February 4, 2009

[redacted]
Las Vegas, NV 89134

Re: [redacted] v. [redacted] et al

Dear [redacted]

I am pleased to submit to you my report on the issue upon which you sought my expertise, i.e. whether [redacted] is an "other immediate member of the family" as that phrase is used in NRS 41.440. The reason why an expert opinion is needed is because that phrase, as used in that statute, is not defined by the same statute, the Nevada Supreme Court nor by the legislative history. We are, therefore, required to look elsewhere in the law for guidance.

In providing my expert guidance on this subject, I have relied upon the facts as gleaned from a reading of the depositions of [redacted] and as stated in the opinion of the Nevada Supreme Court in Arata v. Faubion, 123 Nev. Adv. Op.#19, 161 P.3d 244 (June 26, 2007).

It is also important to note at the outset that the "family" can have a broad meaning in ordinary, everyday usage. Employees of a business entity or workers in an office may have worked together a long time and consider themselves like "family." Likewise members of small fraternal groups, athletic teams, etc. often refer to themselves as "family" when they spend significant time together and share common goals, activities or interests. We often hear of loosely affiliated groups of individuals such as the infamous "Manson family" referring to themselves as "family" when there are no biological ties or associations by marriage.

However, when the issue of "family" arises in the legal context, what is "family" is often very restricted and may have nothing to do with everyday life and beliefs of people who refer to themselves and others as "family." The definition of "family," "immediate member of the family," etc. may have very narrow definitions and applications. Since this case arises in a highly legal context, it is necessary to try and define that term in the light of various legal principles and applications. If anyone thinks the definition is simple, look at the term "family" in Black's Law Dictionary. It occupies four full pages because the meaning varies with the legal context.

The essential facts as relevant to my opinion are straightforward. [redacted] is the natural child of [redacted] Mr. [redacted] not the biological father. [redacted] was age 19 (DOB 5-21-1979) at the time of the accident on January 22, 1999. He was a 1997 graduate of Silverado High School and was working as a laborer for Best Electric. He had moved out but then had moved back into their residence and was living there when the accident occurred.

[redacted] had his own pickup truck that was purchased for him by his mother and stepfather and was insured by them under their car insurance. On January 22, 1999, he took his mother, stepfather and younger sister to the airport early in the morning. He drove them to the airport in the 1998 Ford Expedition normally driven by his mother.

[redacted] then directly went to work from the airport. After work, he proceeded to travel across the southern part of Las Vegas to go to his friend's house. He and his close personal friend had a custom of going to the bank together on Friday after work to deposit their paychecks.

[redacted] struck a pedestrian who was jogging northbound on Valley Verde as he was performing a left hand turn from Valle Verde on to Paseo Verde.

The pedestrian sued him and the [redacted] for her injuries arising out of the accident. The jury returned a large verdict in favor of [redacted] against [redacted] and the [redacted] was obviously deemed liable for the injuries as the driver of the vehicle.

Vicarious liability of the [redacted] was based solely upon NRS 41.440 which reads in its entirety as follows:

> ***"Imposition of liability.*** *Any liability imposed upon a wife, husband, son, daughter, father, mother, brother, sister or other immediate member of a family arising out of his or her driving and operating a motor vehicle upon a highway with the permission, express or implied, of such owner is hereby imposed upon the owner of the motor vehicle, and such owner shall be jointly and severally liable with his or her wife, husband, son, daughter, father, mother, brother, sister or other immediate member of a family for any damages proximately resulting from such negligence or willful misconduct, and such negligent or willful misconduct shall be imputed to the owner of the motor vehicle for all purposes of civil damages."*

In reviewing the essential facts of the case, certain objective facts stand out as the most relevant and also simple, clear, and undisputed:

1. [redacted] was never adopted by [redacted] and there is no legal relationship of parent and child between them. The relationship, insofar as it can be described, is that of stepfather and stepson which is a relationship by affinity and not by consanguinity.

2. [redacted] was age 19 at the time of the accident and was therefore deemed emancipated under state law. NRS 129.010

3. [redacted] has no legal obligation of support or responsibility towards Andrew Arata. See NRS 125B.020 (obligation of parents).

