MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON COMMERCE AND LABOR

Seventy-Third Session
March 23, 2005

The Committee on Commerce and Labor was called to order at 2:07 p.m., on Wednesday, March 23, 2005. Chairwoman Barbara Buckley presided in Room 4100 of the Legislative Building, Carson City, Nevada, and via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Ms. Barbara Buckley, Chairwoman
Mr. John Oceguera, Vice Chairman
Ms. Francis Allen
Mr. Bernie Anderson
Mr. Morse Arberry Jr.
Mr. Marcus Conklin
Mrs. Heidi S. Gansert
Ms. Chris Giunchigliani
Mr. Lynn Hettrick
Ms. Kathy McClain
Mr. David Parks
Mr. Richard Perkins
Mr. Bob Seale
Mr. Rod Sherer

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblywoman Susan Gerhardt, Assembly District No. 29, Clark County
Assemblyman William Horne, Assembly District No. 34, Clark County

STAFF MEMBERS PRESENT:

Brenda J. Erdoes, Legal Counsel
Diane Thornton, Committee Policy Analyst

Russell Guindon, Deputy Fiscal Analyst
Keith Norberg, Deputy Fiscal Analyst
Vanessa Brown, Committee Secretary

OTHERS PRESENT:

Dr. Julio Garcia, Private Citizen, Las Vegas, Nevada
Dr. Frederick Ernst, Private Citizen, Dothan, Alabama
Neena Laxalt, Private Citizen, Reno, Nevada
Melissa Moore, Private Citizen
Michael Fischer, President, Nevada State Medical Association (NSMA)
Scott Craigie, Legislative Advocate, representing Nevada State Medical Association
Denise Davis, Executive Director, Nevada Osteopathic Medical Association
Donald Baepler, Ph.D., D.Sc, Public Member, Nevada State Board of Medical Examiners
Dr. Frank Nemec, Private Citizen
Dr. John Ellerton, Private Citizen
Keith Lee, Legislative Advocate, representing the State Board of Medical Examiners
Drennan A. "Tony" Clark, J.D., Executive Secretary/Special Counsel, State Board of Medical Examiners
Brian Sanchez, Lieutenant, Interim Manager, Criminal History Repository, Nevada Department of Public Safety
Denyette DePierro, Director of Bank Relations and Legislative Representative, Independent Community Bankers of America
Danny Thompson, Executive Secretary/Treasurer, Nevada State AFL-CIO
Bill Uffelman, President, CEO, Nevada Bankers Association
Donal Hummer, Vice President, Community Government Affairs, Harley-Davidson Financial Services
Phillip LaChapelle, President and Chief Executive Officer, Fifth Street Bank (Proposed Nevada Thrift Charter)
Chuck Alvey, President, CEO, Economic Development Authority, Western Nevada
Bernard Nebenzahl, Attorney, Fifth Street Bank,
Larry Osborne, Chief Executive Officer, representing Carson City Area Chamber of Commerce
George Ross, Legislative Advocate, representing the Retail Association of Nevada
Michael Pennington, Public Policy Director, Reno/Sparks Chamber of Commerce
Ron Weisinger, Private Citizen, Reno, Nevada

Trey Delap, Deputy Executive Director, Nevada State Board of Osteopathic Medicine
Denise Selleck Davis, Executive Director, Nevada Osteopathic Medical Association

Chairwoman Buckley:
[Meeting called to order. Roll called.] I will open the public hearing on Assembly Bill 120.

Assembly Bill 120: Requires physicians to report to their licensing boards certain information concerning performance of office-based surgery. (BDR 54-888)

Assemblywoman Susan Gerhardt, Assembly District No. 29, Clark County:
This bill addresses the issue of office-based surgeries, an issue that has become a documented problem in Florida and other states (Exhibit B). Improvements in surgical and anesthesia technology and the demand to be cost-effective have driven an explosion in the number of surgeries performed in office settings. Patients today, when given a choice, are increasingly opting for office settings over hospital settings for certain medical procedures such as hernia repairs, hemorrhoidectomies, removal of cancerous lesions, rhinoplasty, liposuction, knee arthroscopic surgery, and the list goes on.

Many physicians favor office-based surgeries since they can charge a facility fee, anesthesiology fees, and a professional services fee. I've seen reports that as much as 10 percent of all surgeries and 30 percent of outpatient procedures are now office-based. According to the American Society of Aesthetic Plastic Surgeons, more than 46 percent of cosmetic surgeries are performed in office-based surgical facilities. These figures are not surprising, given the convenience and potential savings of having procedures performed in a doctor's office rather than in a hospital setting or an ambulatory surgery center. Convenience and cost are just two considerations. Another consideration, and one that certainly is not trivial, relates to the risks associated with surgeries that are performed in a doctor's office rather than a hospital or at an ambulatory surgery center.

Just how safe are office-based surgeries? Reliable data is very difficult to obtain, since there are no federal requirements for reporting adverse events during office-based surgeries, and only a few states mandate reporting in such cases. However, a 2003 study in the medical journal *Archives of Surgery* found that over a two-year span, patients in Florida were 10 times more likely to die or

be injured in surgeries performed at doctor's offices than those whose surgeries were performed at ambulatory surgery centers.

[Assemblywoman Gerhardt, continued.] Much of my research on this topic suggests that the problems associated with office-based surgeries tend to result from ill-equipped facilities and preventable anesthesia-related incidents. In many states, doctor's offices are not subjected to the same regulatory and accreditation requirements that apply to hospitals, so when an adverse event occurs, the patient is at a much greater risk of injury or death. In some doctor's offices, physicians handle the administration of anesthesia, then give the job of monitoring the equipment to an assistant or an office nurse. Without minimum safety standards, there is a chance that office-based surgeries are being performed in places with limited or outdated equipment, few or no emergency resources, inadequately trained staff, or insufficient safety precautions.

Currently, six states have enacted legislation specific to office-based surgery. Sixteen additional states have regulations or guide lines in place, most commonly administered by their respective medical boards. Twenty-two states have taken action. Nevada is one of the states that have no standard in place to regulate office-based surgeries.

A.B. 120 is a first step in trying to assess the extent to which office-based surgery problems may be present in Nevada. This bill proposes to have medical doctors and osteopathic physicians report to their respective licensing boards information concerning the number of office-based surgeries they perform that require sedation or general anesthesia. In addition, these doctors would be required to report information concerning any unexpected occurrences involving the death or injury of any of their patients.

A.B.120 also required the Board of Medical Examiners and the State Board of Osteopathic Medicine to include in their biennial reports to the Governor and Legislature information received from licensees regarding office-based surgeries involving sedation or general anesthesia, including any sentinel events arising from any surgery requiring sedation or anesthesia.

The bill as introduced requires that this information be provided by physicians as part of their annual or biennial license renewal applications. However, in consultation with various affected parties, I have agreed to amend the bill (Exhibit C) in a manner that does not tie this reporting requirement to the license renewal process. Instead, I am proposing that this information be provided to the respective licensing boards on an annual basis. However, failure to submit the information required by this bill, or knowingly reporting false information, would still constitute grounds for initiating disciplinary action by the Boards.

[Assemblywoman Gerhardt, continued.] Additionally, I am proposing to amend the bill to provide that the information reported to the respective licensing boards is confidential, is not subject to subpoena or discovery, and is not subject to inspection by the general public. This confidentiality provision would be adapted from existing statutes that required the reporting of sentinel events by certain health care facilities. That can be found in NRS 439.800 [*Nevada Revised Statutes*].

I worked for 10 years as an office manager in medical and dentists' offices. I have every respect for those in the medical profession. The intent of this bill is to collect information so that we can determine if we have a problem in Nevada. My goal is that if a patient chooses office-based surgery, they will be able to expect the same good quality of care that they would receive in a hospital or surgical center.

Dr. Julio Garcia, Private Citizen, Las Vegas, Nevada:
I'm here to speak in support of A.B. 120. I'm a practicing plastic surgeon in Las Vegas. In accordance with our society's rules and regulations, for us to perform office-based surgery, we have to have our facilities accredited by a national accrediting foundation. There are three of those that monitor what we perform in our offices. I totally agree with the need to look at this scenario. Those of us who do voluntarily choose to follow these regulations absorb an enormous amount of additional cost that needs to be spent for these procedures to be done in a safe environment.

Stories you hear about office-based procedures having complications are certainly true. The largest reason for that is, if physicians have been sanctioned at hospitals for having high complication rates, they can always retreat to their offices, where there's no oversight, and continue to do those procedures. Many physicians will elect to do procedures in their offices if they've been denied privileges at a hospital due to complications or never even had those privileges to begin with. Therefore, they have gone to their offices to continue to perform these procedures for profit-based reasons. These sentinel events should be recorded. Some doctors use different types of anesthesia, which should be considered.

[Dr. Julio Garcia, continued.] The public's perception that intravenous sedation or general anesthesias are more dangerous than local can be deceiving. Many physicians in our communities administer oral medications at the time of the procedure, and some of these oral medications can be just as dangerous as intravenous medications, but with no way of reversing them unless you have an intravenous line. I'm here to speak in support of A.B. 120. We need to start

monitoring these issues. I agree with Ms. Gerhardt that these need to be held in confidence. Physicians are always concerned about the potential ramifications of these findings but we in Nevada who want to continue to have a high-quality practice cannot continue to be injured by high malpractice premiums due to bad physicians who don't want to comply.

Assemblywoman Gerhardt:
Dr. Frederick Ernst is a graduate of the University of Michigan. He received his M.D. from Ohio State University. He's certified by the American Board of Anesthesiologists and has been a practicing anesthesiologist for over 37 years. Most recently, he has worked for 15 years as Medical Director at two Alabama out patient surgical centers.

Dr. Frederick Ernst, Private Citizen:
[Read from (Exhibit D).] I'm here to speak in support of A.B. 120. I do not represent nor am I a spokesperson for any medical organization or business corporation, and that includes the American Society of Anesthesiologists, of which I am a member. I am here today solely for the purpose of speaking on behalf of the medical consumers of Nevada to ensure high quality of care and safety for them in office-based surgery settings.

At the present time, 25 percent of all surgery in this country is office-based. Within two to three years, it is projected this figure could increase to as much as 35 percent of all surgery performed. We are not just talking about the cosmetic, plastic, and dental surgery that has been done in office settings for 25-plus years. Already in areas across this country, inguinal hernia repairs and hemorrhoidectomies are being done in office settings. I can guarantee you, as a physician, you will never do my hemorrhoidectomies in an office setting or even on a one-day basis. Within time, it is projected the list of office surgeries will broaden to include abdominal and vaginal hysterectomies, laparoscopic gall bladders, diagnostic laparoscopic surgery, mastectomies, lumbar and cervical discectomies, anterior cruciate ligament repairs, and ENT [ear, nose and throat] procedures, to name but a few. In essence, doctor's offices will become mini-operating suites.

[Dr. Frederick Ernst, continued.] Once that physician's office door is closed, what goes on behind closed doors is solely the business of that physician. Furthermore, there are no quality-control or peer-review processes going on in that office. These are two processes that must be ongoing and copiously documented in every single hospital and ambulatory surgery center in this country in order for those facilities to obtain the national accreditation that allows them to keep their doors open and operating.

Despite these crucial facts, the insurance companies are jumping on the bandwagon to promote office-based surgery. It is simple economics. The facility fee charged is lower here than in any other setting. When surgery is performed in a hospital or outpatient surgery center, the surgeon only receives his/her professional fee for performing the surgery. However, in office-based surgery, the surgeon also makes a profit on the facility fee, and in many cases will make a profit on the anesthesia service provided, especially if an anesthesiologist is not involved. It is no wonder surgeons are also pushing this type of care. More money, less overhead, and fewer restrictions on what they can do are powerful incentives.

I am sure you will hear opinions from those opposing setting up these guidelines. They will say it is much more convenient for me to do my surgery right where my office is, and it is much less intimidating and more convenient for patients to come to an office setting than a hospital or even an ambulatory surgery center. Furthermore, if I have to redo my office to come into compliance with the standards of some national accrediting organization, it will be cost-prohibitive for me. These and other copouts merely cloud the real dangers that have already been proven to exist and to occur not only in your state, but across the country. The Ohio State Board of Medical Examiners, when they passed their Gold Standards for office-based surgery in November, 2003, said this: "Doctors, if you are going to do office-based surgery in Ohio, then it will be done at the highest level of quality of care and safety. If you do not like these guidelines, then you will not do office-based surgery in Ohio."

In September 2003, a study by Dr. Hector Vila from the Moffitt Cancer Center of the University of South Florida was published. This study covered a two-year period from April 2000 to April 2002 in Florida comparing complications and deaths for surgeries done in office settings versus surgeries in ambulatory surgery centers. Dr. Vila found there was a tenfold increase in both complications and deaths in office surgeries compared to surgeries in ambulatory surgery centers. What makes these results even more profound is that this study occurred in a state that already had strong guidelines in place to attempt to ensure quality of care in office surgery settings. And these guidelines had been in place for several years.

[Dr. Frederick Ernst, continued.] There are a number of reasons why office-based surgery done in states without guidelines to ensure quality of care is potentially dangerous and lethal. Heading the list has to be the fact that the surgeon may not have any hospital privileges to do the same surgical procedure that is being done in the office. The reasons for this may easily be the credential committees did not feel that the surgeon had adequate training, experience, or credentials to warrant privileges, or the surgeon had problems/complications

with the procedure or the perioperative care rendered and his/her privileges were put on probation or rescinded. So the surgeon goes to the office setting to do the surgery where no one can monitor him/her. This absolutely impacts quality of care and patient safety, and not in a positive way. We simply cannot assume that every physician knows, understands, or cares about utilizing all the pieces of the safety equation in their office practices that have been proven to contribute towards making surgery and anesthesia performed in hospitals and ambulatory surgery centers as safe as it is today.

Critics argue that ambulatory surgery centers are really just larger doctors' office surgery suites, and that both are non-hospital venues. Why, then, we ask, should the rules under which office surgery settings operate be any different from those for ambulatory surgery centers? The real concern is that it is imperative to require office surgery settings be accredited by one of the three national accreditation organizations—JCAHO [the Joint Commission on Accreditation of Healthcare Organizations], Accreditation Association for Ambulatory Health Care, and the American Association for Accreditation of Ambulatory Surgery Facilities. Anyone who has ever gone through an on-site visit by a state health board and any one of three national accrediting organizations knows the difference between the two. A state health board visit is a breeze compared to any one of the national accrediting organizations. The latter are far more structured, detailed, and include more encompassing standards than any State Health Board.

