MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-third Session
February 9, 2005

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 8:05 a.m. on Wednesday, February 9, 2005, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chair
Senator Maurice E. Washington, Vice Chair
Senator Mike McGinness
Senator Dennis Nolan
Senator Valerie Wiener
Senator Terry Care
Senator Steven Horsford

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Kelly Lee, Committee Counsel
Johnnie Lorraine Willis, Committee Secretary

OTHERS PRESENT:

Clifford King, Chief Insurance Assistant, Division of Insurance, Department of Business and Industry
Michael J. Fischer, M.D., President, Nevada State Medical Association
Scott M. Craigie, Nevada State Medical Association
Lawrence P. Matheis, Nevada State Medical Association
Bill Bradley, Nevada Trial Lawyers Association
John Echeverria, Attorney
Ann Wilkinson, First Assistant Attorney General and Legislative Liaison, Office of the Attorney General
Marta Adams, Senior Deputy Attorney General, Office of the Attorney General

Liesl Freedman, Solicitor General, Office of the Attorney General

Chair Amodei called the meeting to order. He said the record should reflect that, "The members who are present are noted such, and those who arrive during the course of the hearing should be reflected as present. Show Senator Care as present in Las Vegas."

Senator Amodei advised that the first order of business was the adoption of the Committee Rules—73rd Session for the Senate Committee on Judiciary (Exhibit C). He asked whether the Committee had reviewed the rules and if there were any questions or comments on the standing rules for the Committee.

> SENATOR MCGINNESS MOVED TO ADOPT THE COMMITTEE RULES–73RD SESSION FOR THE SENATE COMMITTEE ON JUDICIARY.
>
> SENATOR HORSFORD SECONDED THE MOTION.
>
> THE MOTION CARRIED. (SENATORS WASHINGTON, NOLAN AND WIENER WERE ABSENT FOR THE VOTE.)

*****

Senator Amodei said the Committee would now hear a presentation on medical liability insurance. He called on Clifford King, Chief Insurance Assistant, Division of Insurance, Department of Business and Industry.

Mr. King said his testimony would be a summary of the report submitted to the Legislature entitled, "Medical Malpractice" (Exhibit D). Reading from his written testimony, Mr. King said he had been asked to testify on the current state of the insurance industry in relation to medical malpractice rates (Exhibit E). He said in 2003, the State of Nevada had 10 carriers that provided medical malpractice insurance. He indicated directly after the 2003 Session ended, 4 of those insurers withdrew from doing business in Nevada or severely restricted their policy writings. He stated those four included: American Physicians Assurance Corporation (APA), Truck Insurance Exchange, Continental Assurance Company of North America and the Medical Insurance Exchange of California.

Mr. King said Nevada currently had six medical malpractice insurers in the marketplace. He explained there were approximately 50 medical malpractice insurers; however, most of those did not cover physicians. The six companies that were providing insurance for Nevada's physicians were Nevada Mutual Insurance Company, The Doctors' Company, Physicians Insurance Company of Wisconsin, Hudson Insurance Company, The Medical Protective Company and Medical Liability Association of Nevada (MLAN), which was not an insurer but an essential insurance association established by the Governor and the Division of Insurance Commissioner, Alice A. Molasky-Arman.

Mr. King explained if the Committee wanted rates to go down, it must look at cost drivers for medical malpractice. He said one of the largest influences on rates was reinsurance. He explained an insurance company, like any other business, will have to lay off part of their exposures in order to relieve themselves of risk or exposures too great to retain, and for that, they purchase reinsurance. Mr. King continued, when an individual or business purchases insurance, that was considered an insurance transaction; when an insurance company purchases insurance, that was called reinsurance. He said insurers have to purchase reinsurance to remain solvent and have the capacity to write large insurance policies. He asserted a reinsurer had a great amount of influence over the pricing of insurance policies as well as the acceptability of businesses to be insured.