4. Nevada tort law would not allow Mr. [redacted] to sue for wrongful death if [redacted] were to die in an accident caused by some other party.

5. Nevada probate law would not allow Mr. [redacted] to inherit from [redacted] if [redacted] were to die intestate and leaving an estate for his heirs.

It is equally clear that liability of Mr. [redacted] rests solely upon whether the jury determines that he comes within the meaning of the phrase "other immediate member of a family" as that phrase is used in NRS 41.440, supra. If he does not, there is no liability. The Nevada Supreme Court has already determined that there is no legislative history which supplies any answer as to the Legislature's intent and, therefore, the liability issue has to be determined at a later trial.

The purpose of this opinion letter is to illustrate how these terms may be used in different but explicitly legal contexts.

In order to provide you with an opinion, I have utilized multiple principals of statutory interpretation as well as other case law authority relevant to this legal issue.

First, the language of the statute itself uses the words "wife, husband, son, daughter, father, brother, sister" preceding the phrase "other immediate member of a family." There is no language that includes "step" as a prefix for any of the relationships.

These words also denote the concept of a basic nuclear family whose members are connected by blood relations in what we call "consanguinity." An excellent discussion of this topic can be found in Attorney General Opinion No.2007-07 which discussed a transfer tax exemption statute which included language defining "consanguinity and affinity." Prior to 2005, the statute at issue, NRS 375.090, allowed an exemption for transfers among family members within the first degree of consanguinity. The 2005 Nevada Legislature added the phrase "or affinity" and this was interpreted by the Attorney General to now include stepparents, stepchildren, parents-in-law and children-in-law.

"Consanguinity" is recognized in the law as being relationship by blood and biology. It does not include non-blood relations that exist by marriage only such as stepparent and stepchild. Those are deemed relationships by affinity.

That has legal significance in those instances where an act or course of behavior may be prohibited or restricted by a relationship described as being within certain degrees of consanguinity. That would limit the scope of the legal operation to blood relatives only. If the legislature wants to include other people who are relatives by marriage only, the legislature can include language such as "consanguinity or affinity" to cover those extended family relationships. See Commonwealth v. Rahim, 805 N.E.2d 13, 16-17 (MA 2004).

If the accident in this case was caused by [redacted]i, [redacted] could be liable by the language of this statute. However, the language of this statute does not extend to stepparent relationships because the Nevada Legislature did not use descriptive words of step relationships in the list of potentially liable family members.

There are certain applicable principals of statutory construction. The first is the established principle of statutory construction as stated in Ford Motor v. County of Tulare, 193 Cal. Rptr. 511, 512 (1983):

> "It is a well recognized principle of statutory construction that when the legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded."

See also State v. Jenkins, 728 A.2d 293, 297 (NJ Sup.Ct. A.D. 1999) and Moran v. City of Houston, 58 S.W.3d 159, 162 (TX App.2001)("When the legislature has employed a term or phrase in one section of a statute and excluded it in another, we presume the legislature had a reason for excluding it and that term should not be implied where it has been excluded.").

Although no Nevada case states this principle in the same way, several Nevada cases suggest that the approach is similar. As far back as 1873 in State v. Birchim, 9 Nev. 95, 99 (1873) in which the court stated that "True, the words to be construed are common to each section, and are contained in the same legislative enactment. But the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument; their meaning must be determined by the subject to which they are applied."

Even earlier, the Nevada Supreme Court stated in Virginia and Truckee Railroad v. Board of County Commissioners, 5 Nev. 341, 347 (1870) that "There is no rule of construction which will authorize the application of provisions stated in one law respecting a certain officer or body, to another and different officer or body mentioned in another law, although the laws be *in pari materia.*"

If the legislature leaves words out of a statute during a revision process, it is not the province of the courts to supply the missing words. If the legislature left the words out, so be it. The court lacks the power to supply the legislature's omission of words. Crane and Hastings Co. v. Gloster, 13 Nev. 279, 280-81 (1878).