Competent anesthesia for office-based surgery is another major concern and a critical area in which many of the deaths are occurring. Reports keep surfacing from across the country that non-medical personnel, such as office managers and secretaries, are administering intravenous (IV) medications and sedation. The monitoring of the patient's vital signs is then being done by the same person who is doing the surgery. This is indeed pushing the envelope to the limits and providing medical care on the ragged edge.

The practice of employing IV sedation for office-based surgery is very common in today's market. There are two distinct types of IV sedation, conscious and unconscious/deep sedation. In conscious sedation, the patient is able to easily respond to verbal commands and does not lose the ability to swallow. With deep or unconscious sedation, the patient does not respond to verbal commands and does not retain the protective swallowing reflex, meaning the ability to prevent aspiration into the lungs is gone.

[Dr. Frederick Ernst, continued.] It is extremely important to understand there is a very fine line between conscious and unconscious sedation. Furthermore, this line is crossed many times a day all over the country. A large part of conscious

sedation is being administered by personnel other than those fully trained and certified in anesthesia. And when conscious sedation crosses that fine line, many of these non-anesthesia personnel are ill-equipped to safely and completely rescue a patient and maintain the airway for an extended period of time. Make no mistake about it, intravenous sedation is a form of anesthesia and must be administered and maintained accordingly. Furthermore, one of the most commonly administered drugs for IV sedation is propofol (Diprivan), and there is no such thing as conscious sedation with propofol, nor do we have a reversal drug for it at the present time. Need I say any more to convince you of the importance of having guidelines in office-based surgery for the administration of IV sedation and anesthesia alone?

I have included 11 questions (Exhibit D) the medical consumer should ask and must have answers for before ever signing a consent for office-based surgery. These questions address additional issues that need quality of care standards set for office-based surgery. Besides three articles I have written from my syndicated medical consumer newspaper column, I have also included the "10 Core Principles for Office-Based Surgery" that the American Medical Association's Board of Trustees unanimously passed in November 2003. These principles will certainly become the accepted standard of care for office-based surgery in this country.

I wish to leave you with a very serious challenge. You are being charged with the responsibility of ensuring high-quality care and safety for the patients of Nevada when they enter the office-based surgery setting. Do not, under any circumstances, allow politics or economics to enter into any decisions that will affect in a negative way the quality of care or medical safety of the people of Nevada.

Assemblywoman Giunchigliani:
Is there a difference in how insurance is charged in cases that are handled as in-office surgeries?

Frederick Ernst:
No, there is no difference in how they are charged. Charges are different because the facility fee is less. At the present time, insurance companies cannot force a patient to have surgery in an office setting. It is still a choice of the patient to go hospital, ambulatory surgery center, or a doctor's office.

Assemblywoman Giunchigliani:
Are these doctors that are doing the surgeries all surgeons? Don't you have to be a surgeon in order to do surgery?

Frederick Ernst:
Podiatrists and dentists are doing it. They operate under their own guidelines. Non-physicians that are in there are physician assistants. The surgeon may allow the physician assistant to be doing things, some of which may not be appropriate.

Assemblywoman Giunchigliani:
Anesthesiologists have a whole separate licensing and requirement. I didn't know a surgeon could actually do anesthesiology.

Frederick Ernst:
Yes, a surgeon may, at the present time in states that don't have guidelines, be giving the sedation themselves. That's a practice of medicine; you do not have to be certified in anesthesia to do that.

Assemblywoman Giunchigliani:
I didn't realize that.

Frederick Ernst:
We are having a lot of conscious sedation being done with no certified or trained anesthesia personnel in that office to give it or to monitor.

Assemblywoman Giunchigliani:
What is the difference between conscious sedation, deep sedation, and general anesthesiology?

Frederick Ernst:
Conscious sedation, the patient does not lose total. If you, for example, go and have a colonoscopy or a gastrocopy and have IV sedation and you don't remember a thing about it when you wake up—it's done and gone, I don't care what they told you were having, then you had unconscious sedation. That is not conscious sedation. Part of the problem is that often the patient is told that they are going to have conscious sedation, and that line is crossed. Most of the time, it's crossed on purpose and knowingly. In states that have guidelines that don't require anesthesia personnel for conscious but do for unconscious, they bill it or chart it as conscious so they don't have to go to the cost of having anesthesia personnel in there. Unconscious and deep sedation are synonymous. They are a form of general anesthesia.

Assemblywoman Giunchigliani:
What you are trying to do here is make sure in case someone uses a different terminology, you've defined it any which way. Basically, they are all one and the same.

Frederick Ernst:
Deep unconscious sedation is a form of general anesthesia.

Assemblywoman Giunchigliani:
They're interchangeable? I'm assuming that the idea for the definition is to make sure someone doesn't say, "You didn't say 'conscious sedation,' you only said 'general anesthesia.'"

Frederick Ernst:
It's to delineate between conscious or not losing consciousness, and unconscious, where you no longer respond to verbal stimulus and no longer have your swallowing reflex. You basically have a light plane of anesthesia. We have different planes of anesthesia and surgical anesthesia. Deep unconscious sedation is a form of general anesthesia.

Assemblyman Seale:
You're collecting this information and it's being collected by the Medical Board and the Osteopathic Board. I don't see in the bill what happens next. Where does it go? What do we do with it? None of this bill seems to address the very concerns that the doctor has been talking about and probably should be implemented. I don't see how this bill gets there.

Assemblywoman Gerhardt:
The intent of the bill is to collect information. What we're attempting to do in the next two years is to collect information from the M.D.s and the osteopaths so that when we get the report that will be submitted to the Legislature from the Boards, we can make a decision. At this point in time, there is no information on what's happening on office-based surgeries. The only times the Boards themselves find out if there is a problem is when there is a malpractice case. Otherwise, they have no idea. The statute as it is now has the licensing boards reporting every biennium to the Governor and to the Legislature. What we're asking is that this information, when collected, is added to that information.

Assemblyman Seale:
So this is like an interim study with teeth?

Assemblywoman Gerhardt:
You could look at it that way. It's a beginning look. Because dentists were mentioned, I think it is important to note that the dentists are regulating themselves. They took steps to address the problem, and I actually mirrored part of the bill after what they're doing. They are also looking at the three

deepest levels of sedation and having the doctors reporting to their licensing board. The dentists have already taken the step here in the state.

Chairwoman Buckley:
What you're trying to do is get notification of sentinel events' serious outcomes, so that overall quality improvement can follow in addition to whatever someone's private remedies may be. We did a similar approach when we considered the medical malpractice issues. We finally set up the Sentinel Events Registry, to try to look at patterns and whether overall quality can be improved from a facility level, because of the number of medical errors occurring in facilities, hospitals, et cetera. If the concern about office-based surgeries is that there may be the same concern that some errors may happen there, why not just have the reporting be to the Sentinel Events Registry, as opposed to setting up something completely new with the Board of Examiners, who really have not experienced this function? They receive reports of malpractice cases to investigate, but why not use the avenue we created so all facilities could be treated in a similar manner?

Assemblywoman Gerhardt:
I did look at that avenue and did speak with the Health Division. Historically, what has taken place in other states is that the regulation board collects the information regarding sentinel events, so the Health Division is the regulating body for the hospitals and the surgical centers. They have access to those facilities and they're the ones collecting the sentinel event information. The dentists are now doing some regulation. They are collecting the data on sentinel events in dental offices. If we left it to the Division, we really would not have any idea whether we were getting correct information.

If it's left with the Board of Medical Examiners and the Board of Osteopathic Medicine, we have a couple of safeguards in place to be sure that we are collecting good information. If there is a malpractice suit that, by statute, must be reported to the Boards, so if you have a malpractice suit and then the Board realizes that the doctor did not report the sentinel event, there's a check and balance. The Boards also receive information from the Governor's Office. The Governor's Office takes consumer complaints from patients and reports to the respective Boards. The Boards themselves get consumer complaints from patients who have problems. At least if we leave it with the Boards, we have some certainty and some checks and balances that we're actually getting good information.

Chairwoman Buckley:
I do recall that they do have a notification procedure to the person to whom the sentinel event happened. Quality control had reporting confidentiality because the sole purpose was to improve systems to prevent errors.

Assemblywoman Gerhardt:
During my conversation with the individuals who are working that program with the Health Division, one of the key components missing was that the reporting wasn't funded. They are collecting data at this point in time, but producing a result hasn't been funded.

Chairwoman Buckley:
We did fund it last session. It wasn't funded in the initial round, but I believe Assemblywoman Giunchigliani included it in a budget item. Because it just started this year, we haven't seen the results of it. We'll have her and Assemblywoman Leslie check during the budget hearings as well.

Assemblywoman Gerhardt:
One of the things that seemed to make sense as I was talking to the respective Boards was the fact that we're trying to do something that wasn't going to have a huge fiscal impact. The Boards are accustomed to getting information about malpractice cases, compiling that information, and sending it to the Legislature. Basically, all they're going to do is collect this data, send it on, and we should have some workable information.

Frederick Ernst:
There are copies of my medical consumer book (Exhibit E), complimentary for each member of the Committee. Hopefully, you will find it of help and enlightening.

Neena Laxalt, Private Citizen:
[Read from Exhibit F.] My family had a tragic experience four years ago and I pray it never happens to any one else.

My aunt was 63 years young. She was my aunt, my mentor, my surrogate mother, and my best friend. Her house was always open and what was hers was ours. She was a petite blond who was eternally youthful. She loved kids, she loved sports—she was a big Wolf Pack fan—hardly ever missing a game, whether it was football, basketball, or baseball. She loved her husband, she loved her children, and she loved her many nieces and nephews. One thing she didn't love or allow was for people to feel sorry for themselves. She loved to have fun, be active, to swim, the sun, and smiling faces. I lived with her some

summers, and stayed with her when I lived in Arizona and would come to Nevada to visit, and many times stayed with her on nights during the legislative sessions when I was too tired to drive back to Reno. If there was ever something wrong in your life, she would be the first to tell you what it was, and you were to fix it.

The last time I was with my aunt, I was staying with her during a legislative weeknight, mid-May, four years ago. I had been upset that evening and was afraid to mention it; after all, I was feeling sorry for myself. She knew me well, of course, and asked me what was wrong. I told her my woes, knowing I would get no sympathy from her, and instead she placed her hands on her hips and stated to me, with every intention, "Whom do you want me to beat up?"

The next morning, as I was going out to my car to make my trek back to these halls, she walked me out as she did every time during my life, and my final words to her were, "You know, Auntie, you are the only consistency left in my life." Within a week, that all changed.

It was uncommon that I not speak to my aunt on a daily basis, but sometimes during the legislative chaos, we get too busy to keep in touch with those we love. We all understand that the crunch is short-lived, and after 120 days, we can then pick up where we left off. That is a dangerous assumption.

[Nina Laxalt, continued.] While sitting in the cafeteria one afternoon, I received a frantic phone call from my cousin, informing me that her mother was in the emergency room having experienced respiratory failure. I felt like I had gone into a nightmare while trying to comprehend what I was hearing, trying desperately to understand my cousin's highly emotional words and yet trying to wrap my brain around what just didn't make sense. Surely there must be a misunderstanding somewhere. After all, my aunt was in spectacular shape.

When I arrived at the emergency room, I was directed to a room where the bed had been wheeled away to take its occupant for tests. There on a stool in the middle of the room was my uncle, sobbing. This was his life mate, the mother of his children, his friend, and as he many times introduced her, his "girlfriend."

The day for them started as typically as any other, although for a few days my aunt had been bothered with a feeling that she had something lodged in her throat. At the urging of the family, she reluctantly sought medical attention and was then planning to pick up my uncle at the auto repair shop. The day didn't turn out as planned.

After calling for an appointment with a doctor's office, she was informed that they were too busy to see her that day, so she chose instead to go to the emergency room. While there, she was referred to go to the attending doctor's office for attention. Ironically, she was referred to the same office that just earlier could not make an appointment with her. Following the directions, she proceeded to the doctor's office.

My aunt was put under conscious sedation prior to her procedure. It's unclear to me as to what transpired form that point other than what I made a point to find out. My understanding is that my aunt was given enough anesthesia to "put down an elephant." Following that, instead of calling 911 when she initially went into respiratory failure, when she recovered, the procedure continued, again she went into respiratory failure, and the paramedics were called.

After attempts by medical personnel at the hospital to counter the effects of the drug to bring my aunt back, it was too late. She had already been deprived of oxygen for too much time. She suffered severe brain damage due to the respiratory failure. Ten days later, my aunt was dead.

There is nothing that can bring back my aunt. But never in my wildest dreams did I think something like this could happen to her, to my family, and, selfishly, to me. I know that none of us are immune. When something like this happens, you want revenge. Luckily, there is a legal process that needs to be followed. And that's what happened. The end. No reporting, nothing to alert others as to this situation to prevent it from happening again. A settled lawsuit—providing the family does not mention names—and lives torn apart. For the rest of us, silent screams begging for vindication.

[Nina Laxalt, continued.] A.B. 120 is the least of what I would see as justice for those of us who have lost. A simple report is hardly asking for more than what is truly deserved.

Melissa Moore, Private Citizen:
[Read from Exhibit G.] I am here representing myself and my family, all of whom wholeheartedly support A.B. 120. I would like to take this opportunity to share with you an experience that radically and permanently changed the lives of my family members, especially mine, my brother's and my sister's. The story concerns my father, Lou.

My father loved life. His life revolved around his wife, his children, and his grandchildren. He was especially devoted to my mother. Dad cared for mom ceaselessly, especially during the difficult final years of her life. My father was the kind of caring person we all hope to emulate when we are his age.

When my mother passed away, my father had fulfilled all of his obligations to his family. His children were grown and it was time for him to begin a new life. He loved his family and spent time with us, but also enjoyed an active, athletic, and social lifestyle.

He had a love for life that was unquenchable. Tragically, that life was taken from us on June 27, 1996. The day before, my father went in for outpatient surgery at a surgical center in Las Vegas.