Mr. King said in ratemaking, there were two important considerations. One was the objective and the second was the subjective. He said the objective was the numbers reports, the loss and loss-adjusting expense factors that actually were experienced by insurance companies. He said the carriers take the actual numbers from their loss and lost-adjusting transactions, then trend and develop them in order to bring them to today's dollars. If a loss occurred today, it would be expressed in today's dollars, not yesterday's dollars.

Mr. King stated most current price drivers were compiled from data previous to Assembly Bill (A.B.) No. 1 of the 18th Special Session. Because A.B. No. 1 of the 18th Special Session only applied to cases occurring after October 1, 2002, he stated very few, if any, losses had actually entered into the current ratemaking scheme.

Mr. King explained occurrences after October 1, 2002 would take three to five years or longer to affect rates.

Mr. King explained the second major cost driver for insurance was loss and loss-adjusting expenses. He said costs were subjective in nature and included four major areas. Mr. King explained the four areas included the legal environment, the economic environment, the credibility of the claims data and any changes that had occurred within the staffing of the insurer. He said staffing and those issues were taken into consideration because different insurers had different attitudes towards reserving in their claims practices.

Mr. King noted the legal environment claims that had occurred after October 1, 2002 would not be considered because they were so new. He said one of the things the actuaries must consider when looking at A.B. No. 1 was whether all or part of the legislation would withstand legal challenge. He explained, as of this time, none of the claims filed under the provisions of A.B. No. 1 had gone through the legal system. Mr. King said the insurance industry had no idea what would withstand legal challenge and what would not. He pointed out the Division of Insurance must still ensure that each insurer would be financially capable of fulfilling its obligations when it did its filings. Mr. King continued with the information that the insurers must have adequate rates, must not have excessive rates and must not be unfairly discriminatory. He said those standards were spelled out in *Nevada Revised Statute* (NRS) 686B.050. Mr. King said the Division's objective was to make sure the State's insurers remain solvent and able to fulfill their financial obligations. He stated if there were to be an insolvent carrier, no one would win.

Mr. King said the second thing an actuary considers would be the legal environment which would deal with the noneconomic damages on claims, and the cap on noneconomic damages. The other provision would be several liability. The actuary had to consider what portion each one of those items contributed to A.B. No. 1 in terms of a rate reduction. Mr. King explained the actuary must consider the $50,000 limitation on damages when treating trauma patients, several standards for cases that were noneconomic damages and shortened statute of limitations. Mr. King pointed out each one of these provisions within A.B. No. 1 must be considered to decide what kind of reduction would be warranted. He commented the assumption that provisions of A.B. No. 1 were being upheld would have to be made.

Mr. King said the final consideration was the defense costs, and in almost all cases in policies, those costs were unlimited. He explained that meant if a physician or provider was sued, then the insurer must defend that physician or provider. He

continued with the information that those limits do not come within the limits of the policy, those were part of the loss-adjusting expenses the insurer must understand and evaluate.

Mr. King said also to be considered were the economic influences, the insurer's expectation of future income from investments. He said under Nevada statutes, insurers were prohibited from using rates to offset investment income losses. Mr. King cited NRS 682A which restricted how an insurer was allowed to invest capital; investment income can only be shown as a gain and cannot be shown as a loss. He said in addition, NRS 686B.050 documents the standards that determine whether rates were legal. He quoted NRS 686B.050, section 3: "Rates are inadequate if they are clearly insufficient, together with the income from the investments attributable to them, to sustain projected losses and expenses in the class of business to which they apply." Mr. King reiterated that under this statute, investment income can be used to reduce the rates, but not to increase the rates.

Mr. King stated reinsurance plays an extremely important role. He said insurers must have reinsurance to have the capacity to write the business and to protect themselves from a significant loss or series of losses. He emphasized that failure to protect themselves from significant losses could cause an insurer to become insolvent. Mr. King said when a reinsurer agrees to assume a portion of the losses ceded by the primary insurer, they charge a premium which results in the reinsurer's costs being directly related to the end costs of insurance. He explained the reinsurers also oversee businesses that were underwritten by establishing standards of what is acceptable and not acceptable.