An example of how this legal reasoning is used is People v. Justin M, 2007 Cal. App. Unpub. LEXIS 4323 (Cal. App. 2007). This case is not being cited as legal authority for any point of law in this opinion. It is included as an example of the legal reasoning used by the Court of Appeal in reaching its conclusion. Exhibit 1.

The second principle employed is "ejusdem generis" which is described in Orr Ditch and Water Company v. Justice Court, 64 Nev. 138, 147 (1947):

> *"And the rule ejusdem generis follows in sec. 249, pp. 244-246, and is as follows: "§ 249. Limitation of General Words by Specific Terms. -- General and specific words in a statute which are associated together, and which are capable of an analogous meaning, take color from each other, so that the general words are restricted to a sense analogous to the less general. Under this rule, general terms in a statute may be regarded as limited by subsequent more specific terms. Similarly, in accordance with what is commonly known as the rule of ejusdem generis, where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designation and as including only things or persons of the same kind, class, character, or nature as those specifically enumerated. The general words are deemed to have been used, not to the wide extent which they might bear if standing alone, but as related to words of more definite and particular meaning with which they are associated. In accordance with the rule of ejusdem generis, such terms as 'other,' 'other thing,' 'other persons,' 'others,' 'otherwise,' or 'any*

> *other,' when preceded by a specific enumeration, are commonly given a restricted meaning, and limited to articles of the same nature as those previously described. The rule of ejusdem generis has been declared to be a specific application of the broader maxim of 'noscitur a sociis' which is discussed in other sections of this subdivision."*

A definition of "ejusdem generis" which explains the concept in simpler terms is found in Black's Law Dictionary (7th Ed. 1999):

> "***Ejusdem generis*** ..... (Latin 'of the same kind or class') A canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed. For example, in the phrase '*horses, cattle, sheep, pigs, goats, or any other barnyard animal*' – despite its seeming breadth – would probably be held to include only four legged, hoofed mammals (and thus would exclude chickens). "

As stated above, NRS 41.440 expressly describes certain specific family members and then uses the general phrase in dispute. Using the interpretation aid of ejusdem generis, the disputed phrase has to refer to relatives of the same degree and kind as used in the specific family member terms, i.e. close blood relatives.

OTHER NEVADA STATUTES AND ADMINISTRATIVE REGULATIONS

The methodology used here is to compare the phrase "immediate member of a family" as used in NRS 41.440 with similar phrases in other Nevada statutes or the Nevada Administrative Code using the Lexis Nexis research service. That precise phrase was set up as the search term and that phrase does not appear in any other Nevada Statutes or administrative regulations.

The next step was to search the statutes and regulations for comparable terms. Attached hereto as Exhibit 2 is the Lexis Nexis search results for "immediate family" as it appears in other Nevada statutes. The result was 40 "hits" i.e. where the phrase appeared in a statute. Each statute is included with the Exhibit except for NRS 41.440 itself since that is already quoted above.

In the great majority of the statutes, the phrase "immediate family" is not defined. Only a few of the statutes included a definition of "immediate family" and those statutes include NRS 176.357, 178.5698, 217.160, 218.908, 417.210, 449.0115, 449.915, 449.031, 640C.100(4) and 678.130.

The definition varied depending upon the purpose and scope of the statute.

NRS 176.357 defines "immediate family" as those related by blood, adoption or marriage "within the second degree of consanguinity or affinity." NRS 178.5698(8)(a) defines "immediate family" as "any adult relative of the victim living in the victim's household." NRS 217.160(2)(c) defines the term as persons related by blood, adoption or marriage within the first degree of consanguinity. All of these are criminal statutes.

NRS 218.908 is in a chapter regulating the state legislature. It addresses "gift" and it excludes gifts received from a member of the recipient's immediate family "or from a relative of the recipient or his spouse within the third degree of consanguinity or from the spouse of any such relative."

NRS 417.210(5) defines "immediate family" as the spouse, minor child or, when the executive director deems appropriate, the unmarried adult child of an eligible veteran."

