the State of Nevada will be adversely effected by the Emergency  
11 Regulations as a result of the vagueness and ambiguity inherent within them. Under the  
12 Emergency Regulations, the ability to use a medical assistant to perform a plethora of services  
13 under the direction and supervision of a physician is greatly compromised. As such, physicians  
14 will have to replace medical assistants with nurses to perform skills and services which  
15 unlicensed and unregistered assistants have been providing for decades without incident. Not  
16 only will such inflate the costs of health care in an already economically depressed industry,  
17 but, given the nursing shortage in Nevada, the use of nurses may be impossible. As such,  
18 delays in the delivery of medical care are substantially likely under the Emergency Regulations.

19                   **4. The Defendants will not be Harmed More than Plaintiff Is Helped by the**  
20                   **Injunction.**

21                   This injunctive relief is sought to restore the status quo. Health care has been delivered  
22 for decades, if not centuries in Nevada without the Emergency Regulations.

23                   Defendant may argue that the Emergency Regulations are necessary to allow medical  
24 assistants to provide injections, primarily for flu shots and other immunizations. They make  
25 such claims because they state in the Emergency Regulations that under two state statutes, NRS  
26 § 453.375 and NRS § 454.213, it is illegal for medical assistants to administer any injections,  
27 including flu shots and immunizations. Further, they claim that under the Emergency  
28 Regulations, medical assistants would now be allowed to administer such injections.

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This argument is flawed for numerous reasons. First, under Nevada law, a regulation cannot trump a state statute; hence, if the administration of injections by medical assistants is illegal under NRS § 453.375 and NRS § 454.213, there is no regulation that can be passed that can override such prohibition. Second, to say that the administration of injections by medical assistants is a known practice in the medical community is an understatement. Accordingly, if it was true that such practice was illegal, why has there not been one prosecution for such illegal activity. Law enforcement does not have the prerogative to pick and choose which laws are to be enforced; the lack of any single charges, yet alone convictions suggest that the Defendants have improperly interpreted the statutes in this case.

Third, the statutes cited do not state what Defendants suggest. NRS § 453.375 gives a list of people who may possess and administer a controlled substance. It does not address flu shots or immunizations, as neither are controlled substances. Moreover, as a medical assistant has always been thought of as a physician extender, the medical assistant is merely the hands of the physician, a person authorized under the statute to possess and administer the controlled substance. Similarly, NRS § 454.213 gives a list of people who may possess and administer a prescription drug or other dangerous drugs. Interestingly enough, in both statutes, the passive word "may" is used as opposed to the limiting word "shall" when discussing who is allowed to possess and administer such substances. Understanding the nature of legislative construction, it may be inferred that the use of the word "may" in these statutes is not limiting, unlike if the statutes used the limiting word "shall."

#### **5. Granting the Injunction is in the Public Interest.**

The public has an interest to ensure that health care is delivered in a smooth functional manner. Through the Emergency Regulations, the Defendants have created a myriad of confusion and controversy. The Emergency regulations are so obtuse and ambiguous, that it will be impossible for a physician to ensure compliance with them by still using a medical assistant. For example, Section 3(2)(g) of the Emergency Regulations states that "a physician or physician assistant may not direct and may not allow a medical assistant to administer... any other drug where the therapeutic outcome is dependent upon the placement, quantity or

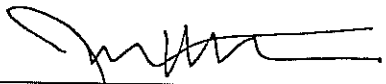
1 technique uniquely within the discretion, training and judgment of a physician or physician  
2 assistant." Since all medical orders for the administration of any drugs are dependent upon the  
3 quantity of the drug administered, the Emergency Regulations would seem to prohibit any drug  
4 from being administered by a medical assistant. As discussed above, the removal of medical  
5 assistants from physician offices will create a substantial added cost to the delivery of health  
6 care. Moreover, given the nursing shortage, such transition may not even be possible. Finally,  
7 given that the regulations are only valid for 120 days, the expense to the medical community  
8 surpasses the potential benefit.