Mr. King said the next area of consideration was whether or not the data were credible. He said credibility was established by the number of claims. He stated data were considered credible to an actuary if there were at least 1,000 claims. Mr. King explained Nevada had less than 4,000 physicians, and not every physician had a claim. Mr. King explained, over a period of several years Nevada may have 1,000 claims, but not in a single year's time. Mr. King noted there was insufficient data in Nevada to be able to produce pure ratemaking.

Mr. King said the final process added to the mix of rate-setting for reinsurance was to assess the staffing and management of the insurer. He said this was because each insurer operates differently. He stated rate-setting for physicians' medical malpractice insurance was very different from workers compensation in that for workers compensation, the benefits were set by statute and regulated by the

Legislature. He said in medical malpractice, some insurers were more aggressive in defending claims and others would seek to just settle and get it over with.

Mr. King called attention to Exhibit D, which documents the six largest insurance carriers in the State with an attached listing of the rate-filing activities for those six companies for the period of October 1, 2002 through December 31, 2004. He pointed out the Division of Insurance believes the rate increases were driven by the reinsurers. He reiterated the reinsurers dictated the terms of coverage, the terms for underwriting and the pricing.

Mr. King said Nevada Mutual Insurance Company was the largest insurer of physicians in Nevada and a doctor-owned company. He stated if Nevada Mutual were to fail, doctors would not only lose their insurance coverage, but also their capital investments. He explained Nevada Mutual purchased its reinsurance for claims in excess of $250,000. He continued, it was the responsibility of the company to charge an adequate premium and maintain adequate reserves in order to remain solvent. Mr. King said the doctors who own Nevada Mutual must also pay the capital lenders they borrowed the funds from in order to start the business.

Mr. King drew the attention of the Committee to the rate-filing activities on Exhibit D, and cited the information about the Nevada Mutual Insurance Company.

Mr. King explained the Division of Insurance recently received an overall rate-reduction proposal of 2.5 percent and was in the process of evaluating that rate adjustment.

Mr. King said the second largest medical malpractice insurer in Nevada was the Medical Liability Association of Nevada. He explained that MLAN was not an insurer, but an insurance association created by the Governor and the Division of Insurance Commissioner during the medical malpractice crisis. He explained MLAN was like a self-insurance association of doctors who put their money into one big pot to cover the cost of claims against the doctors in the association. He said the association was created to provide a market for those medical doctors who were unable to find a carrier in the voluntary market. It was also not a take-all-comers company, but was designed to provide coverage for doctors who either had numerous filings making them high risk or were in a high-risk specialty practice and unable to find coverage elsewhere.

Mr. King stated since its organization, MLAN has had three filings: one for a class plan change that affects providers of radiology and neurosurgery, one to file for the experience-rating plan revision which was based on a doctor's filing history and the last filing was to add a new hostel-like classification and a new gynecology-with-surgery classification. He said the new gynecology-with-surgery classification was 20 percent lower than the obstetrician rate.

Mr. King noted that the third largest malpractice insurance provider in Nevada was Physicians Insurance Company of Nevada, which was another physician-owned insurer which had five filings in the same time period as MLAN had three, and those filings were described and documented in Exhibit D.

Mr. King informed the Committee that the fourth largest insurer for medical malpractice insurance in Nevada was The Doctors Company, an interinsurance exchange, and their filings with the insurance commission were also documented in Exhibit D.

Mr. King continued, the Hudson Insurance Company was the fifth largest insurer in Nevada and replaced The Innovation Group. The Hudson Insurance Company writes policies mostly in northern Nevada and in the rural areas of Nevada. He said their filings were also documented in Exhibit D.

Mr. King stated the final company he would comment on was The Medical Protective Company. He said this insurer had three filings that were documented in Exhibit D.

Mr. King stated the Division of Insurance asserts that the requests for rate increases from medical malpractice insurance companies have been greatly reduced and the marketplace has become more stable since the passage of A.B. No. 1. He said the attitude expressed by insurers since Ballot Question No. 3 was that the marketplace will become more competitive, but not until the insurers and underwriters have been given assurances that the laws will be upheld.