At some point during the procedure, my father had complications. These complications could have been easily addressed and his life could have been spared had the facility been properly equipped with personnel, equipment, and supplies. All agree that this tragedy would have been avoided had the surgery taken place in a hospital.

The loss of a loved one is always tragic, but that tragedy is made all the more tragic when you find out it could have been avoided. When we learned of my father's untimely death, we discovered that had the medical facility been properly equipped, Dad would still be with us today. My family now lives daily with the pain and anger associated with the easily preventable loss of a loved one.

[Melissa Moore, continued.] My life has been profoundly changed as a result of my father's death. His absence from my life has left a void that will never be filled. It has resulted in an emptiness among those who were close to him and whose lives he touched in the most simple and life-changing way, including my brother and sister, as well Lou's grandchildren and other loved ones.

For my family's sake and to help ensure that a similar tragedy doesn't affect someone else, I respectfully and earnestly ask you to pass A.B. 120.

Michael Fischer, President, Nevada State Medical Association (NSMA):
The Nevada State Medical Association (NSMA) supports the intent of A.B. 120, which is to assure that the two Nevada physician licensing boards have available to them information regarding patient safety problems that may result from a surgical procedure conducted in a physician's office. NSMA takes the position that the quality of a surgical procedure performed should be the same regardless of the setting in which it is performed.

We understand that there has been significant increase in the number of office-based surgeries during the past few years. This has resulted from improved medical technology that allows for more procedures to be done safely

and conveniently for the patient in outpatient settings. This trend also results from payment policy changed by health care payers, particularly the federal Medicare program, which is the largest payer in the nation. Over the past few years, payers have changed payment policy regarding many hospital-based surgeries, resulting in the development of ambulatory surgery centers. Increasingly, they have changed their payment policy and won't pay for many surgeries that are done in either of these licensed settings.

Our principal concern with A.B. 120 is the extent of new reporting that busy physicians' office staffs would be required to do without clear identification of an extensive problem which needs such a dramatic new monitoring program. NSMA does not object to the use of the American Society of Anesthesiologists "Continuum of Depth of Sedation" as criteria for defining the universe of surgical procedures in which there is an interest. Because these categories cover all forms of sedation, the Committee needs to understand that this will result in formidable numbers of reported procedures. We understand the bill limits the information sought to "surgical procedures," leaving out many non-surgical procedures that require some sedation.

We would like to suggest an approach that limits these new tasks and provides a more focused approach to information gathering and problem identification. "Sentinel event" reporting, as defined in the bill, seems a prudent place to start the reporting requirements and can be used to identify the extent of any problems or issues. If the reports are made directly to the licensing boards, they can then determine if an investigation is warranted. It will take some time for the boards to develop a form and regulations and for physicians and their staffs to become familiar with them. We would recommend that the bill be amended to require the sentinel event reporting and to require that offices maintain a record in a format to be developed by the Board.

[Michael Fischer, continued.] This sort of data collection and analysis is a new function for the licensing boards. We would recommend that the boards be required to contract with a federally designated "Quality Improvement Organization," as defined in 42 CFR 400.200 [Code of Federal Regulations], to analyze and report trends regarding sentinel events. The quality improvement organization should report to the Board and to the Legislature its findings regarding the analysis of aggregated trends of sentinel events, any recommendations regarding specific procedures, which require additional reporting or review, and any recommendations regarding practice requirements on certain procedures.

Since this is an exploratory project, we think that all reports by the Boards should be aggregated without identifying either physician or patient. A concern

that has been expressed by nearly every physician is that these data-gathering and analysis functions are inappropriate for the licensing boards, which really aren't staffed for these tasks. Physicians do agree that any sentinel event should be reported to them. We're not making a specific recommendation on this, but it is a consensus concern in the physician community.

We understand the bill is to be limited to surgical procedures. While the bill seeks to limit the surgical procedures to those done in a licensed physician's office, it also includes "or any other facility" in Section 1, subsection 1, paragraph (a), to line 8, and again in Section 5 subsection 1, paragraph (a), to line 12. We think that this is meant to refer to surgical procedures that are performed in an "unlicensed" medical facility. There may be unlicensed medical facilities in which surgeries are performed by someone other than a Nevada-licensed physician. The Committee may wish to review those situations to require reporting of surgeries performed to the State Health Division or some other appropriate agency. There are a number of Nevada-licensed physicians who do not have a Nevada-based practice. We understand the bill to require that those physicians must report their surgical activities and would recommend that these data, if collected from them, need to be separated from reporting and interpretation purposes. The Nevada State Medical Association looks forward to working with the Committee to address these concerns and to develop legislation that can be supported by all affected parties and implemented effectively.

[Michael Fischer, continued.] I did want to answer one question that was raised earlier in reference to payments for office-based surgery. I am an administrator of a licensed surgical facility, and under the present guidelines, State Medicaid and Medicare will not pay for an office-based surgery. They will only pay for a surgical procedure in a licensed facility. If a physician were to elect to do an office-based procedure, he's not going to receive the facility fee from Medicare or from a Medicaid patient.

Assemblyman Anderson:
The deletion of the name of the physician concerns me, relative to some of the practices that have taken place in the past that we saw in previous sessions, where one or two physicians caused a myriad of problems and overly burdened the insurance system as a whole. If we deleted that information, we would not be able to identify those physicians having the greatest complaints leveled against them. Is that what your intention is, or do you see this as a purely statistical gathering method?

Michael Fischer:
As I understand the State Medical Association position on sentinel events, which would generate a concern for the public and for the Board of Medical Examiners or for the Osteopathic Board, I believe that if sentinel events are reported to the licensing boards, the licensing boards should deal with the sentinel events appropriately. I would think that if you were a member of one of those boards and you saw that you were seeing significant sentinel events, it would generate some kind of an investigation. That's my personal opinion.

Assemblyman Anderson:
If we're judged by past practices, unfortunately, that has not been the case, and I think that's one of the reasons why we're concerned about it. It's not relative to your particular practice, but to those in the medical areas in general, and that may be what I'm gauging.

Michael Fischer:
I understand exactly what you're saying; however, I believe there's a difference between a settled claim and a sentinel event.

Scott Craigie, Legislative Advocate, representing Nevada State Medical Association:
We did appreciate Assemblywoman Gerhardt's comments early on, making changes here. Obviously, steps need to be taken. We see this as a step that's moving this issue forward, and we're happy to sit down and try and work with everybody to find a system that meets the needs that the state has as they deal with this growing part of the medical community and these practices. We felt that we heard the same come from the other side when the hearing opened and we're very pleased with how this is starting.

Chairwoman Buckley:
Dr. Fischer, if there is a sentinel event, it is recorded at the office, put on a form, promulgated by the Board, and then sent to a quality review organization to combine in the aggregate, and then, without identifying information, it is available for quality control purposes?

Michael Fischer:
I think the important thing for the public and for you as the public representatives that what we're trying to do here, I believe, in the field of medicine, is to improve patient safety. There are organizations with these goals. You find issues that are definitely showing you that there need to be some changes in order to maintain patient safety.

Chairwoman Buckley:
Is it reported to the Board just on that form that's developed? Do they get it at the same time and do they send it to the quality improvement organization, or would the physician do that?

Michael Fischer:
I don't think that the Nevada State Medical Association has any problem with the sentinel event being reported to the Board of Medical Examiners. I don't know how the Osteopathic Board feels about it or even how the Board of Medical Examiners feels about it. I don't think there's any problem with that on the part of all physicians that sentinel events can happen in physician's offices. They're bad things, and the Board of Medical Examiners would be interested in knowing about them. Then there should be some criteria that we should all learn from when those types of things might happen in order to prevent them from happening again.

Denise Davis, Executive Director, Nevada Osteopathic Medical Association:
The testimony that Dr. Fischer gave we would echo, and we wanted to make sure those things were on the record.

Donald Baepler, Ph.D., D.Sc., Public Member, Nevada State Board of Medical Examiners:
I agree with the previous testimony. There is a migration of surgical procedures from the hospital to the surgical center, to the office. Office surgery is not regulated. We license doctors to practice medicine, not by specialty, so once a doctor is licensed, they can give the anesthetic and can do anything that you might call the practice of medicine. This whole matter has received a lot of national attention. It's been prominent in areas like Florida, where there were three recent deaths as a result of preventable errors in office-based surgeries. In many states, it's totally unregulated. My concern with this bill as written is simply that we would have every office-based surgery written up with a description of the procedures and the outcomes if it involved anesthetic. We would get thousands of reports, put them together, and send you thousands of reports. Two years from now, I don't think we'd be any further than we are right now.

I don't see that Nevada is different from any other state in that we know there are problems. Other states are beginning to address these problems by adopting regulations, and I prefer regulations to guidelines. The Federation of State Medical Boards adopted guidelines in 2002, some of which would be suitable to be changed into regulations. I would propose that if you want sentinel events reported, it would certainly save the thousands of reports. We get our information about problems through malpractice suits and by patients who

complain. It's a very imperfect system because there are some people who do not file suits and not everyone complains. We're not getting a total picture of the problems in Nevada, but we know we have a problem and we ought to address it.

I would really prefer that we be mandated to come up with this set of regulations to present to you in two years, rather than a list of problems. We would look at those few states that have good model regulations in place and contact them to see if they're effective. Then we would work through our normal procedures involving the medical societies and hearings and come up with some regulations that would protect the members of our communities that elect office-based surgeries. I would like to speed up the process to get to the end we all agree we have to.

Assemblywoman Giunchigliani:
Are you a public member of the Board? [Dr. Baepler answered in the affirmative.] Does the Board ever look at trends in a proactive manner?

Donald Baepler:
I think this would be an example that we are being proactive.

Assemblywoman Giunchigliani:
You want us to wait for two years to be proactive?

Donald Baepler:
No, I'm saying that our normal course of events would take at least a year to go through the processes to draw up regulations, but if you want to enact it as a statute, our next opportunity would be in two years.

Assemblywoman Giunchigliani:
I disagree because I think we could do it now, and actually, this is a minimal bill in my mind. It really is not that difficult to include. I remember the arguments we had on the whole sentinel issue. I think the Board's intent is to protect the public, as well as deal with professionalism of Board members. Too often, though, it doesn't seem like it wants to move forward. I think this bill is very reasonable piece of legislation and probably doesn't go far enough.

Donald Baepler:
That's my problem. It doesn't get us to where we need to be.

Assemblywoman Giunchigliani:
We could start here, couldn't we?

Donald Baepler:
Yes, but we can get there faster if we—

Assemblywoman Giunchigliani:
We can get this done before session. You would have to wait another two years to do your regulations.

Donald Baepler:
We could adopt regulations before the next session. I think we have enough information on the problem that we don't have to spend two years collecting information before we start working on the regulations. I don't want to be in a position where we're going to wait two years just collecting information to discover what we already know.

Assemblywoman Giunchigliani:
I think the focus has to be care versus convenience for surgeries done in doctors' offices as well as not just for the convenience of the Board. Maybe there are some steps that can be taken intermittently where we set the foundation and the collection now, and then maybe you do special licensing.

Donald Baepler:
We'd be very interested as we draft regulations to get information on sentinel events, but I don't think it helps us to get thousands of reports on events that had good outcomes.

Chairwoman Buckley:
I assume you'll be working with the sponsor of the bill and the Medical Association on something that works. That's what we'd prefer. It's not thousands of reports, it's when submitting the registration, so it doesn't require a report every time there's a surgery.

Donald Baepler:
The bill does not call for just sentinel events. It involves all of the surgical procedures involving anesthesia.

Chairwoman Buckley:
Right, in a cumulative fashion in the biennial registration, which is one form. I think we have some good suggestions on how to move forward, and obviously you want to do it in a way that doesn't cause unnecessary paperwork and gets at the information that's truly needed for patient safety.

We'll close the public hearing on Assembly Bill 120 and ask anyone interested to please work with the sponsor of the bill. I appreciate the Medical Association,

especially, giving the perspective of the doctor and how to make the process work well. We'll open the hearing on Assembly Bill 208.

Assembly Bill 208: Revises provisions governing physicians and osteopathic physicians. (BDR 54-1108)

Assemblyman William Horne, Assembly District No. 34, Clark County:
[Read from Exhibit H.] I would like to thank the Committee for the opportunity to present A.B. 208, which I believe is an important piece of legislation necessary to help protect Nevada patients.

As many of you are already aware, last year a physician in Clark County was arrested for child pornography and molestation. This doctor did not have a criminal record, so this piece of legislation would not have uncovered him before he began practicing here. However, this case brought to my attention the gap that exists in our state that would allow doctors with criminal histories to practice in Nevada undetected, thus placing Nevada patients and families at risk.

[Assemblyman Horne, continued.] Imagine taking your child to the pediatrician for an exam or physical. However, unknown to you, the doctor is a pedophile with a criminal record for such deviant behavior in another jurisdiction. This doctor is now alone in an examination room with your child. Imagine your wife or daughter has a need to see another gynecologist; however, unknown to anyone, this doctor is a sexual predator with a criminal record in another state and came to Nevada because licensing restrictions in most other places prevent him from obtaining a license to practice medicine due to his criminal history.

I apologize for painting such distasteful pictures, but these are potential scenarios in the state of Nevada because currently, M.D.s are not required to undergo a criminal background check in order to obtain a license to practice medicine here. While the application for licensure asks the applicant to divulge any criminal history, this is currently voluntary and provides no proactive responsibility on the part of the licensing board to follow up on the applicant's disclosure or lack thereof.

A.B. 208 requires the Board of Medical Examiners to verify that physicians seeking to practice medicine in the State of Nevada do not have criminal backgrounds. This verification would be accomplished by having the applicant submit his/her fingerprints to the Board with their

application and require the board to submit the fingerprints to the Nevada Criminal History Records Repository for submission to the FBI. According to the Federation of State Medical Boards, at least 12 states, including California, Texas, Florida, and New Mexico, have similar laws.

It's important to remember that other medical professionals are required to undergo criminal background checks, such as doctors of osteopathic medicine, nurses, and physical therapists. Other, professionals such as teachers and lawyers undergo criminal background checks. Therefore, why would Nevada not require M.D.s to undergo the same scrutiny?