NRS 449.0115(2)(a), a hospice care statute, defines "family" as "the immediate family, the person who primarily cared for the patient and other persons with significant personal ties to the patient, whether or not related by blood." NRS 449.031 includes a similar definition.

NRS 640C.100 is part of the chapter regulating massage therapists. Subsection 5 defines "immediate family" as "persons who are related by blood, adoption or marriage, within the second degree of consanguinity or affinity."

NRS 678.130 defines "immediate family" as "any relative, by consanguinity or marriage, of a member living in the member's household and includes foster and adopted children." Chapter 678 governs credit unions.

Attached hereto as Exhibit 3 are the search results for "immediate family" in the Nevada Administrative Code.

The search term "immediate family member" was utilized for a computer search of both the Nevada Revised Statutes and Nevada Administrative Code and those are also included as Exhibits 4 and 5. In none of the cited statutes or regulations are the terms defined.

Exhibit 6 contains the statutory references to "stepparent" and the only notable statute is NRS 432B.130 which addresses the responsibility for children. The statute does include stepparents but this is all in the context of Chapter 432B which addresses the prevention of child abuse and neglect.

Other collateral sources are used in this opinion. In Pulice v. State Ethics Commission, 713 A.2d 161 (Pa. 1998), one precise issue was whether a son-in-law was included within the scope of "immediate family" for as used in a state ethics statute. The court concluded that it did not:

> *"The Commission charges Public Official with using his public office for the private pecuniary benefit of his daughter, Paige, and son-in-law as members of his immediate family. Petitioner first challenges the Commission's inclusion of son-in-law within the Conflicts of Interest definition in Section 2 of the Act, 65 P.S. § 402. In support of its conclusion that "son-in-law" is included in the definition of "immediate family" member, the Commission reasoned that Public Official is "circumventing" the pecuniary benefit prohibition to his daughter by, in effect, channeling funds to her through her husband, the son-in-law.*
>
> *The Commission is bound, however, by the plain language and legislative intent of the entire statute. Immediate family" as defined in Section 2 of the Act, 65 P.S. § 402 is not difficult to understand: "A parent, spouse, child, brother or sister." (Emphasis added.) The definition in the Act for "immediate family" member clearly does not include any in-laws, including a son-in-law, and has no language in it from which "in-law" can be implied. The legislative intent of the statute is clear, as stated in Section 1(a) of the Act, 65 P.S. §401, that "the General Assembly by this act intends to define as clearly as possible those areas which represent conflict with the public trust."*
> *It is, therefore, clear that the legislature has deliberately omitted any "in-law" from the definition of "immediate family" and the Commission cannot enlarge the definition of "immediate family" in the face of the clear legislative intent. The Commission has, therefore, committed an error of law by including son-in-law as an immediate family member in considering whether Public Official's actions constituted a Conflict of Interest by voting on the appointment of son-in-law to the new position as well as his voting on the creation of the new position."*

Since the instant case involves a question of tort liability, it would be provident to rely on published Nevada cases concerning the standing of a party to sue in tort for personal injuries or wrongful death.

In Grotts v. Zahner, 115 Nev. 339 (1999), the Nevada Supreme Court held that a decedent's fiancé could not bring her own tort claim for bystander negligent infliction of emotional distress (NIED) when she was involved in the same car accident that killed her fiancé. The court held that she was not a member of the "immediate family." The opinion written by Justice Maupin tried essentially to define the phrase by referring in part to footnote one for "family relationships beyond the first degree of consanguinity." Notably absent from this footnote is the phrase often added in other statutes, "or affinity." Thus, the family relationship tests in Grotts are limited to blood relatives or relatives by marriage.

In that case, the parties were personally very close, i.e. fiances, and would obviously be adversely affected be the accident for both being in the same accident and losing the person that he or she was to marry. The personal closeness of the relationship was of no legal consequence. Since they were not legally married at the time, she had no claim for NIED.