Senator Nolan asked if information already collected and known from county hospitals and trauma centers could be used to evaluate whether or not there had been an increase or decrease in the trauma cases filed since the passage of the $50,000 cap on trauma. Mr. King responded, to the best of his knowledge, there had not been such a study. He noted most carriers were unwilling to make a change

because trauma was one of the areas targeted in determining whether or not the laws would be upheld.

Senator Nolan inquired whether The Doctor's Company had requested a 40-percent rate increase and whether it was denied. Mr. King replied the insurance commission approved the 40-percent rate increase, but it was not strictly a 40-percent rate increase to all physicians. He explained a portion of the increase was charging for entities such as corporations. He said in the past there had been little or no charge for the coverage of a corporation as part of a professional association. Mr. King clarified there were claims filed as a result of the corporation, as an entity, not paying for malpractice insurance. The Doctors Company justified the loss experience they had gained through that, and as a result, a charge was implemented for the entities that had previously not been charged. He said most of the other insurers were already charging for entities; and in some cases, there was either a separate limit or they were lumped in together.

Senator Nolan asked Mr. King to define an entity in regard to malpractice insurance. Mr. King responded an entity could be a group of physicians with a corporation as a shell to protect the physicians and the corporation.

Senator Care said a newspaper article dated November 5, 2004, indicated Nevada Mutual Insurance Company and Medical Liability Association of Nevada together carried 60 percent of Nevada's medical malpractice insurance. He said an article in August 2002 cited one of the reasons for the exodus of doctors from Nevada was that The St. Paul Companies, Inc., had more than a majority of doctors as their clients.

Senator Care asked if it was true that two carriers had two-thirds of the malpractice insurance business in the whole State. He commented if one of those carriers failed, then the current situation seemed to be at odds with the passage of Ballot Question No. 3, which was designed to increase competition. Mr. King replied it was true that Nevada Mutual Insurance Company and Medical Liability Association of Nevada were the two largest carriers in the State. He said none of the other carriers had a capacity to principally increase their market share in Nevada at this time. He said the marketplace at the time was fragile because if the State were to lose a major carrier, it could cause a crucial difficulty in the marketplace.

Mr. King continued with the information that the sole reason for the creation of the Medical Liability Association of Nevada was to provide a marketplace for physicians

who could not get a market. He said the State was looking to the Medical Liability Association of Nevada to provide a market for any physicians who did not have a market in which to purchase medical malpractice insurance. He said the company was not controlled by the Insurance Commissioner, but had a board of directors that report to the Commissioner.

Chair Amodei asked Mr. King what conclusions he felt the Committee should come to by his characterization of the medical malpractice market as fragile. He commented that because of the notoriety on this issue, the Committee was well aware of the insurance market problems. Chair Amodei said he believed the Committee would eat, breathe and sleep this issue. He said with the withdrawal of the St. Paul Companies, Inc., from the Nevada market, the Committee needed to know what was happening in terms of the State's vulnerabilities and what the Legislature could do to help, if anything. He said if something were to happen with either the State's company or the physicians' company, the Legislature would like to know. Chair Amodei wanted to know whether the Legislature could proactively help the situation. He explained the Legislators did not want a crisis situation to happen with another carrier that could have been avoided.

Mr. King replied that Commissioner of Insurance Molasky-Arman agreed with Senator Amodei and was actively involved in the financial examinations of Nevada Mutual Insurance Company and Medical Liability Association of Nevada. He said Ms. Molasky-Arman makes sure each of the insurers meet the solvency test so they will remain viable carriers in Nevada.

Mr. King explained that Medical Liability Association of Nevada was not an insurer, but was created to fill a void; it was established by statute. He said the Medical Liability Association of Nevada could be privatized as Nevada Medical Insurance Company was. He said it was also established as an essential insurance association, sold to The St. Paul Companies, Inc., became insolvent and pulled out of Nevada's insurance market, creating the State's recent medical malpractice crisis. Mr. King said the Division of Insurance did not anticipate losing any carriers and had received some positive responses from carriers stating if the ballot measure was upheld, then those companies would have more confidence in making greater investments in Nevada and trying to increase their market shares. However, he continued, since A.B. No. 1 of the 18th Special Session, there had been no court cases to determine its constitutionality. Mr. King said until A.B. No. 1 was tested and upheld, the State would continue to have a fragile marketplace.