Currently, there exist gaps in Nevada law that allow physicians who are also predators to enter our state undetected and harm the patients who place their trust in them to do no harm. I think it is our duty and responsibility to protect our citizens from this harm.

Dr. Frank Nemec, Private Citizen:
[Submitted Exhibit I.] I wish to give this Committee one physician's perspective on this important issue. Patients trust their doctors with their health, lives, and secrets. It's for this reason we demand the highest moral and ethical standards from our health care providers. This is the very reason that the licensing board asks applicants about past criminal convictions, and we rely on the honesty of the applicant that the information that they provide is accurate. Just as we do source verification regarding medical education, residency training, and Board certification, it is reasonable to expect the Board of Medical Examiners to exercise due diligence that the information supplied by the applicant is accurate.

Unless more states require criminal background checks as a condition of licensure, the few remaining states that never bother to perform checks will be shouldering the burden of the few problem applicants. However, we don't need a witch hunt. The vast majority of my colleagues are honest, ethical, and devoted health care professionals who have dedicated their lives to the care of their patients. You might imagine that a doctor who has practiced in this state for 20 years with a parking ticket would be unenthusiastic about being hauled downtown for fingerprinting. This program has merit, but the implementation must be measured, not creating undue burden on physicians, the Board of Medical Examiners, the Department of Public Safety, or the patients that we all serve. Therefore, I recommend the following amendments.

I would recommend limiting the background checks to new applicants only. These are the doctors who are not known to us. These are the doctors who may be reluctant to apply to states doing criminal background checks and these are the high-risk applicants. Requiring that over 5,000 existing doctors to

undergo criminal background checks will average a quarter-million-dollar unfunded mandate on doctors at a time when reimbursements are falling and overhead continues to rise. The cost of these criminal background checks eventually gets passed on to the consumer one way or another.

We must allow the Board of Medical Examiners discretion regarding the approval of applicants. The purpose of the criminal background check is to protect the public from doctors that might want to take advantage of vulnerable patients and not to punish applicants who may have had prior indiscretions that would not be placing future patients at risk.

Assemblywoman Giunchigliani:
Currently, it allows for an applicant to have their fingerprints taken. The intent is to add and expand that to those currently practicing, and then to make sure there's an actually background check?

Assemblyman Horne:
That's correct. I think this is one area where Doctor Nemec and I have a small disagreement. We don't know about the doctors who are currently practicing. We may be familiar with them, but we don't know if any of them have this criminal background check, if they may be acting criminally now. I recall a biology teacher that I had in high school who was a former naval officer and stand-up guy. It turns out that he was molesting his stepdaughter and ended up serving time in prison. You can't go by just the exterior of the person you see from day to day. What I would propose is that current licensed physicians, upon re-licensure when they reapply, would submit their prints one time. I believe that 99 percent of them will come back clean and then they wouldn't have to do that again.

One of the things mentioned to me regards the cost. The osteopathic physicians pay a $45 fee with their licensing fee the one time for this criminal background check. The State Bar, when I got my license, was $100, and that's the highest I've seen. This would be a one-time event, and for currently licensed physicians would not disrupt their practice at all. We wouldn't change their title to a provisional license, current or temporary.

Assemblywoman Giunchigliani:
I'm trying to find that in here. I thought that was your intent, and I keep seeing the reference to "applicant" rather than "upon renewal."

Assemblyman Horne:
Because I've been speaking with people off and on, I didn't ask for any particular amendments right away. In here, "may issue a provisional license"

was initially put in because we wanted to address the problem of prohibiting doctors from coming to the state and allowing them to practice on a provisional basis and then later give them a full license once their background check came back clean. Only later did it come to me that provisionals were considered reportable events that had to be reported to other jurisdictions where they license. Many physicians more than likely would not want to do that. There were suggestions on pulling that out. We've been going back and forth.

Assemblywoman Giunchigliani:
I think the intent is good as far as making it very clear who can practice and who can't. I was surprised that there wasn't a background check. Schoolteachers have it and we all [Legislators] do. I agree with Dr. Nemec in that you don't want to capture with this youthful indiscretions that shouldn't be a reason to have your license yanked or pulled or non-renewed. But, in looking at Section 2, what you've picked up is the specific area and it doesn't seem to go with that. I think the intent is to specifically focus on certain types of crimes that may not have been anticipated by the Board. I would have thought that they would have been included under moral turpitude or something along those lines. What you're attempting to do is deal with some individuals who have been charged accordingly and make it very clear that the Board can yank the license or not accept the applicant.

Assemblyman Horne:
You mention charged as opposed to convicted, and there are differences. Dr. Nemec is correct; we don't want youthful indiscretion to bar a doctor from being able to practice but our intent is important. One of the things I have to go though is character and fitness background, and I have to not only submit my fingerprints for licensing, but I have to sign a waiver that if I had any hearings in the past, or trials or any claims against me, even if they were sealed as a juvenile, I have to agree that these can be opened. Then, if I have anything in my background, the State Bar weighs that against who I am today. I just received my license to practice law last year at the age of 42, so I had much life before that. If I had a conviction for embezzlement when I was 21 years old, I probably would not be licensed today, because embezzlement for an attorney is basically death. It's not going to happen in any jurisdiction.

I think you can take this same type of weight and take it to the medical profession. Regardless of the span of time that's passed, we don't want physicians who have committed certain criminal acts to practice. If a doctor was convicted when he was 21 years old of embezzlement, would that rise to the level of him not practicing medicine in our state? Maybe not. If this doctor at the age of 21 was convicted of statutory rape, that may draw more scrutiny,

even if they are 42 now. I think Dr. Nemec is correct that we'd want the Board to have some discretion.

Assemblywoman Giunchigliani:
I think that you have to look at the span of time, because in some states embezzlement could have meant writing a bad check. It depends on how they define it. The idea of fingerprinting and background checks makes good sense, upon re-licensing. It's $45, so I don't know what they're charging the osteopaths for because the FBI test is $45.

Assemblyman Horne:
The State Bar is $100, but the osteopaths' test is $45 for their background check.

Dr. John Ellerton, Private Citizen:
I don't have any problem with requiring background checks on new licensees. I'm specifically urging the Committee to follow the proposed amendment to give the board flexibility. Make it "may," not "shall," if they discover the information about a physician, how they utilize that information to decide on licensing. I'm particularly concerned about that because if the Legislature decides to proceed with background checks on all currently licensed physicians, the Board have a great deal of confidentiality and discretion available to them. I'm certain there are people who have had their legal rights restored to them in full amount and are no longer a threat to anyone, and I would hate that after many years of practicing in Nevada and doing a good job, something negative would happen because of this sudden look back into their past.

I absolutely agree this is a good idea. All professionals who handle patients should go through the same background check. I would urge you to amend it to give the Board of Medical Examiners the ability to be flexible and have discretion and make decisions based on reasonable conclusions, not because the statutory language says that they must do something.

Chairwoman Buckley:
If you go to page 3 of the bill, the existing law, NRS 630.301, says, "The following acts constitute grounds for denying licensure." Then they list "conviction of a felony related to practice of medicine," "engaging in conduct that violates the trust of a patient;" "engaging in sexual contact with a patient." If we change it on a going forward basis to be discretionary, doesn't that foul up the existing statutory structure? Shouldn't things like murder and sexual assault—the serious offenses, assault with intent to kill or to commit sexual assault, mayhem, sexual assault, abuse, and neglect, some of these I find

difficult to ever consider waiving. They're not minor. How would you respond to that, and how it would fit in the existing statutory scheme?

John Ellerton:
There are two levels of behavior. Some things are completely unacceptable, and other situations like the one Assemblyman Horne said, suppose the doctor was convicted of embezzlement when he was 21, working in the bank in the summertime. What does that mean to the Board? That would be a mandatory removal. On the other hand, if he murdered his anatomy professor because he didn't like the grade, he shouldn't be licensed as a physician. How it would fit into the statute, I haven't looked at.

Scott Craigie, Legislative Advocate, representing Nevada State Medical Association:
On page 3 of the bill, Section 2, subsection 1, this was changed during the 2003 Legislative Session. What happened in Section 2, subsection 1, the issue of "conviction of a felony relating to the practice of medicine or ability to practice medicine"—the "relating to the practice of medicine or the ability to practice medicine" was added. If you eliminated that, and leave or drop all of what's in subsection 11, or leave it all in and have all of these categories exist, but leave the discretion with the Board of Medical Examiners to determine what to do to the extent that there are areas—if you left "conviction of a felony," and then left the Board with the discretion to decide what to do based on circumstances, I think that might answer your question and leave the Board with the ability to decide what needed to be done based on what the actual circumstances were. It sounded to me like that's what we're trying to get to.

Michael Fischer, President, Nevada State Medical Association (NSMA):
The Nevada State Medical Association (NSMA) supports A.B. 208, which is intended to assure that the two Nevada physician licensing Boards have available to them the information gathered by criminal background checks of applicants and licensees. We do have some concerns regarding some of the bill's text, which we think needs to be revised to avoid implementation problems. NSMA would welcome the opportunity to work with the sponsor and other interested parties to address them.

Since 2003, the Nevada State Board of Osteopathic Medicine has conducted criminal background checks as part of the initial licensing process for new applicants for a license as an osteopathic physician. This bill requires the Nevada State Board of Medical Examiners to add this requirement to the initial licensing process for a medical doctor. We do not disagree with this requirement, but we would observe that the bill focuses on the licensing of

"physicians" and is silent regarding the initial licensure of other regulated professionals by these Boards.

We do have some concerns about the A.B. 208 proposal to create a new provisional license category for applicants under NRS 630. Under this provision, new applicants would be permitted to practice medicine until the information of the criminal background check is available. Similar language already appears in NRS 633.328, but no provisional license has actually been granted under the statute. The bill, as does the current language in NRS 633, proposes that this "provisional license" be revoked if the background check results in grounds for disciplinary action or if the applicant gave false information on their applications. We would suggest that creating the category of a provisional license for every new applicant creates potentially significant technical and career problems for physicians coming into Nevada who are seeking an active license to practice medicine here. If the Legislature wished to permit otherwise qualified applicants to be licensed temporarily while the Board awaits the criminal background information, there is an alternative approach, which the Legislature has used previously.

[Michael Fischer, continued.] Under NRS 630, seven special categories of physician licenses are created, while NRS 633 provides for three additional categories. We would recommend that either a "restricted license" or a "limited license" to practice medicine could be granted until the receipt of the information. Upon receipt of the information, the applicant should be issued an "active license." This would forestall future problems in implementing the legislative intent. While we are concerned that the criminal background investigation process will add to the time it takes to grant initial licenses, we would observe that there is proposed legislation, S.B. 163, being processed in the Senate that would prohibit any temporary licensing by occupational licensing boards that require criminal background checks. To avoid confusing bill reconciliation issues late in the session, we would suggest that the Committees might wish to coordinate an approach as soon as possible.

A.B. 208 also requires that all currently licensed M.D.s and D.O.s must submit to a criminal background check. Again, the Nevada State Medical Association does not oppose the policy. Implementing it smoothly is likely to be more problematic than anticipated because of the numbers involved and the period it will take to conduct the checks. Many licensed physicians who were not required to have a criminal background check as part of their initial licensing process have received such clearances prior to or during their period of being licensed to practice medicine in Nevada. As a practical measure, the bill could provide some flexibility to the Board to use this information previously gathered.

Section 2, pages 3 and 4, requires the NBME; Section 4, pages 4 and 5, requires the NBOM to initiate disciplinary actions, which includes denial of a license when there is a conviction of a number of crimes, which would be discovered by a criminal background check. Prior to 2003, the laws did provide that conviction of a felony was sufficient for the Boards to initiate such an action. NRS 630.301, subsection 1, and NRS 633.511, subsection 2(b), were revised during the last session to cover only felonies relating to the practice of medicine. Rather than starting a process of listing every felony, which should be considered sufficient to initiate a disciplinary action, it might be simpler and more comprehensive simply to return the language to cover all felonies. It is appropriate that each Board initiate a disciplinary action, including the denial of a license application and, if the Boards' investigation justifies it, sanction or deny a license.

[Michael Fischer, continued.] There appears to be an inconsistency, or at least the potential for confusion, between these provisions and the language in Sections 5.4 and 6.4. We presume that the intent of these sections is to clarify that the statutory requirement that the Board revoke or deny a license by preponderance of the evidence does not apply when the Boards become aware of felony convictions after a criminal background check. The language in each of these sections, however, states that the "Board shall revoke the license" rather than that the Board "may" revoke or deny the license. We would recommend that Section 5.4, line 36 and Section 6.4 line 16, should be amended to replace "shall" with "may". Since the Boards would now be required to initiate action when they become aware of some criminal background, and it does not have to meet the "preponderance of evidence" standard, they have significant authority to sanction as appropriate based on the facts of the specific case.

The Nevada State Medical Association appreciates the opportunity to comment. We do support the bill with the reservations we have expressed and look forward to working with the sponsor and the Committee to address these and related matters.

Keith Lee, Legislative Advocate, representing State Board of Medical Examiners:
I think I have an answer to the question, Madam Chair, that you posed about the "shall"/"may" issue. I think we would propose, as Dr. Nemec and the State Association have proposed, is that the discretion will lie with exercising discretion as to new applicants who apply and as to the previous licensed applicant, should that requirement be imposed as opposed to those referring to the section that you referred to, NRS 630.301. We're not suggesting that there be any change in that with respect to the discretion. There is some discretion that goes forward under that because those constitute grounds for initiating

disciplinary action, but I don't think there are any suggestions that I've heard thus far and certainly not our suggestions that particular provision be changed. I have proposed amendments (Exhibit J).

Donald Baepler, Ph.D., D.Sc, Public Member, State Board of Medical Examiners:
We think there is a need for this bill with some changes for your consideration. About 21 states have adopted the policy of having criminal background checks for applicants. Some of those states require only an in-state search of the criminal record and some of them are national in scope. We don't want to become a state that doesn't require criminal background checks of new applicants, because we're going to increasingly get those individuals with the criminal backgrounds because they will not apply to the states that demand such background checks. There are more and more states requiring these background checks.