9  
10 **IV.**  
**CONCLUSION**

11 Defendants had an obligation to enact the Emergency Regulations in a manner that  
12 complied with the Open Meeting Law. By cutting short public comment, they failed to do so.  
13 The Open Meeting Law states that any violations may result in the voiding of any regulations  
14 passed as a result of an improper meeting. Plaintiffs respectfully request that this Court grant  
15 immediately relief to void the Emergency Regulations, as they are a product of an illegal  
16 meeting.

17 Dated this 21<sup>st</sup> day of September, 2009.

18 LAW OFFICE OF JACOB HAFTER & ASSOCIATES

19  
20 By:   
21 Jacob L. Hafter, Esq.  
22 Nevada Bar Number 9303  
23 Michael Naethe, Esq.  
24 Nevada Bar Number 11222  
25 7201 W. Lake Mead Blvd., Ste 210  
26 Las Vegas, Nevada 89128  
27 Attorneys for Plaintiff  
28

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of September, 2009, I, personally, did transmit a true and certain copy of the foregoing PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AON SHORTEN TIME by both faxing to the number listed below and depositing in the United States Post Office, at Las Vegas, Nevada, in a sealed envelope with postage fully pre-paid thereon, a true and correct copy of the above and foregoing addressed to:

Edward O. Cousineau, Esq.  
General Counsel  
State of Nevada Board of Medical Examiners  
1105 Terminal Way, Suite 301  
Reno, NV 89502  
Fax: (775) 688-2321

Catherine Cortez Masto, Esq.  
State of Nevada Attorney General  
Office of the Attorney General  
100 North Carson Street  
Carson City, Nevada 89701-4717  
Fax: (775) 684-1108

\_\_\_\_\_  
An employee of the Law Offices of Jacob  
Hafter & Associates

7201 W. Lake Mead Blvd, Suite 210  
Las Vegas, Nevada 89128  
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1 CER  
2 JACOB L. HAFTER, ESQ.  
3 Nevada State Bar No. 9303  
4 MICHAEL K. NAETHE, ESQ.  
5 Nevada State Bar No. 11222  
6 LAW OFFICE OF JACOB L. HAFTER & ASSOCIATES  
7 7201 W. Lake Mead Blvd., Suite 210  
8 Las Vegas, Nevada 89128  
9 Tel: (702) 405-6700  
10 Fax: (702) 685-4184

11 Attorneys for Plaintiffs

12 **EIGHTH JUDICIAL DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

14 TRACY HURST, an individual; and AMBER  
15 TSANG, an individual;

16 Plaintiffs,

17 vs.

18 STATE OF NEVADA BOARD OF MEDICAL  
19 EXAMINERS; DOE Defendants I through X,  
20 inclusive; and ROE CORPORATIONS A through  
21 Z, inclusive,

22 Defendants.

Case No.: \_\_\_\_\_

Dept. No.: \_\_\_\_\_

23 **CERTIFICATION OF JACOB HAFTER, ESQ., PURSUANT TO NEVADA RULE OF**  
24 **CIVIL PROCEDURE 65(b)(2)**

25 COUNTY OF CLARK }  
26 } : ss  
27 STATE OF NEVADA }

28 I, JACOB HAFTER, ESQ., being first duly sworn, deposes and states as follows:

1. I am an attorney to practice in the State of Nevada and am one of counsel for Plaintiffs TRACY HURST and AMBER TSANG, in the above captioned matter.

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2. This Certification is made in compliance with N.R.C.P. 65(b)(1)(B), in support of PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER. It is based upon my personal knowledge and I am competent to testify to the matters contained herein.

3. On or about Tuesday, September 15, 2009, I received notice that the Nevada State Board of Medical Examiners scheduled a meeting of the Board for September 18, 2009.

4. On or about Tuesday, September 15, 2009, I received a copy of the agenda published by the State Board of Medical Examiners published for the September 18, 2009 meeting which included one item, the "discussion, deliberation and action regarding an emergency regulation pursuant to NRS 233B.0163 related to the regulation of medical assistants."

5. The proposed regulations were not publicly disseminated until the time of the meeting on September 18, 2009.

6. Despite numerous requests to the Board of Medical Examiners, I did not receive a copy of the proposed regulations until the Governor's office sent them to me on late Thursday afternoon, September 17, 2009.