Chair Amodei asked whether the Division of Insurance had discussed with its assigned assistant Attorney General ways to access any declaratory relief mechanism on some of the basic constitutional issues. Mr. King replied the Commissioner had discussions with the Attorney General's Office; he, however, had not been a part of those discussions.

Chair Amodei said if there was a way to bring the issue up in a declaratory context, then the State could become proactive in determining the constitutionality of A.B. No. 1 of the 18th Special Session.

Chair Amodei said his understanding of Mr. King's previous statements was that some of the rate decisions would be based on how the courts rule on A.B. No. 1. He reiterated if there was a way to get the courts to rule on some of the aspects of the issue, such as Senator Nolan mentioned, then instead of waiting for someone to challenge the litigation, the State could become proactive on the issue and settle some of the questions.

Mr. King responded one of the major insurers indicated if it could receive some assurance that A.B. No. 1 would be upheld in the courts, then it would be willing to make a solid investment in Nevada by writing more contracts and reducing rates. He said he would discuss with the Insurance Commissioner the possibility of taking a proactive approach to the problem as Senator Amodei suggested.

Senator Nolan indicated he had noted Mr. King's testimony asserting the Insurance Commissioner was performing traditional activities to assure the remaining malpractice insurers in Nevada would continue to be solvent. He questioned whether there were some nontraditional things the Legislature or the State could do to regulate the market for stability. He asked whether the State should be proactive in keeping the market viable through monitoring not only current providers in Nevada, but also national providers in the market to ensure providers were presenting an honest picture of the state of the market. He mentioned the State and Legislature seemed to take a hands-off attitude in respect to the insurance market and indicated that could have been part of the domino effect precipitating the crisis that led to the 18th Special Session and A.B. No. 1 of the 18th Special Session.

Mr. King responded one of the hazards of getting involved with control of an insurer was the state-of-domicile issue. He said The St. Paul Companies, Inc., was domiciled in Minnesota, which would give the State of Minnesota's insurance commissioner direct regulatory authority over St. Paul. Mr. King commented

companies were domiciled in other states. He said the State of Nevada's commissioner had authority over Nevada Mutual Insurance Company and Medical Liability Association of Nevada because their corporate offices were based in Nevada.

Mr. King explained other small-population states had contacted the Division of Insurance requesting information on how the Medical Liability Association of Nevada was created and how it operated. He said those other small states were looking at the idea of setting up their own companies, as some of them only had three carriers for their whole state, whereas Nevada had six, which was a positive factor.

Mr. King said it appeared A.B. No. 1 and Ballot Question No. 3 could be positive influences to attract insurance carriers to Nevada as these companies decide where to invest their capital. He said those investments were also limited by the reinsurance market. Mr. King explained if Nevada tried to work with one of the carriers in any proactive activities, aid would be limited by the reinsurers. The reinsurers did not have any assurance that A.B. No. 1 and Ballot Question No. 3 would be upheld, but if they did, they might be willing to give the carriers a break. He said the reinsurers affect both pricing and underwriting, which was the acceptability in the terms of coverage. He stated both the carriers and the reinsurers need to be convinced the State of Nevada does have a law that will be upheld.

Senator Nolan asked if in hindsight there was anything the State could have done to prevent the pullout or insolvency of a major carrier such as The St. Paul Companies, Inc. Mr. King pointed out The St. Paul Companies, Inc., not only pulled out of Nevada's malpractice insurance market, but pulled out of malpractice insurance worldwide. He said the Division of Insurance would like to think if rates had been charged that ensured those rates were adequate and not just competitive, perhaps the withdrawal could have been held off.