The same result occurred when Las Vegas residents Kenneth Milberger and Heather Olson vacationed in Maui and Kenneth was injured by a large wave while in the water in front of their hotel. Heather had witnessed his injuries. They both sued the hotel property on various theories but the NIED claim was dismissed since they were only engaged, not married. The U.S. District Court in a diversity lawsuit held in Milberger v. Kaanapali Beach Hotel, 486 F. Supp. 2d 1156, 1162-1167 (2007) that such claims will not be permitted for unmarried couples and that the fact of a marriage is an appropriate bright line test for such claims. The court recognized that fiances are certainly affected by the witnessing of these injuries but believed that the legal system had to draw a line somewhere in order to prevent a proliferation of law suits from people in relationships other than marriage.

The same result happened in Smith v. Toney, 862 N.E.2d 656 (IN 2007) a case in which a woman engaged to be married witnessed the accident in which her fiancé was killed. As in these prior two cases, liability for NIED was not permitted when there was no marriage.

Nevada's wrongful death statute, NRS 41.085 limits wrongful death claims to the decedent's heirs at law which is determined as if the decedent died intestate. That statute reads as follows:

> 1. As used in this section, "heir" means a person who, under the laws of this State, would be entitled to succeed to the separate property of the decedent if he had died intestate. The term does not include a person who is deemed to be a killer of the decedent pursuant to chapter 41B of NRS, and such a person shall be deemed to have predeceased the decedent as set forth in NRS 41.B.330.
>
> 2. When the death of any person, whether or not a minor, is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent may each maintain an action for damages against the person who caused the death, or if the wrongdoer is dead, against his personal representatives, whether the wrongdoer died before or after the death of the person he injured. If any other person is responsible for the wrongful act or neglect, or if the wrongdoer is employed by another person who is responsible for his conduct, the action may be maintained against that other person, or if he is dead against his personal representatives.

3. An action brought by the heirs of a decedent pursuant to subsection 2 and the cause of action of that decedent brought or maintained by his personal representatives which arose out of the same wrongful act or neglect may be joined.

4. The heirs may prove their respective damages in the action brought pursuant to subsection 2 and the court or jury may award each person pecuniary damages for his grief or sorrow, loss of probable support, companionship, society, comfort and consortium, and damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are not liable for any debt of the decedent.

5. The damages recoverable by the personal representatives of a decedent on behalf of his estate include:

(a) Any special damages, such as medical expenses, which the decedent incurred or sustained before his death, and funeral expenses; and

(b) Any penalties, including, but not limited to, exemplary or punitive damages, that the decedent would have recovered if he had lived, but do not include damages for pain, suffering or disfigurement of the decedent. The proceeds of any judgment for damages awarded under this subsection are liable for the debts of the decedent unless exempted by law.

Resort is then made to NRS 132.255, part of the probate code, which defines "parent" and "expressly excludes any person who is a stepparent, foster parent or grandparent."

In Banegas v. SIIS, 117 Nev. 222 (Nev. 2001), the court refused to allow the ex-wife of a decedent who died from a work related disease to receive death benefits from the SIIS. Although the ex-wife and ex-husband (now deceased) lived together after the divorce and he supported her, she did not qualify as a "dependent" under the work compensation statute nor could she be deemed as a "surviving spouse" since she was not longer married to the decedent.

Thus, if [redacted] died in an accident caused by the fault of another, Mr. [redacted] could not sue for his wrongful death. Likewise, if Mr. [redacted] died in an accident caused by the fault of another, [redacted] could not sue for his wrongful death either since [redacted] was never adopted by Mr. [redacted] See C.H.H. v. R.H., 696 S.2d 1076 (AL App. 1996). The right to sue has nothing to do with any personal degree of closeness. They could be extremely close personally and feel a deep personal loss if one or the other died but that alone would not provide a legal basis for a claim. Likewise, an estranged father and son could sue despite the lack of any close personal relationship since the right to sue is based solely on the familial relationship.

There is a critical distinction between stepchildren who have been adopted by a stepfather and those who have not been so adopted. The stepfather who adopts and the child who is adopted will have a right to sue for wrongful death and for negligent infliction of emotional distress. Without a formal adoption, these claims are precluded.

Respectfully submitted,

ROBERT W. LUECK, LTD.