7. I attended the September 18, 2009 meeting of the State Board of Medical Examiners at the Las Vegas location where the meeting was broadcasted over a conference call.

8. Abruptly, in the middle of the meeting, Charles Held, M.D., president of the Board, interrupted and terminated public comment.

9. I observed that three or four people who came to the meeting still did not speak at the time that the public comment was abruptly terminated.

10. At the earliest opportunity for additional public comment, I stated that such action was in violation of NRS § 241, et. seq., (the "Open Meeting Law").

11. I asked the Defendants to rescind their adoption of the emergency regulations and comply with the Open Meeting Law.

12. I notified Defendants that if they did not take such action, this office would file suit and seek injunctive relief to prevent the enforcement of the emergency regulations.



1 AFFT  
2 JACOB L. HAFTER, ESQ.  
3 Nevada State Bar No. 9303  
4 MICHAEL K. NAETHE, ESQ.  
5 Nevada State Bar No. 11222  
6 LAW OFFICE OF JACOB L. HAFTER & ASSOCIATES  
7 7201 W. Lake Mead Blvd., Suite 210  
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9 Tel: (702) 405-6700  
10 Fax: (702) 685-4184

11 Attorneys for Plaintiffs

12 **EIGHTH JUDICIAL DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

14 TRACY HURST, an individual; and AMBER  
15 TSANG, an individual;  
16  
17 Plaintiffs,

18 vs.

19 STATE OF NEVADA BOARD OF MEDICAL  
20 EXAMINERS; DOE Defendants I through X,  
21 inclusive; and ROE CORPORATIONS A through  
22 Z, inclusive,

23 Defendants.

Case No.: \_\_\_\_\_

Dept. No.: \_\_\_\_\_

24 **AFFIDAVIT OF TRACY HURST PURSUANT TO**  
25 **NEVADA RULE OF CIVIL PROCEDURE 65**

26 COUNTY OF CLARK }  
27 } : ss  
28 STATE OF NEVADA }

I, TRACY HURST, being first duly sworn, deposes and states as follows:

1. I, TRACY HURST, am a resident of the State of Nevada.
2. I am the Plaintiff in the above captioned action.

1 3. This Affidavit is made in compliance with N.R.C.P. 65(b), in support of  
2 PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER. It is  
3 based upon my personal knowledge and I am competent to testify to the matters contained  
4 herein.

5 4. I attended the September 18, 2009 meeting of the State Board of Medical  
6 Examiners at the Las Vegas location where the meeting was broadcasted over a conference call.

7 5. I wanted to speak at the public comment session of the meeting.

8 6. I wanted to have my comments made before the Board started its deliberations.

9 7. I was sitting at the telephone in Las Vegas, ready to begin my comments when,  
10 abruptly, just before I could speak, Charles Held, M.D., president of the Board, interrupted and  
11 terminated public comment.

12 8. I was not able to make any comments during the time set on the agenda for  
13 public comments.

14 9. I was not able to make any comments before deliberations occurred.

15 10. I heard the Board enter into deliberations and pass the emergency regulations.

16 11. The Board then re-opened public comment.

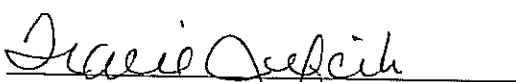
17 12. I made a few comments, however, as the regulations were already passed, I did  
18 not make all of the comments I wanted to, as I felt that my comments would not matter.

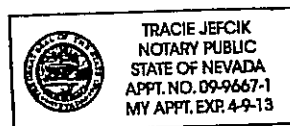
19 FURTHER SAYETH NAUGHT.