Mr. King explained the passage of the federal Liability Risk Retention Act of 1986 allowed an alternative to traditional insurance. He said the Division has seen a greater number of risk retention groups that were formalized versions of self-insurance and were an alternative to traditional insurance. Mr. King mentioned the Division of Insurance had, through the captive laws, licensed several medical malpractice carriers operating in other states. He explained that a few emergency room physicians were participating in one of the physician-owned risk retention

groups domiciled in Nevada, but most of their physicians were located in other states. He stated these alternatives were currently becoming more popular as a means to solve the marketplace problems; the market had failures in all the insurance industries, not just medical malpractice.

Senator Wiener asked whether the carriers that were offering to come to Nevada, provided the marketplace was made more stable and A.B. No. 1 was upheld, were going to give Nevada physicians a real rate cut or actually offer a slowdown in rate increases for premiums. Mr. King replied rate-making was based on the objective; the numbers were the numbers. He said if the numbers coming out of those claims occurring October 1, 2002 and thereafter actually show a reduction in loss dollar amounts based on caps, the other limitations or several liability, then the State could expect to see rates actually fall. He said the Division had received comments from some of the current carriers saying if the legislation were to be upheld, there might be some reduction in rates.

Mr. King stated that since October 1, 2002, the rates have been stabilizing, reducing the large rate swings that had been happening. He said there have been isolated incidences of rate increase for doctors who have had claims. He commented the claims had not stopped with the passage of A.B. No. 1. Mr. King stated if the loss costs of those claims go down, then there should be a reduction in rates.

Senator Wiener asked Mr. King's opinion of the termination of the medical screening panel in regard to public policy and its effect on rates. Mr. King replied the medical screening panel was a voluntary process that, at the end of its existence, was unable to give prompt justice to anyone, the victims or the providers. He said because of its structure, the medical screening panel, being an all-voluntary process, had delays of up to two and a half years, and the result was failure.

Senator Wiener asked if a professional medical review panel were reinstituted to meet the demands, could that help reduce rates by providing another tier of review. Mr. King replied if the loss and loss-adjusting expenses went down, the rates should go down. He said if a screening panel resulted in the loss costs going down, there should be a rate decrease.

Chair Amodei said the reason the Senate Committee on Judiciary was hearing this testimony was because the Committee heard it during the 18th Special Session. He

commented it was his hope that the carriers, physicians and all the entities involved in this issue were not just waiting for someone to get sued so the industry could see whether or not the legislation would be upheld in the court system. He stated the State needed to take a proactive part to precipitate getting some of the questions answered. He said he was sure the Keep Our Doctors in Nevada initiative did not have parenthesis behind it with the rider saying, "providing a court case comes along some time in the next umpteen years and the ruling is correct." He said he did not believe that was what the physicians thought, and did not believe that was what the people who voted for it thought. Chair Amodei said the issue was then and still is the cost of practicing medicine in the State of Nevada in the context of liability insurance premiums.

Chair Amodei said he would appreciate Mr. King getting together with the committee policy analyst and discussing ways to facilitate rulings on some of these issues.

Michael J. Fischer, M.D., President, Nevada State Medical Association, reading from his written remarks to the Senate Committee on Judiciary (Exhibit F), said his association believed "that the reforms adopted with the passage of Ballot Question No. 3 will be successful in restoring proper balance to Nevada's medical care system, as they have when adopted in California and a handful of other states." Dr. Fischer continued reading Exhibit F for the record.

Senator Nolan asked if the State, without doing something that would have an adverse influence on the insurance market, should be actively pursuing or monitoring Nevada's current carriers to ensure the State does not have another crisis like the one it already had. Dr. Fischer said after watching what was happening across the country and realizing that medical injury compensation reform was first accomplished in 1975 in California, with five other states following California's lead, the track record showed the insurance increases and the insurance availability had remained stable in those states. He said one of the reasons his association believed A.B. No. 1 and Ballot Question No. 3 will be successful was because of what had happened elsewhere. He admitted he did not know how to instruct the Legislature to change laws and force any insurance company to provide coverage when that company was losing money.