The provisional license question is okay as it is in the bill, as long as you leave it discretionary with us. Most doctors will not accept a provisional license because it does leave a black mark on their permanent record, which is never erased. As long as it's discretionary with us, we don't have to give a provisional license and there would be no problem leaving the wording as it is. I suspect we would give none. I am concerned about grandfathering the 5,300 currently licensed. The figures that were quoted before are accurate: $45 a licensee comes to $238,000. We have a significant number of out-of-state doctors who hold active licenses in Nevada. I have a hunch a number of them may not go through this process and we would begin to lose numbers of licensed doctors in that particular category. I really think that it's good to get the applicants to think twice about doing the existing 5,300 doctors. [Exhibit K]

Chairwoman Buckley:
Under the existing law, page 3, NRS 630.301, paragraph 1, says, "The following acts constitute grounds for denying license or initiating disciplinary action." Prior to last session it said "conviction of a felony." After last session it said, "Conviction of a felony related to the practice of medicine or the ability to practice medicine." How many physicians with felony convictions for murder, voluntary manslaughter, mayhem, use of firearms, assault with intent to kill, or to commit sexual assault, sexual assault, or child abuse or violation of felony controlled substances laws, are actually licensed as physicians in this state?

Donald Baepler:
With that on their background and they're applicants? [Chairwoman Buckley answered affirmatively.] I've been on the board for 6 years and I don't recall licensing any in those categories.

Chairwoman Buckley:
Why do you have so much trouble with this language? Why do you need discretion for someone convicted of sexual assault or child abuse?

Donald Baepler:
We need discretion for the provisional license.

Keith Lee:
I managed to confuse the issue rather than clarify it. We're not suggesting that NRS 603.301 in any way prevents us. It does because of the change where we feel that we've been unable to proceed against several physicians because they were convicted of felonies in the interim, but they weren't related to the practice of medicine. The difficulty is trying to establish the ability to practice medicine. We're not suggesting that discretion should be exercised—

Chairwoman Buckley:
I think the members of this Committee disagree. We think you are trying to legislate. We think you are usurping our jobs. If you don't consider felony controlled substances conviction as affecting your ability to practice medicine, we think you're wrong. We need to pass Assemblyman Horne's bill. I, along with Assemblywoman Giunchigliani, take grave exception to that.

Keith Lee:
The discretion that we're suggesting that we need here is not as to currently licensed physicians in any acts they conduct—criminal acts or other acts of misconduct that they do during the period of their licensure. Again, NRS 630.301 gives us the ability to discipline them. The discretion we're asking for is with respect to the new applicant who will be required to submit fingerprint cards. Section 1, paragraph 3, line 13 reads, "The Board shall revoke a provisional license upon receipt of the report from the Federal Bureau of Investigation, if the report indicated who has been convicted of an act that is grounds…." "Shall" should be "may" so we may revoke a license in exercising discretion.

It's a difficult situation, but it may be one of those situations even with a new applicant who went to medical school later may have a youthful indiscretion or some other act that would otherwise prevent them from being licensed, but because of the nature of the act and the long period and rehabilitation, one should not be denied that licensure. I think the same logic applies on Section 5, page 5, paragraphs 3 and 4, where in paragraph 3, line 27, it says, "The Board shall initiate disciplinary proceedings." We're suggesting that ought to say, "The Board may initiate disciplinary proceedings." On line 36 on that same page, paragraph 4, "shall" should be "may revoke" so there's some discretion to take

into account the indiscretion of many years ago that has clearly been rehabilitated by that particular person without changing NRS 630.301. Clearly, the Board should and does go after licensees who commit those violations outlined in 301.

Assemblywoman Giunchigliani:
"Shall" does not mean necessarily you shall initiate it. It doesn't mean you'll necessarily come to that conclusion.

Keith Lee:
I concur with that. Any disciplinary proceeding brought against a physician is a reportable event to the National Practitioner Data Bank. Then that may create additional problems for that particular applicant. It's the same problem you have with the provisional license and why we think the provisional license as written now is discretionary. We give the physician the opportunity with telling him/her what the consequences may be. If that person understands those consequences and still wishes to have a provisional license, then we have that discretion to issue it.

Assemblywoman Giunchigliani:
Provisional is the national standard that triggers a problem?

Keith Lee:
Anything less than a full licensure is a reportable event to the National Practitioner Data Bank. There are certain situations where we have special licenses in this state that, when they're issued under the circumstances that are set forth in statute, are not reportable events.

Assemblywoman Giunchigliani:
Anybody who is a current applicant is either approved or denied for full licensure. There are no steps in between, currently in either 633, or 630?

Drennan A. "Tony" Clark, J.D., Executive Secretary/Special Counsel, State Board of Medical Examiners:
Yes, that's true. They either are licensed or not licensed. They either get an unrestricted license or they don't get a license, unless you're in a special category like you're at the University of Nevada medical school in the residency program, and then you get a restricted resident license, which limits you to practicing in the resident program only.

Assemblywoman Giunchigliani:
Does the restricted license trigger this thing in the National Practitioner Data Bank?

Tony Clark:
Yes, you would as a physician if you had either a provisional license granted or a restricted license. Every time you apply for licensure in another state, or in this state again for re-licensure, or for hospital privileges, you have to report that you had something other than an unrestricted license granted by the Nevada State Board of Medical Examiners, and then explain why. That follows you your whole career.

Assemblywoman Giunchigliani:
That's unfortunate because that's somewhat antiquated. For your new applicants, though, would you even want them to practice pending the return of the fingerprinting?

Keith Lee:
Probably not for practical reasons. We don't want to get a physician into the marketplace and then five months later say, "Sorry, you're gone." That person will have number of new patients who all of sudden are without a physician and have to go to find another physician to treat them and their families.

Assemblywoman Giunchigliani:
I understand there is a time factor. We've run into that in the teaching and attorneys and every other place as far as waiting on the timelines of turning those back in. I think this is being over-thought. The issue of adding the moral turpitude is already on page 5, but that's only under the osteopathic, so you're trying to parallel that to the M.D. section. Is that correct?

Keith Lee:
Yes. I think we've spoken about most of my proposed amendments with the exception of the last one. It's proposing to amend Chapter 179(A); there may be a germane issue here. This is just a clean-up that we think criminal justice agencies within the state of Nevada, if we're going to ask them to share the information with them, we better give them the authority under 179(A).100 to make sure they share it with us. There's a list of agencies, and we're not on that. This is a clean-up that we need there so that the criminal justice reporting agencies will not have a problem sharing that information with us.

Brian Sanchez, Lieutenant, Interim Manager, Criminal History Records Repository, Nevada Department of Public Safety:
I'm neutral, and the information I bring forward are the financial adjustments. These fingerprints issues would increase both from the Board of Medical Examiners and the Osteopathic Medical Board approximately $6,700 of fingerprint cards in the first 2 years. After this initial cost, we will be less than

$1,000 a year processing these. In fiscal year 2006, we will make an adjustment to our revenue of $56,250, and in fiscal year 2007 we will have to make a revenue adjustment of $38,745. These adjustments will be monies that we're taking into our fiscal system. Our current expenses to the Federal Bureau of Investigation will also have to be adjusted. We will have to adjust our fees going to the Federal Bureau of Investigation at $27,500 in 2006 and $150,900 in 2007. This will also create unearned revenue for the Criminal History Repository in 2006 of $25,000 approximately and $140,000 in 2007.

Chairwoman Buckley:
I'll close the public hearing on Assembly Bill 208, and we'll work with Assemblyman Horne on our next work session to decide on the approach that we'll take.

We'll open the hearing on A.B. 196.

Assembly Bill 196: Prohibits control of thrift company by department store. (BDR 56-1166)

Assemblyman Marcus Conklin, Assembly District No. 37, Clark County:
We're here today to present A.B. 196. This bill is designed to limit who can control thrift companies in the state of Nevada (Exhibit L). As defined in the section, we're talking about department stores that provide the retail sale of six or more items listed at the bottom of the bill—apparel, appliances, et cetera.

There appears to be, in my estimation, a significant area of conflict within the thrift industry. There are a multitude of very fine companies, many of whom exist in Nevada—Ford Motor Credit, Toyota Financial, Harley-Davidson—who are stellar members of our community and are consummate business professionals in the way that they conduct business. They operate thrift companies as part of integration into their business to provide financing for their products. What makes them unique and hopefully excludes them from this bill is that they sell and finance items that are large in nature and are elective expenditures…boats, cars, motorcycles, planes, and the like.

It is not my intent with this bill to discourage those types of thrift companies. There is another segment of the economy that wants to enter into this arena that does not provide those things. They provide life essentials, such as clothing for children, soap, food, and the like. These companies are trying to enter into the thrift arena, and what bothers me with this arrangement is that most companies of such a nature do an immense amount of marketing based on

people's spending habits. They have access, when you go to a store, to your address, your name, phone number, essentially who you are, and they record every item you buy, how often you buy it, how much you spend, and they market to you based on that information. They have a significant amount of control over your discretionary spending habits. Many of the people who are at these stores are spending their only weekly money to fund their family for the following week. They are being aggressively marketed to. In many respects, that's okay. That has been around for years and as technology grows that's an acceptable practice, I suppose.

[Assemblyman Conklin, continued.] The problem is, once they enter into the thrift side of business, not only will they have a significant amount of control over the discretionary spending habits of individuals, they will not have a similar amount of control over the saving habits of these folks. That is a recipe for disaster. Imagine a situation in which now you're not only being marketed to based on your spending habits, but also your spending ability. This is the type of situation that has forced me to bring A.B. 196 forward.

This bill has been before you previously in similar fashion. This is different because the last bill sought to eliminate thrift companies and only grandfathered those that currently exist in Nevada for as long as they are owned by their current owner. This bill does not eliminate thrift companies. It only precludes certain companies from owning them in Nevada. That makes it a far different piece of legislation than that last one to come before you, and far more friendly to those consummately professional businesses that want to come forward and do business here in Nevada that are not department store establishments in dealing in the types of conflicts of interest that I have just explained to you.

There have been some concerns with the language and I encourage the Committee to address it. If it's the wish of the Chair, I would like to see what I could do. It will require Research or Legal. The concern is this: there are some companies, such as Toyota, who operate thrift companies who sell apparel, automotive accessories, electronics, et cetera. It is not their prime market objective. They are tertiary markets for them. I would like to establish some language in this bill that indicates that your core business has to be the operation of the definition that's listed in here, not a tertiary business, so that certain companies we are trying not to include don't get caught up in this net. It needs to be clear.

Denyette DePierro, Director of Bank Relations and Legislative Representative, Independent Community Bankers of America:

The Independent Community Bankers of America is the largest banking association in the country. We represent 5,800 banks nationwide as well as the

community banks here in Nevada. We are regionalized banks. We aren't the megabanks. We take local deposits and make local funding. Our primary objective is the health and welfare of small businesses. We are in strong support of A.B. 196, because it promotes responsible banking practices and prevents the further mixing of banking and commerce.

In recent news, there have been a lot of situations regarding corporate scandals and accounting practices. What we're concerned about is, how can we be assured that corporations that engage in high-risk activities, as they do in pursuit of a profit as they are meant to do, can really preserve the fiduciary duty that a bank has to its deposit holders for the long-term preservation of those funds? Nationally, there seems to be a trend and a concern, as they're sometimes called nationally an "industrial loan company." In Nevada we call them thrift companies. The Gramm-Leach-Bliley Act of 1999 [15 USC 6801] forbids any corporation, retail or otherwise to hold a thrift company, or industrial loan company [ILC], at the federal level. Similarly, at the state side, a growing number of states have similarly decided that there's reason to be concerned about the mixture of banking and commerce and whether or not we can be assured that corporations can truly preserve the funds of its depositors.

California closed a loophole in 2002. Colorado closed that same restriction to commercial corporations in 2004. Nevada thrift company code, created in 1975, was based on the California code. There was a California banker who retired to Nevada, got bored, and wanted to start an ILC here and was the main proponent of creating the thrift company code here in Nevada. In California they found that the provisions of their code were not substantial enough to preserve the funds of those depositors; thus, they found it necessary to close the California code to all commercial corporations. Obviously, the bill here is much more moderate than that. We want to keep good actors such as Harley-Davidson and Toyota here and active.

Our concern arises when we're dealing with retail corporations. The difference between an ILC and a thrift company owned by automotive group versus a retail group. I think we need to look at the business model. In Utah, they have a number of thrift companies that are owned by automotive corporations. Many of these started off as finance companies and were rolled over into thrift companies more recently. You have a large consumer good such as a car or a plane—it's an elective purchase. We have found when the concentration is purely on those goods—again, these are collateralized loans because they do have the car or plane in their possession—the possible harm to either consumer confidence or to the banking system in the sense of if the corporation were to go under, which is the worst-case scenario, what would happen to those depositors' funds? If Enron had owned a bank, would those depositors' funds

still be there? Probably not. What Toyota and Harley-Davidson can do with financing large consumer goods is one thing, but what is a large retailer who doesn't have those large consumer goods to finance? You could technically finance a tube of toothpaste, but it's unlikely. Their business model is looking at going into full retail banking. That means taking the savings accounts of your general public and holding them there in the store or within the corporate hub.

[Denyette DePierro, continued.] As bankers, we are very concerned because of the derivative effects it could have on the consumer confidence on the banking industry as a whole. There's no reason the consumer would know a difference between a corporate-owned ILC and a traditional bank. That's the primary concern. Why is it different? Aren't there things in place or regulations that make sure that if a company went under the bank wouldn't go with it? What is the difference between banks and a thrift company? Ultimately, you have to look at the definition of a thrift company. They can do everything a bank can except have demand deposits, which are generally checking accounts.

The other big difference is how they're regulated. Imagine a ladder. At the top of the ladder is the parent corporation, which would be that public, commercial, or retail group that owns a thrift company. At the bottom of the ladder is the thrift company. Banks have something similar called a holding company that does those basic administrative investment groups that is the controlling body of a bank. Not all banks are set up this way, but this is a rough analogy between what the thrift companies and banks do.