20 DATED this 21<sup>th</sup> day of September, 2009.

21  
22   
23 TRACY HURST

24 Subscribed and Sworn to before  
25 Me on this 21<sup>st</sup> day of September, 2009

26   
27 Notary Public in and for said  
28 Clark County, Nevada



**EXHIBIT "A"**

---

**EXHIBIT "A"**

SECRETARY OF STATE  
FILING DATA

2009 SEP 18 P 3:46  
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NEVADA

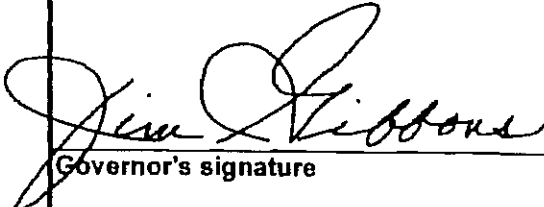
Form For Filing  
Administrative Regulations

Agency: Nevada State Board  
of Medical Examiners

FOR EMERGENCY  
REGULATIONS ONLY

Effective date: September 18, 2009

Expiration date: January 16, 2010

  
Governor's signature

Classification: \* PROPOSED \* ADOPTED BY AGENCY \* EMERGENCY

Brief description of action

Amending NAC 630.230 and new language in NAC chapter 630 relating to the regulation of medical assistants.

Authority citation other than 233B

NRS 630.130

Notice date: September 15, 2009

Date of Adoption by Agency: September 18, 2009

Hearing date: September 18, 2009

**Chapter 630 of NAC**

**EMERGENCY REGULATIONS OF PHYSICIANS AND PHYSICIAN ASSISTANTS RELATING TO MEDICAL ASSISTANTS**

(Effective for 120 days from September 18, 2009)

**NEVADA BOARD OF MEDICAL EXAMINERS'  
STATEMENT OF EMERGENCY**

WHEREAS, the Nevada Board of Medical Examiners (the Board) has convened this public meeting for the purpose of considering the adoption of the foregoing Emergency Regulations of physicians and physician assistants as it relates to medical assistants; and

WHEREAS, the Board finds that an emergency exists insofar as:

1. Substantial confusion in the medical community exists as to whether NRS 453.375 and 454.213 apply to medical assistants and their authority to administer prescription drugs;
2. Physicians in the state are uncertain as to whether they can allow their medical assistants to administer medications;
3. Medical assistants are being laid off from their employment because of the confusion and uncertainty;
4. Some physicians are curtailing patient services and procedures, and most physicians are uncertain how to proceed, creating considerable statewide disruption to patient care;

WHEREAS, the Board believes that the Emergency Regulations will clarify the practice boundaries for physicians, physician assistants, and medical assistants;

WHEREAS, the Board also believes that immediate clarification is needed to prevent further harm and disruption to the delivery of patient care by Nevada's physicians and physician assistants.

NOW THEREFORE, the Board hereby adopts the following Emergency Regulations which shall be effective September 18, 2009.

## **EMERGENCY REGULATIONS OF PHYSICIANS AND PHYSICIAN ASSISTANTS RELATING TO MEDICAL ASSISTANTS**

### **Sec. 1. NAC 630.230 shall be amended to read as follows:**

1. A person who is licensed as a physician or physician assistant shall not:
  - (a) Falsify records of health care;
  - (b) Falsify the medical records of a hospital so as to indicate his presence at a time when he was not in attendance or falsify those records to indicate that procedures were performed by him which were in fact not performed by him;
  - (c) Render professional services to a patient while the physician or physician assistant is under the influence of alcohol or any controlled substance or is in any impaired mental or physical condition;
  - (d) Acquire any controlled substances from any pharmacy or other source by misrepresentation, fraud, deception or subterfuge;
  - (e) Prescribe anabolic steroids for any person to increase muscle mass for competitive or athletic purposes;
  - (f) Make an unreasonable additional charge for tests in a laboratory, radiological services or other services for testing which are ordered by the physician or physician assistant and performed outside his own office;
  - (g) Prescribe controlled substances listed in schedule II pursuant to NAC 453.520 or schedule III pursuant to NAC 453.530, controlled substance analogs, chorionic gonadotrophic hormones, thyroid preparations or thyroid synthetics for the control of weight;
  - (h) Allow any person to act as a medical assistant in the treatment of a patient of the physician or physician assistant, unless the medical assistant has sufficient training to provide the assistance;
  - (i) Fail to provide adequate supervision of a medical assistant who is employed or supervised by the physician or physician assistant;
  - (j) If the person is a physician, fail to provide adequate supervision of a physician assistant or an advanced practitioner of nursing;
  - (k) Fail to honor the advance directive of a patient without informing the patient or the surrogate or guardian of the patient, and without documenting in the patient's records the reasons for failing to honor the advance directive of the patient contained therein; or
  - (l) Engage in the practice of writing prescriptions for controlled substances to treat acute pain or chronic pain in a manner that deviates from the guidelines set forth in the *Model Guidelines for the Use of Controlled Substances for the Treatment of Pain* adopted by reference in NAC 630.187.
2. As used in this section:
  - (a) "Acute pain" has the meaning ascribed to it in section 3 of the *Model Guidelines for the Use of Controlled Substances for the Treatment of Pain* adopted by reference in NAC 630.187.