The ladder with the bank holding company at the top and the bank at the bottom is under umbrella supervision. Generally this is done by the Federal Reserve. The state is regulating the ILC at the bottom of the ladder. As you go up the ladder, that's where the real difference becomes apparent. Umbrella supervision of the Federal Reserve means the Federal Reserve is looking at the holding company as well as at the bank. What are those relationships and transactions? Is it healthy, are they managing risk, are they going into areas of the economy that they shouldn't be? Have they bought too much real estate? Is real estate going up or down? Have they bought too many stocks or bonds? Are they looking at junk bonds? There are a ton of investments that one day can look like a great plan, and the next day the stock market goes and suddenly they have incurred an incredible risk.

[Denyette DePierro, continued.] What the Federal Reserve does is umbrella supervision for holding companies that are holding banks, risk management. They're constantly monitoring the health of the holding company to be sure that it's a source of strength to the bank. They consider reputational harm. If the corporation itself were to be harmed, maybe getting some bad headlines about

the misreporting of accounting matters, the reputational harm to the corporation could still have derivative effects to those people who have a savings account with that bank. That could happen on the corporate side. If you're looking at the parent corporation that has an ILC, they wouldn't necessarily see on the banking side. This difference between umbrella supervision and what you see on the ILC side, which is state regulation, the bottom of the ladder, and no regulation of the parent corporation by a federal group. Granted, the ILC is regulated both by the state and probably by the FDIC [Federal Deposit Insurance Corporation], depending on how they held their insurance. There's no umbrella supervision to be sure the transactions and the risk of the parent corporation are in line with the expectations of those depositors at the ILC who want their money there for a long time.

You may also hear occasionally that, due to the Sarbanes-Oxley Act of 2002 [18 USC 1514A], some of those regulations we've had in the aftermath of Enron are adequate to preserve or to have oversight over that parent corporation, and that somehow we should see that the umbrella supervision of the Federal Reserve is equal to the regulation under Sarbanes-Oxley, which is generally done by the FDIC. I dispute this opinion. If you look at Sarbanes-Oxley, it was developed to preserve the investment of shareholders and stockholders, not to preserve the long-term investment of a depositor—completely different intention. Moreover, what Sarbanes-Oxley may see as inappropriate risk because you have a for-profit, high-risk corporation taking its acts, may very well be too high of a risk and an inappropriate risk when you consider there are depositors' funds there. Sarbanes-Oxley is for stockholders and shareholders; it's not to preserve the deposits of the general public who have deposits in a bank.

In Nevada, DFI [Department of Financial Institutions] can go into the parent corporation and make an investigation if there's reasonable knowledge of wrongdoing or of future wrongdoing. Unlike the umbrella of supervision that you have on the Federal Reserve side, which is a routine and part of the annual checkup that every bank and holding company has to go though, the powers of the Nevada DFI to go into the parent corporation, although they do exist, are only in times when there is reasonable knowledge of some kind of wrongdoing. In recent headlines, by the time we have reasonable knowledge of wrongdoing, oftentimes it's too late to save the corporation or preserve even the reputational harm of bad headlines. That may be due to the depositors at that bank who are now concerned if their money is safe. Are they going to run in and try to withdraw all of their funds? There is still harm to the consumer confidence, even when a corporation doesn't necessarily go under or bankrupt. Those problems in a stock market fall can have enough of an effect on those consumers to actually affect what's going on at the banking level.

[Denyette DePierro, continued.] One issue is the bill will be bad for business because everyone wants to be like Utah. If A.B. 196 was applied to the Utah ILC or thrift companies, it would only affect 2 of their 35 current thrift companies, and those 2 thrift companies would still be allowed under this law to invest in an ILC or thrift company as long as they don't have a controlling interest. We do have an amendment (Exhibit L and Exhibit M) that asks Nevada to recognize that there are retail-owned ILCs out of state that can still open branches here in the state. If we're not allowing in-state, retail-owned ILCs to open branches here, then we should not allow out-of-state ILCs owned by retail companies to own a bank here.

Assemblyman Seale:
I want to disclose that I'm an officer and sit on a board of a financial institution and have substantial equity interest in that institution. I will be voting and participating in the conversation, as it doesn't affect me any differently from anyone else.

Danny Thompson, Executive Secretary-Treasurer, Nevada State AFL-CIO:
We have long taken a position on this issue. We don't believe that it's in the community's best interest, certainly not the state's best interest, to allow the mixing of banking and retail commerce. We've had experiences in Las Vegas, in particular, with these large retail stores. When Wal-Mart came into the Las Vegas market, a study done by a professor at UNLV [University of Nevada, Las Vegas] showed that the impact on the community of those super centers was actually a negative number. It cost the community $211,000 a year, according to a study, for those to be open. What we have seen are very predatory business practices. If you were a small business owner who happens to be unfortunate enough to be in the proximity of one of these large retailers, you cannot compete with them. You are either bought out or go out of business.

Mr. Conklin laid it out well; we don't believe it would be in the best interest for the State of Nevada to allow a company like Wal-Mart to be in the banking business. Based on their business practices, I would have no doubt that other financial institutions in Nevada would soon be at risk. Once they become the dominant provider, do you really believe that they're going to make small business loans to competitors? I think it's just a dangerous practice and it's something that should not be allowed. There's talk in Utah that they're currently seeking to have an industrial loan company there. The companies that we do have in Nevada have done a good job. They're good community partners and they provide for their employees, unlike others. We're very much in support of this bill and urge you to pass it.

Bill Uffelman, President and CEO, Nevada Bankers Association:
The Nevada Bankers Association has 44 members in the state. Ninety percent of those are community banks. I surveyed the entire membership, and the entire membership is opposed to this bill.

Donal Hummer, Vice President, Community and Government Affairs, Harley-Davidson Financial Services:
I'm Vice President, General Counsel, Secretary, and a Board member of Eagle Mark Savings Bank, a Nevada thrift that is a wholly-owned subsidiary. I have 500 reasons to get this bill killed today, and they each have a name, family, and home here in northern Nevada. I've prepared a document entitled, "In Defense of the Nevada Thrift Companies Act" (Exhibit N). It provides an in-depth review of Nevada thrift law and why this bill is a bad idea for Nevada.

Let's first discuss why we're here today. It has nothing to do with the risks that thrifts pose to Nevadans or protecting Nevadans. It's all about Wal-Mart. Let's call it what it is: It's the anti-Wal-Mart bill. The proponents of this bill see the slim possibility of Wal-Mart being able to get a thrift charter in Nevada as the worst of all worlds. It doesn't matter that Wal-Mart has never filed an application for a thrift license in Nevada. It doesn't matter that Wal-Mart has publicly announced it's going to do so in Utah. It doesn't matter that Wal-Mart's business model is only to recover ACH [automated clearing house] transaction fees and credit card transactions and not to set up brick-and-mortar thrift branches in every state. It doesn't matter that Wal-Mart has signed long-term relationships with GE Capital and Discover Card and has established relationships with over 1,000 community banks across the country. That's who is operating banks in your stores: community banks. There are some exhibits attached to the documents presented to you today that you see to back up what I'm saying (Exhibit N).

It doesn't matter that the passage of this bill will permanently destroy a vital source of jobs and economic diversification in this state, now and in the future, especially here in the north. It doesn't matter that thousands of current jobs will be at risk if this passes and that thousands more in the future will never be created. All that matters is that ICBA [Independent Community Bankers of America] of California wants Wal-Mart, and the fact that this bill has gotten as far as it has is sad.

[Donal Hummer, continued.] You'll hear testimony today from at least twelve different associations, banks, and thrifts—from banks and thrifts to economic development associations and community groups how damaging this bill will be to Nevada. You'll hear from a person who has 28 years experience with FID and

that there's no danger to community banks from thrifts. On the contrary, you'll learn how this is a complementary relationship. You'll hear experts from bank and thrift law that thrifts are under the same scrutiny as national, and community banks in a thrift pose even less risk to depositors.

In 1975, the Nevada Legislature enacted S.B. 544 of the 58th Legislative Session, known as the Nevada Thrift Companies Act. The purpose of this legislation was to enhance economic development opportunities in the State of Nevada. Robert Goodman, the Director of the Nevada Department of Economic Development, said, "I find this legislation to be a most valuable tool. This is the type of legislation needed in our State, as it has many safeguards built in for both borrowers and investors. It introduced a new financial institution which can augment the financial needs of our citizens and thereby stimulate economic growth in Nevada."

It was true back then, and it's even truer today. The proponents have tried to make you believe that thrifts are bad, pose risk to Nevadans, are unregulated, and the bill will have no economic impact. Thrifts are regulated just like banks. The same rules that apply to banks apply to thrifts. For those of you familiar with banking laws, called Regulation W of the Federal Reserve Act [12 USC 221] Section 23, subsections (a) and (b), applies to all institutions whether they're members of the Federal Reserve or whether they're insured by the FDIC. Section 23, subsections (a) and (b), restricts certain transactions between a bank and its affiliate companies, including any entity that controls a bank; any company that's controlled by a company that controls a bank; or any company in which a majority of the directors, trustees, or general partners also constitute a majority of the directors, trustees, or general partners of a bank. The restrictions under 23 (a) and (b) are in place to prevent any type of shenanigans between the bank and an affiliate.

Another regulation that's equally important is Regulation O, restricting the ability of a bank or thrift to channel funds to a parent corporation. Regulation O is very strict and governs any extension of credit to an executive officer, director, or principal shareholder of that bank, as well as the extension of a credit to an "affiliate" of the bank, defined as a corporate parent, and the subsidiaries.

[Donal Hummer, continued.] Further, Gramm-Leach-Bliley (GLBA) is a recent bill under which any financial institution, a thrift or bank, has to comply with the strict requirements of GLBA. Before any Non-Public Information (NPI) could be shared among affiliates, a financial institution is required to explicitly disclose the privacy policy pursuant to 12 CFR 40.5. In addition, there are annual notice privacy requirements that have to be delivered to the customer, they have to be clear and conspicuous, and they have to accurately reflect the privacy policies

and practices. It was Congress's intent to carry out for banks, thrifts, and financial institutions to have an obligation to respect the privacy of their customers, and to protect the security and confidentiality of customers' non-public records, 12 CFR 216.1, in following the spirit of the law; this includes allowing customers to opt out of sharing among affiliated companies.

Regular banks have access to the same data that they're afraid a retailer would have. If those customers are using credit cards or debit cards, all of the information about their purchases is going to be available to those banks. Banks can do the same type of marketing today that they say they're trying to prevent a thrift from utilizing. If someone is really concerned with this type of sharing information, they can always require an opt-in for sharing for thrifts owned by department stores. It does not require that we say, "We don't want these types of business." These could be great jobs for Nevada. Target just opened up a huge call center in Utah. It has not opened, but the charter was just approved last month. You're talking about a 1,000-person call center with professional jobs, loan officers, underwriters. It would be great to have jobs like that here in northern Nevada.

The state regulations, while they are in place, those in federal regulations are not sufficient to protect thrifts, especially thrifts owned by retailers. The FDIC, FRB [Federal Reserve Board], IRS [Internal Revenue Service], and the U.S. Treasury have powers to investigate even the parent with respect to the bank. That said, none of these divisions have any real control over inspecting the parent. That's because the parent has even a worse and more draconian regulator, the SEC [Securities and Exchange Commission]. All the information that the parent has with regard to its entire book and how everything is consolidated, all the financial information is made public and reviewed by SEC and the Treasury.

Let's talk about what we're going to lose if we start putting restrictions in place. Thrift companies allow the State of Nevada to diversify the economy and the job-base of the state. Traditionally, financial institutions provide above-market-wage jobs. At HDFS [Harley-Davidsons Financial Services], the starting salary greatly exceeds minimum wage. All the jobs at HDFS in Nevada have all of the following benefits: 401(k) matching, medical, dental, vision, life insurance, short-term/long-term disability, and college education reimbursement of up to $7,000 per year, per employee. We offer paid time off for community involvement. It's companies like Harley we want to attract to the state to help retain the best Nevadans in the state, working and prospering, and also serve to attract other high-caliber people and companies to the state.

[Donal Hummer, continued.] Harley has been here for roughly 13 years. We just celebrated our grand opening of our new building last week, and many of you were here for it. We have 700 employees across the world; 500 of them are in Carson City. We built that building here, even though last time, they tried to force us out under A.B. 389 of the 72nd Legislative Session, but everyone got together, understood what these jobs were, and we got that bill killed. I promised the Legislature in my testimony last time, if we get that bill killed, I'll build a building and we'll hire more employees. We did that. We hired more employees. We spent $23 million and had a $67 million impact in northern Nevada in the last two years.

I'll also mention community involvement. Companies like us, especially ones with thrift charters, have obligations under CRA to provide community reinvestment into the communities in which we live. Harley is a very big proponent of that. We exceed our requirements and go further with regard to all the types of community endeavors that we get involved in, from the colleges, the hospitals, Boys and Girls Clubs, et cetera. The big problem in Utah they have right now with their industry is they have so much community reinvestment money available from all the thrifts there—keep in mind, in a $130 billion business in Utah, with 15,000 jobs, they can't find enough places to spend the money in the schools, Boys and Girls Clubs, colleges, and community groups.

Assemblywoman Giunchigliani:
Does Harley-Davidson sell apparel, appliances, and the lists that are here?

Donal Hummer:
We sell that entire list. Harley has some company stores—

Assemblywoman Giunchigliani:
In Nevada?

Donal Hummer:
Not in Nevada, in other various places. We potentially will have one in Nevada. We have one in our plans.

Assemblywoman Giunchigliani:
You have a thrift currently?

Donal Hummer:
Yes, we have thrift currently here in the state.

Assemblywoman Giunchigliani:
At your branch?

Donal Hummer:
Our parent has retail operations in some of its plants here in the United States and in Europe. Those retail operations sell a whole gamut of items from parts for their Harleys, clothing, apparel, jackets, and accessories. Some of it has logos, some does not. Occasionally, there could be a problem with a Harley-Davidson dealership that we would have to take back and own and operate until we could find another buyer. During that period of time, those stores even sell more. Some have restaurants or toys.

Assemblywoman Giunchigliani:
That's the parent company. In Nevada, do you currently sell any of these items?

Donal Hummer:
Currently, I do not sell any of those items in Nevada.

Assemblywoman Giunchigliani:
So this bill technically would not affect you, then?

Donal Hummer:
I'm thinking about the future.

Assemblywoman Giunchigliani:
I appreciate that, but right now, it would not affect you?

Donal Hummer:
Today, yes.

Assemblywoman Giunchigliani:
I don't support anything to do with Wal-Mart. I do worry about this issue of monopolization. Years ago we had the big fight about insurance being sold by banks. Each group was constantly eating up the other group and it became this blended monopoly. Regardless of whether it's Wal-Mart, why would we want the eating up of what little bit small business we might have left?

Donal Hummer:
We'll take Wal-Mart, and we can talk about Target too. Wal-Mart's plans were to get a thrift license to cover the ACH payments on the credit card transactions in their stores. As large as they are and the number of transactions they do, that's a $400 million check; they would have just become their own

clearinghouse. That was their plan. Anyplace they do have some financial, they have community banks having their branches there. That's not part of their model. The same is occurring with Target. Target is going to be doing a credit card operation out of Utah. The majority of the income is imported in from all the rest of the states. At Harley-Davidson, 99 percent of our income that we pay our employees and bring to the state comes from outside of the state. That's what Target would do, too.

Assemblywoman Giunchigliani:
Your company has been wonderful for this state. We appreciate that. This current bill that we're looking at does not affect you. We have to be watchful of any legislation that further promotes the cannibalization of small businesses. I have friends in South Dakota where Wal-Mart just set up business. They contracted with a small "mom and pop" who made quilts. If they didn't sell the certain amount of quilts, they had to buy back that inventory, and within a year and half, that company closed down. We have to be very careful with what we consolidate and create into monopolies so we don't lose that vision. I'm glad to hear that this does not affect you, because we would not want that to happen.

Donal Hummer:
It affects us because all of the sudden there are things I can't do that I need to do, whether it is operate a dealership that has problems, or if I want to set up a store here in the state, now, all of a sudden, I can't do it. It changes the structure to the point that I have to look at other places that would be less restrictive where I could keep our charter.

Assemblywoman Gansert:
My family owns a percentage of a local bank in Reno. I don't believe that this legislation would affect me in any other way or more than any other person. We do, in fact, have a discloseable amount.

Assemblyman Conklin:
I should disclose that my wife is manager of a large department store that could be affected by this bill; however, my wife's interest is affected no differently than any other employee of a department store. Therefore, I will be voting on this matter.

Phillip LaChapelle, President and Chief Executive Officer, Fifth Street Bank (Proposed Nevada Thrift Charter):
I founded Security State Savings Bank, a Nevada-chartered, FDIC-insured thrift company pursuant to NRS 677. In April 2000, I served as the president and CEO until it changed ownership. This past October 2004, there was significant interest to buy the thrift, which concluded with the current ownership providing

additional new capital and new high-paying jobs. Presently, I am now founding a new thrift in Nevada and expect to once again serve as the president and CEO of the proposed Fifth Street Bank.

My application was filed with the Nevada FID [Financial Institutions Division] and the FDIC on November 17, 2004, and is currently in process. Among other directorships in nearly 35 years in the banking industry, I served on the board of directors of the Independent Community Bankers of America for three years, through November 2003. I also served on the board of directors of the California Independent Bankers for nearly 10 years, until the conclusion of the 2003 Legislative Session in Nevada, when I received a "Dear Phil" letter for supporting the Nevada Thrift Charter and opposing A.B. 389 of the 72nd Legislative Session.

As a veteran executive officer in community banking and thrift company operations, I want to explain why A.B. 196 is bad for Nevada. My background is extremely important because, through current and relevant experience, I can validate the existing regulatory examination and evaluation process for both the State of Nevada and the FDIC, including community banks and thrifts.

My testimony doesn't speak to the conceptual policy issues, but rather to the highly complex safety, soundness, and compliance application process. The change-in-control application and new application process are very similar. Neither process begins until the FDIC and the FID deem the application complete. Further, the public is afforded the opportunity to review and comment on the non-confidential portions of the application by contacting the FDIC and the FID Commissioner.

[Phillip LaChapelle, continued.] In general, the comprehensive examination and investigation process include the following, among other requirements: the financial history and condition of the existing thrift and the acquiring entity's complete audited financial statements that involve the business plan and reasonableness of its future earning prospects. The key is the general character and fitness of its management and directors. Do they have current and relevant banking experience, which is determined by each individual's personal inter-agency biographical and financial applications and interviews with the regulators?

Secondly, I oppose this bill because I had the choice of founding this new thrift in Nevada or an industrial bank in Utah. My investor fully endorsed Nevada for many reasons, including Nevada's fast-growing economy, its greater talent pool, and lack of state income tax, among others. A.B. 196 prospectively changes the rules that our application was initiated upon, as well as limiting my

investor's future business choices. He's investing in excess of $10 million of new capital in Nevada and creating initially 10 high-paying jobs. He has the proven capacity to invest more, but he is very concerned about the implications of this bill and the prospects of future changes that, in his words, "challenge all industries and unfairly limit competition."

The Conference of State Bank Supervisors (CSBS) is the trade and training association for state bank examiners, which in addition includes members as banks, and takes advantage of director, officer, and bank personnel training opportunities. The CSBS President and CEO said, "In the welter of concerns that have been raised about industrial loan companies, the Conference of State Bank Supervisors reaffirms the longstanding principles that are the bedrock of state banking. Any diminution of or constraint upon any state charter potentially endangers all state charters in the state banking system. Congress has addressed ILCs in previous legislation and has allowed them to exist where they are authorized by states for more than 100 years. If Congress revisits the issue, CSBS's view will be that no state charter shall be placed in a position of weakness vis-à-vis federal charters."

I'm committed to maintaining competitive, complementary banking services and choices that have historically characterized our Nevada state banking system. Competition and choices remain strong in the face of consolidation when the big get bigger. However, the healthy benefit is new chartering and changes in control, primarily at the state level, which continues to guarantee local and varied banking options to many segments of our customers, including senior citizens on fixed incomes seeking higher money market and CD rates. FDIC Chairman Donald Powell said in a response letter to Senator Bennett of Utah and Representative Royce of California in April 2003, "Overall, it is the FDIC's view that ILC charters pose no greater safety and soundness risk than other charter types."

[Phillip LaChapelle, continued.] In conclusion, please let the regulators continue to process change-of-control applications and determine whether ownership by any and all prospective acquirers of the thrift charter in Nevada meet the regulatory guidelines established in the FDIC statement of policy and the NRS. The California Independent Bankers have spoken here in favor of A.B. 196. Fortunately, as you have heard, they do not represent the views of the Nevada Bankers Association, and, respectfully, as Assembly Speaker Perkins said, "Let this be a session of action of vision for the betterment of all Nevadans." I urge your no vote on A.B. 196.

Chuck Alvey, President, CEO, Economic Development Authority of Western Nevada (EDAWN):
We've worked very hard to communicate what a business-friendly state we are in terms of our licensing and the kinds of companies we want. Financial services are an industry we work to target and try to recruit here because they bring high-paying jobs, do not pollute, and do not tax the infrastructure like many other industries do. It's a target we'd like to keep, and it's amazing how subtle things like this type of a bill will have an anesthetic effect. People read a lot into these bills and they track them very carefully. To help our patients survive in financial services, I would ask you to not pass this bill.

Assemblyman Hettrick:
In response to Ms. Giunchigliani's question a few minutes ago about whether or not this would have an impact at Harley-Davidson, I don't see it says anything about whether the department store has to be located in Nevada. It simply says "a department store." I would ask Mr. Hummer if, on second thought, he believes it would impact Harley-Davidson?

Chairwoman Buckley:
We can have our Legal Division tell us that as well.

Assemblyman Conklin:
The language needs to be tweaked to indicate that "department store" was your core business. That was fully intended so companies such as Harley-Davidson would be completely written out of the bill.

Bernard Nebenzahl, Attorney, Fifth Street Bank:
I'm here because of the investment that Mr. Arkley is going to make and the desire to have another Nevada bank. The interest is not on behalf of Wal-Mart because I don't care about Wal-Mart.

I'm concerned about the logic and the conceptual basis upon which public policy is being discussed and made. I'm quite familiar with California because I've participated in that, and it was indeed a tragedy in California and a great gain for Nevada because of Toyota, who I represented in California and counseled with them to come to Nevada because of what occurred in California. What is occurring here under the guise of separation of banking and commerce is illogical in the way in which it's been presented. If the author and representatives from the union really believe, then this is not the bill for this Committee because it doesn't do it. It picks out an industry categorically. I think that's from a public policy point of view for Nevada, and for Mr. Arkley to be in a state whose public policy is being pronounced about who can control, that's

not just controlling for purposes of de novo, it's a change of control. With regard to the language and tweaking the language, Assemblyman Conklin, the current language does cover my good friend Mr. Hummer. To the extent that you tweak it and have a core or a Nevada residency, that's an issue the lawyers have to assist you with.

The commerce and banking issue is flawed. Testimony in Congress and the Chair of the FDIC publicly support the flaw of that. Things have changed. My father was a small merchant who had a shoe store. Wal-Mart wasn't there, but a shopping center was built about a half mile away. It was the first time a shopping center was built in that community. It destroyed his little shoe store. I'm very familiar with that. Department stores are not just the evil. If the evil is commerce and banking and fear of collapse of a bank, then we have to look again at what the regulatory scheme is. If we demean this State Division of Financial Institutions and we demean the FDIC, then you have a real problem. The depositors are no more at risk whether it's an Enron, Wal-Mart, or Harley-Davidson.

The insurance of deposits is the same. It's a phony issue. The regulation of parents is not a phony issue. That is the core difference that the testimony went to. The Federal Reserve Board does not have any jurisdiction over thrift holding companies, the holding companies of industrial banks in California, or any other similar charters. It does not mean that they're not overseen by the regulators. In order for his thrift company in this state to do business, Rob Arkley has to qualify with the Financial Institutions Division and submit a business plan and they have to approve it. The FDIC looks at the three-year, pro forma, pro-statement of what he intends to do. He has to live up to that 3-year Pro-Form business plan. If he varies from it, he's subject to not only civil money penalties, but all kinds of regulatory impositions. The banking operation is insulated from the parent's position of policy or mischief. If there's a violation of these regulations, the criminal consequences to it, for purposes of taking money on loans that are outside the regulatory scheme dealing with any kind of selling of services or buying of loans or investments from affiliates, very highly regulated. That seems to be lost in the conceptual discussion about if we have a non-banking institution own a bank, a catastrophe is going to befall.

[Bernard Nebenzahl, continued.] The ladder approach is very graphic, and I compliment the witness in using that because it's true. You can visualize it. It's not true that if you don't have the FRB at the top of the ladder, the bottom of the ladder is vulnerable. It is not that you have a new commission in the state; you have regulatory authorities, the FDIC. They examine these banks carefully, and if they feel that there's any mischief, they're all over them.

Kmart is a department store and they're having problems. The department store issue is not an issue because they have information that they're going to misuse. It's an issue because it's a Wal-Mart issue. I bless you if you can find a way to carve it out that doesn't otherwise injure the state. If Target wanted to come into this state and to acquire an institution and to expand its operations under this bill, it couldn't.

Assemblyman Seale:
What you're suggesting is that there is a Chinese Wall in fact between the thrift company and their other activities? [Mr. Nebenzahl agreed.] And you're saying it's impermeable? It can't be gotten though?

Bernard Nebenzahl:
It absolutely can be gotten through by people who are mischievous, break the law, those who defraud and steal from others, and dishonest individuals. Laws can only help us set standards, and those standards have a shield, a Chinese Wall as you said. Those are in regulations.

Assemblyman Seale:
There was discussion about Sarbanes-Oxley earlier and the impact that may or may not have. I assume Harley-Davidson is subject to Sarbanes-Oxley, and I have the fortune of sitting on a couple of company boards because of my financial background. I think the issue there goes to corporate governments and if we are conducting ourselves generally well. [Mr. Nebenzahl answered yes.]

Chairwoman Buckley:
I would like to enter into the record that every member has received a letter of opposition from the Las Vegas Chamber of Commerce (Exhibit O). [Larry Hickman submitted (Exhibit P) for the record.]

Larry Osborne, Chief Executive Officer, Carson City Area Chamber of Commerce:
I represent approximately 1,300 local and regional businesses of all sizes, including Harley-Davidson Financial Services, Wal-Mart, and the Salvation Army Thrift Store. All of those would be declared a department store under this bill. We oppose A.B. 196. We don't believe it's a good bill for the economic growth of our state. I also have a much higher level of confidence in the ethics and character of retail establishments than do some of the proponents of this bill. It is too broad-based, it encompasses too many stores. A.B. 196, no matter how well-intentioned it may have been, undermines the free enterprise system, and we oppose A.B. 196.

George Ross, Legislative Advocate, representing the Retail Association of Nevada (RAN):

I believe I am the only testifier here today who actually represents the presumed target of this legislation: large department stores who may consider having a thrift, which none of them have in Nevada. I recognize the concerns of Assemblyman Conklin are absolutely legitimate, the focus in the Legislature on the concentration of economic power and what its impacts could be. These should certainly be considered. It recognizes that there is probably no one in the state of Nevada who's done more for working men and cares more about them than Danny Thompson. There is another way to look at this. We really feel that the Legislature's number one concern is the welfare, well-being, prosperity, and liberty of your constituents. The appropriate way to look at the financial services industry is not that department stores might add such services. The worry is that this might concentrate economic power.

The relevant industry to analyze is financial services. If department stores were to enter this field, they would provide another source of competition and services in this area. If, as a Legislature, you are concerned with efficient services to customers with a maximum of services provided at the lowest price possible, you should be exploring how to get new entrants into this field, especially when such entrants have a reputation for providing high-quality services at low cost and, particularly with Wal-Mart, with serving underserved populations extraordinarily well. Even if department stores never did actively engage in thrift or banking activities, as long as they can have that opportunity and as long as the threat exists that they could or might be able to enter this field, it can put down with pressure on fees. It can be a settling encouragement to existing firms to improve their quality of service to improve the breadth of service and offerings. Then there would be less incentive for somebody else to come in because there would be less opportunity.