(b) "Chronic pain" has the meaning ascribed to it in section 3 of the *Model Guidelines for the Use of Controlled Substances for the Treatment of Pain* adopted by reference in NAC 630.187.

(c) "Controlled substance analog" means:

(1) A substance whose chemical structure is substantially similar to the chemical structure of a controlled substance listed in schedule II pursuant to NAC 453.520 or schedule III pursuant to NAC 453.530; or

(2) A substance which has, is represented as having or is intended to have a stimulant, depressant or hallucinogenic effect on the central nervous system of a person that is substantially similar to, or greater than, the stimulant, depressant or hallucinogenic effect on the central nervous system of a person of a controlled substance listed in schedule II pursuant to NAC 453.520 or schedule III pursuant to NAC 453.530.

~~[(d) "Medical assistant" means any person who:~~

~~— (1) Is employed by a physician or physician assistant;~~

~~— (2) Is under the direction and supervision of the physician or physician assistant;~~

~~— (3) Assists in the care of a patient; and~~

~~— (4) Is not required to be certified or licensed by an administrative agency to provide that assistance.]~~

**Sec. 2. NAC chapter 630 shall be amended to add the following new language:**

***1. A physician or physician assistant may allow a person to assist the physician or physician assistant in providing medical care or services as a medical assistant only where the medical assistant:***

***(a) Is employed by the physician or physician assistant; and***

***(b) Performs such services at the direction of and under the direct supervision of the physician or physician assistant.***

***2. A physician or physician assistant may not allow a medical assistant to:***

***(a) Except as otherwise provided in Section 3 of this regulation, perform or provide any service for which a license or registration is required by Nevada law in order to perform the service;***

***(b) Except for the administration of an immunization or vaccination, perform or provide any invasive procedure upon or injection into the body of a patient unless the physician or physician assistant:***

***(1) Has previously physically examined the patient;***

***(2) Has determined that the patient has a medical condition for which the physician or physician assistant has determined a course or plan of treatment;***

***(3) Directs and supervises the service performed or provided by the medical assistant;***

***(c) Perform or provide any discretionary or professional service; or***

***(d) Perform or provide any service upon the body of a patient independently of the physician or physician assistant.***

***3. A physician or physician assistant may allow a medical assistant to:***

***(a) Perform routine assessment tasks to assist the physician or physician assistant with the performing of a physical examination of the patient; and***

***(b) Administer a prescription drug as provided in Section 3 of this regulation.***

4. *A physician or physician assistant may allow a medical assistant to perform or provide a service upon the body of a patient only when:*

*(a) Trained by the physician or physician assistant to competently and safely perform or provide the service;*

*(b) Directed to perform or provide the service upon the body of the patient by the physician or physician assistant; and*

*(c) The physician or physician assistant can physically respond to the patient and the medical assistant within five minutes when the medical assistant provides the service.*

Sec. 3. NAC chapter 630 shall be amended to add the following new language:

1. *A physician or physician assistant may possess and administer a prescription drug:*

*(a) Himself;*

*(b) By directing and allowing a person authorized under NRS 453.375 or NRS 454.213 to do so; or*

*(c) By directing a medical assistant to do so.*

2. *A physician or physician assistant may not direct and may not allow a medical assistant to administer:*

*(a) Chemotherapy;*

*(b) Corticosteroids or other injected anti-inflammatory drugs unless by subcutaneous or intramuscular injection;*