[George Ross, continued.] I remember the 2003 debates about banks, and several times we heard the question about fees. Banks charge these fees no matter what their taxes are. New competitors whose business models stress quality products at very low costs can make a difference in the level of those fees. I'm not saying whether department stores could or would ever enter the thrift business in Nevada or any other state. Wal-Mart already cashes payroll checks, they transfer money to Mexico, and they sell money orders. A bill came in yesterday that regulates the payday loan business. Wal-Mart cashes payroll checks for $3. Without the temptation of payday loans and exorbitant, abusive rates, Wal-Mart will send money to Mexico for $9.46, compared to $14.99 of their major competitors to do this. A money order at Wal-Mart costs $0.46.

To quote Gary Stibel of the New England Consulting Group in Westport, Connecticut, "Wal-Mart is giving people in lower-income brackets opportunities in financial services that they have never had before. Wal-Mart's customers as a group fall below the national average income, but Wal-Mart prices enable them to enjoy a higher standard of living than they otherwise could." Analysts estimate that as many as one-fifth of Wal-Mart's customers have no bank accounts. To bring these people into the modern financial world and give them affordable bank accounts, credit cards, mortgages—A recent immigrant who has a member of the family die and wants to send the body back to Mexico or El Salvador can't afford it. He can get an affordable loan, from a place he trusts. For people who are willing to bring him into the modern financial world the rest of us take for granted.

These people are suspicious of regular banks. One person I know personally still buries his money in the floor. They trust Wal-Mart and places where they shop. This can be their entry.

Michael Pennington, Public Policy Director, Reno/Sparks Chamber of Commerce:
The Reno/Sparks Chamber of Commerce is opposed to A.B. 196. We appreciate the values that the current thrift companies bring to the northern Nevada community, and we hope to see that continue.

Ron Weisinger, Private Citizen, Reno, Nevada:
I've been in economic development for over 30 years. I'm charged as you are with helping to diversify the economy of our great state. That means that competition, which is one of the things we're known for throughout all 50 states, we need to keep strong and keep that moving forward. Competition is one of the things that life is all about. I would think that all of you would like to be able to make the financial services community, which we are charged with in northern Nevada as a prime industry to attract, retain, and to expand, that we don't do things in order to be able to negate that. Therefore, I'm against this bill.

Chairwoman Buckley:
We'll keep the record open for anyone else that wants to testify or submit written testimony. I'll close the public hearing on Assembly Bill 196 and open the hearing on Assembly Bill 203.

Assembly Bill 203: Makes various changes concerning osteopathic medicine. (BDR 54-1116)

Assemblyman Bob Seale, Assembly District No. 21, Clark County:
The provisions outlined in A.B. 203 are appropriate for the Board of Osteopathic Medicine to continue its public protection mission enhancing due process, ensuring access to medical records, expanding access to mental health, and protecting the public by maintaining the highest professional standards.

Trey Delap, Deputy Executive Director, Nevada State Board of Osteopathic Medicine:
[Read from written testimony (Exhibit Q).] I would like to review the sections of this bill amending NRS Chapter 633. Sections 2, 3, 6, 14, 15, and 16 provide for the administrative hearing officer to conduct evidentiary hearings relating to formal complaints filed against licensees.

After reviewing this legislation with legal counsel, we submit a couple of amendments (Exhibit R) to clarify some definitions and references made in the bill. In Section 2, we would like to strike the reference to the "hearing officer" as a member of the staff and replace the term to reference "an individual that has been appointed." It is our intent to contract with hearing officers or use the Department of Administration's hearing officers to conduct hearings so that they would not be considered staff.

Secondly, we would like to include a definition of "panel" under Section 3 to ensure the meaning of "panel" is uniform throughout the chapter. A panel for our purposes would then mean a group of not less than three members of the Board, one of whom would be one of two public members. All references to "hearing officer" in A.B. 203 also would be amended to include a reference to a "panel."

[Trey Delap, continued.] The use of hearing officers to conduct our disciplinary hearings would dramatically enhance the discipline process by expediting public protection and ensuring due process and protection afforded to any respondent in a civil action. Most state medical boards conduct hearings by administrative law judges or hearing officers. The Attorney General (AG) supports the use of hearing officers in disciplinary cases concerning licensing. The AG has proposed BDR 54-98, which would create uniform hearing procedures for licensing boards, including using hearing officers.

Section 5 of the bill expands the definition of "unprofessional conduct" to include failure to comply with NRS Chapter 629, and under laws governing medical records. This provision is intended to give the Board more authority to ensure that the public has full access to their medical records at all times. By expanding the definition of "unprofessional conduct," we would have the ability to prosecute and sanction a physician found inhibiting the proper recording of medical information or the transmission of such information as necessary for the patient's health.

In Section 7, the Board wants to obtain a civil search warrant. Documents most commonly procured by the Board pursuant to an investigation are medical records or other business records relating to the care and treatment of a patient. In our past experience, we have found that the provision for subpoena and the authority to obtain medical records provides a time frame for the production of records. We have been concerned about instances whereby the subject of the investigation would have ample time within this time frame to alter or otherwise spoliate the necessary evidence.

In Section 8 of the bill, we ask for a small expansion of the authority granted to a resident physician in providing for a critical medical need and performing medical exams to patients of a public health/mental health facility. Nevada has experienced an increased demand for mental health services. A state of emergency was declared last year in Clark County, where so many emergency room beds were occupied by mental patients waiting for access to mental health services. Mental health patients require medical clearance as part of access to mental health services. The Department of Health and Human Services articulated the idea of using resident physicians and performing medical exams on patients of the mental health facility. It is our hope that this change would help increase access to mental health services. Also, this experience would provide primary care physicians training and exposure to mental health conditions, which can be invaluable in treating patients in a primary care setting.

[Trey Delap, continued.] It is innovative for State government to work together with other State agencies for the public benefit. It is important for government to be technologically innovative. The purpose of Sections 9 and 10 is to change the way we monitor receipt of continuing medical education credits as a requirement for licensure. This section would ask licensees to declare CME [continuing medical education] credits at renewal rather than submit actual verified evidence of receipt of the CMEs. I want to provide for online license renewals. Twenty-five jurisdictions renew licenses online with reported great success. We already have the technology in place to renew licenses online; the only holdup has been the requirement to verify CME credits. With this change,

we would audit one-third of our licensees each year to determine compliance with the continuing medical education requirement.

Thirty-eight percent of our licensees live out of state. Every year, a number of these licensees inquire about putting their licenses in active status. With this bill, we would hope to offer them this status in hopes of retaining the out-of-state licensee. A.B. 203 provides for increased caps on licensing fees charged by the Board. We have asked for two changes in the fee schedule. First, in consultation with the Nevada Osteopathic Medical Association, we have agreed that a reduction in the annual renewal fee down from $800 to $500 would be appropriate.

Secondly, we would like to reduce the initial license and application fee requested in the bill down from $1,000 to $800. These fees represent maximum caps. The higher fees are proposed because we believe that we will need to increase revenue to replenish our reserves spent on disciplinary hearings. We would have no problem reducing the fees in the future if we were in a secure financial position. We will work towards ensuring that adequate funds are available to meet the demand for public protection, but it is now necessary that we shore up our reserves. Over the past three years, since the first increase since 1977, our investigative and disciplinary functions have dramatically increased. We do not see trend delaying because of the rapid growth of the state. From 2003 to 2005, we have paid out $170,000 in prosecution costs. This startling amount represents the cost of prosecution of only three cases. One recently concluded with the conviction of nine counts of gross malpractice and revocation of the license. However, two serious cases are still pending, so we anticipate additional legal costs. $139,000 went to the Attorney General's Office for legal fees. While we had three cases in the works, we have incurred $17,000 to $20,000 in legal fees per month over the past several months. We can expect at least $30,000 to $40,000 in legal fees before the end of these cases, and then we will have to prepare for possible litigation resulting from any outcome of these cases.

[Trey Delap, continued.] Included in these figures are legal fees associated with defending the Board's public protection authority on judicial review. Three times in the past year and a half, the Board has been sued by doctors before disciplinary hearings. In these cases, the respondent doctors attempted to have injunctions placed on the Board from proceeding with an administrative hearing. In each case, the court ruled that their claims for injunctive relief were premature and thus not right for judicial intervention because they had sued before the board had actually acted. Even though these cases were dismissed, the Board incurred significant legal costs in defending them. The cost of

defending misleading cases by doctors under scrutiny increases the overall cost of public protection and disciplinary proceedings.

This Board operates on an annual budget of $230,000, so a $170,000 legal bill takes a severe toll on our operating budget and depletes our reserves. We do not want to be in a position where we are forced to settle a case because we don't have the money to prosecute, or worse yet, we don't want to ignore a case because we don't have the money to discipline. It is possible that the Board can recover costs spent on prosecutions from respondent licensees. Unless the enumeration is part of a settlement agreement, the Board would have to pursue recovery through liens. Processing a lien can itself be constantly delayed and interim cost continues to rise.

If we can recover what we spend on discipline, we could lower licensing fees; however, that isn't the case at this time.

Assemblyman Anderson:
In your hearing process, you're going to move to a northern and southern panel rather than in front of a whole Board. Is that correct?

Trey Delap:
No, currently we do hearings with the whole Board.

Assemblyman Anderson:
In your new proposal, your hearing won't be in front of the whole Board?

Trey Delap:
No, what we would provide is the option for the Board to have a hearing officer, a single person conduct it, or a panel of three members, or the whole Board.

Assemblyman Anderson:
If you do the single member or the three members, is there going to be an opportunity for an appeal if they don't like what happened from this one single member?

Trey Delap:
Yes, they would appeal the findings of the hearing officer to the full Board. The hearing officer would function as a judge by taking all the evidence, ruling on the matters, et cetera. Then the whole record, which would be thick, would be transmitted to the Board. The whole Board would consider all the evidence, and then they would adopt and accept the conclusions of law that were made by the hearing officer and discuss a possible sanction.

Assemblyman Anderson:
Does the member get to come in front of the full Board at the same time, or is it just the paperwork itself?

Trey Delap:
Most often, what will happen is the hearing officer will be a contractor of the Board, someone who is an administrative law judge or a member of the hearing officer pool that the state has, or through the Department of Hearings Division. This person would most likely be a lawyer who would conduct the evidentiary hearing. It could be a Board member. Either way, the case is appealable to the full Board.

Assemblyman Anderson:
Does the respondent get to come?

Trey Delap:
Yes, because at that point the sanction is being discussed.

Chairwoman Buckley:
One of the things we try to do is keep our statutes similar, so, for example, for the medical doctors, how many of these are in their statute?

Trey Delap:
I don't know how many duplications there would be in Chapters 630 and 633 in this bill. They have used hearing officers for awhile.

Chairwoman Buckley:
What about the subpoena power to include the authority to request a search warrant from a judge?

Trey Delap:
I'm not aware if they have that authority or not. There are other boards and commissions in this state that do have the search warrant authority.

Denise Selleck Davis, Executive Director, Nevada Osteopathic Medical Association:
I'd like to commend the Board. We've worked very hard when they gave us their first bill draft request at implementing something that doctors could afford. Additionally, a cap of $800 was a little alarming to physicians, going from $300 to $800. We had an assurance that they probably would not charge $800, but the public has a general feeling that if government can, they probably will. We did work with them very hard. I would urge you to pass this with the amendments (Exhibit R). These are very important to us.

We would also like clarification that hearing officers would have a legal background, as this is conclusions of law. As a representative of the Association, I have sat through the hearings of the physicians in the last year. They are excruciatingly long, and unfortunately they don't seem to benefit the patients or the physicians. In the long run, we have a lot of legal wrangling. We have gone through this process very carefully to see through it that there is peer review involved and complaints are taken to a peer investigator, then to the hearing officer, and then back to the Board, which has physicians. We think this is important because we're talking about medical conclusions, which are based on experience and education. We urge the passing of this with the amendment (Exhibit R) and with the clarification of training of the hearing officer.

Assemblywoman Giunchigliani:
You do fingerprinting currently, correct, for new applicants? [Ms. Davis answered affirmatively.] Why is that not on this list?

Trey Delap:
We started to conduct criminal background checks in 2003, after the last session, when we came before the Legislature and asked for the criminal background check ability.

Assemblywoman Giunchigliani:
I don't see it in the cost in here. Is that part of what you charge for that license renewal?

Trey Delap:
That was a concern with A.B. 208, that it's not delineated in the fee structure, so we would have to work around absorbing that as part of the renewal fee. The cost in total would be around $30,000 for us to do the criminal background checks. As it is now, we passed the $45 fee on to the applicant.

Assemblywoman Giunchigliani:
That's what I thought. There are actually two groups that don't pay a dime that should probably pay if you're going to require for fingerprinting so that we equalize that part.

Chairwoman Buckley:
We will close the public hearing. We're adjourned [at 5:51 p.m.].

RESPECTFULLY SUBMITTED:

_____
James S. Cassimus
Transcribing Attaché

APPROVED BY:

_____
Assemblywoman Barbara Buckley, Chairwoman

DATE:_____

EXHIBITS

Committee Name: Committee on Commerce and Labor

Date: March 23, 2005 Time of Meeting: 2:07 p.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
120	**B**	Assemblywoman Gerhardt	Opening Remarks
120	**C**	Assemblywoman Gerhardt	Amendment
120	**D**	Frederick Ernst	Standards and Guidelines for Office-Based Surgery
120	**E**	Frederick Ernst	"Now They Lay Me Down to Sleep"
120	**F**	Neena Laxalt	Prepared testimony
120	**G**	Melissa Moore	Prepared testimony
208	**H**	Assemblyman Horne, Assembly District No. 34	Commerce and Labor Presentation
208	**I**	Frank Nemec,	Prepared testimony
208	**J**	Board of Medical Examiners	Proposed Amendments
208	**K**	Michael Colletti,	Criminal Background Checks Bill Draft Request
196	**L**	Denyette DePierro, Director of Bank Relations	Proposed Amendments
196	**M**	Robert DeJong	Support for AB 196
196	**N**	Donal Hummer, Harley-Davidson Financial Services	In Defense of the Nevada Thrift Companies Act
196	**O**	Christina Dugan, Las Vegas Chamber of Commerce	Letter of Opposition to A.B. 196
196	**P**	Larry Hickman	Statement in Opposition to A.B. 196
203	**Q**	Trey Delap, NV State Board of Osteopathic Medicine	Testimony in support of A.B. 203
203	**R**	Trey Delap, NV State Board of Osteopathic Medicine	Proposed amendments to A.B. 203