*(c) Anesthetics that would render the patient unconscious or semi-conscious;*

*(d) Botulinum neurotoxin;*

*(e) Collagen and other cosmetic or dermal fillers;*

*(f) Drugs intended to interfere with or block neural function except for topical or local anesthetics used to temporarily relieve pain or to facilitate another medical procedure;*

*(g) Any other drug where the therapeutic outcome is dependent upon the placement, quantity, or technique uniquely within the discretion, training, and judgment of a physician or physician assistant.*

#### ADOPTION BY THE BOARD

SIGNED this 13 day of September, 2009.

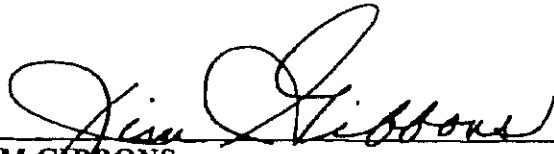


Charles N. Held, M.D., Chairman  
Nevada Board of Medical Examiners

**GOVERNOR'S ENDORSEMENT**

**PURSUANT TO NRS 233B.0613 I, Governor Jim Gibbons, endorse the Nevada State Board of Medical Examiners' statement justifying an emergency for passage of the within regulation of physicians and physician assistants as it relates to medical assistants.**

SIGNED this 17<sup>th</sup> day of September, 2009.

  
\_\_\_\_\_  
JIM GIBBONS  
Governor

**EXHIBIT "B"**

---

**EXHIBIT "B"**



# Nevada State Board of Medical Examiners

## **\* \* \* PUBLIC NOTICE \* \* \***

### **NEVADA STATE BOARD OF MEDICAL EXAMINERS**

### **TELEPHONE CONFERENCE BOARD MEETING**

Board Office Conference Room  
1105 Terminal Way, Suite 301, Reno, NV 89502

Teleconferenced to:

Conference Room at the Offices of the  
Nevada State Board of Dental Examiners  
6010 S. Rainbow Boulevard, Building A, Suite 1, Las Vegas, Nevada 89118

**FRIDAY, September 18, 2009 – 11:00 AM**

## **\* \* AGENDA \* \***

### **Please Note:**

- 1) Persons wishing to attend this meeting may do so at either of the above-listed locations.
- 2) Agenda items, other than those items posted with a specific date and time, may be taken out of sequence to accommodate persons appearing before the Board and/or to aid in the effectiveness of the meeting.

1. Call to Order and Announcements Charles N. Held, M.D., President  
-Roll Call/Quorum
2. \* Discussion, deliberation, and action regarding an emergency regulation pursuant to NRS 233B.0163 related to the regulation of medical assistants.  
- Louis Ling, Executive Director
3. \*\* Public Comment

\* Denotes items on which action may occur.

\*\* Under the Public Comment agenda item, members of the general public may bring

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matters not appearing on this agenda to the attention of the Board. The Board may discuss the matters, but may not act on the matters at this meeting. If the Board desires, the matters may be placed on a future agenda for action. In consideration of others, who may also wish to provide public comment, please avoid repetition and limit your comments to no more than five (5) minutes.

NOTICES POSTED AT THE FOLLOWING LOCATIONS:

Nevada State Board of Medical Examiners – Reno  
Office of the Attorney General – Las Vegas  
Washoe County Court House – Reno  
Southern Nevada Health District – Las Vegas  
Elko County Court House – Elko  
Office of the Attorney General – Carson City  
White Pine County Court House – Ely

PLEASE NOTE:

- 1) Persons/facilities desiring copies of the Board's agenda must submit their request in writing every six months. Check the address label for this agenda for expiration date.
- 2) With regard to any Board meeting, it is possible that an amended notice will be published adding new items to the original agenda. Amended notices will be posted in accordance with the Open Meeting Law; however, they will not be mailed to individuals on the Board's mailing list.
- 3) Members of the public who are disabled and require special accommodations or assistance at the meeting are requested to notify the Board office in writing at P.O. Box 7238, Reno, NV 89510 or by calling (775) 688-2559 prior to the date of the meeting.