Scott M. Craigie, Nevada State Medical Association, said he understood Mr. King's comments as being helpful and optimistic. He explained Mr. King did not talk about a large number of rate reductions coming down the road, but he did talk a lot about

stability. He said having spoken to some of the insurers that were still in Nevada, he knew they were still nervous about the situation. Mr. Craigie emphasized Nevada's insurance market was fragile and small. He said there were two things that combine together to make Nevada a difficult marketplace. One fact was rates were stabilizing with companies that had remained through the elections, which was nerve-racking for them. The other fact was if any of them thought the legislation was not going to result in a better state to do business in, those companies would have left early when it would have been easier to go. Mr. Craigie stated the fact that these companies have remained shows they see a market here with potential. He said he agreed with Chair Amodei's concerns that the court process could be slow, but it was not just the court process everyone was looking at. He said everyone was looking at a small market that without these reforms would be in an even worse crisis than it was in a year ago, because these insurance companies did not have to continue to do business in Nevada. Mr. Craigie said Mr. King gave the numbers that show the rates had stabilized, and everyone was sticking it out. He said he thought they were waiting for some other validation that these reforms were going to remain in place; the market was looking a lot better to everybody, including those who were insured and those who were offering insurance.

Senator Nolan mentioned the best preventative to another crisis was to create a positive environment that insurance carriers would find attractive and lucrative. Mr. Craigie said in the regulatory arena, one of the areas that really scared people was the rapidly changing dynamics, and in Nevada, that was built-in because Nevada has a rapidly growing population that causes a rapidly growing medical marketplace. He said there were several filings from the insurance industry that were shifted and adjusted for what was happening when the risk areas develop. This regulatory environment was adjusting so risk paid for risk. Other specialties did not end up being drawn in and having their premiums go up beyond their means, and those physicians would not have to pay for risk in a market they did not participate in. Mr. Craigie said there were good signs of stability and the State, having gone through The St. Paul Companies, Inc. experience, was recovering. He suggested a major reason for that was because of what happened in the recent election cycle.

Vice Chair Washington, referring to Exhibit D, pointed out the American Physicians Assurance Corporation was in the process of withdrawing from the market. He said the spreadsheet in Exhibit D showed APA's niche, or area of insurance, was obstetrician/gynecologist (OB-GYN) providers. He asked how that niche market

would be affected, would the rates be affected and was the State losing OB-GYNs. He stated his remembrance of the crisis that precipitated the 18th Special Session had to do particularly with trauma doctors and OB-GYN doctors. Mr. Craigie responded he could speak about the insurance side, but Mr. Lawrence P. Matheis, Nevada State Medical Association, could answer the Senator's other concerns. Mr. Craigie said on the insurance side, Nevada Mutual had signed contracts with OB-GYNs. He commented he was not sure whether it had anything to do with why American Physicians Assurance Corporation was getting into the OB-GYN market. He pointed out there was definitely a market there, and he believed MLAN had picked up quite a few OB-GYNs.

Dr. Fischer commented the insurance of obstetricians in the United States was fairly significant. He said the liability availability was affecting around 140 million Americans. He commented data reflected no obstetrical residency program in the United States had fulfilled its quota. Dr. Fischer stated it was his belief that states where there were problems obtaining medical liability insurance would have major problems coaxing OB-GYNs to settle there. He said based on the findings of the six states that had medical injury reform such as Nevada's Ballot Question No. 3, the rates those obstetricians were paying were about half of what Nevada obstetricians' costs were. He noted as rates stabilized, obstetricians would move to Nevada and some physicians who had stopped practicing obstetrics may return to that field, increasing Nevada's obstetrics-practicing physicians. Dr. Fischer declared this was a serious problem for the whole country. He reiterated the obstetrician problem was significant in states where medical liability reform had not been achieved.

Mr. Matheis said Dr. Fischer had covered the policy issues involved. He said the data from the Nevada State Board of Medical Examiners' annual report would show the data on physicians who had closed their practices, on new physicians moving into the State and whether market stabilization had been accomplished. Mr. Matheis stated there was a small pool of obstetricians that was not growing equal to the need for OB-GYNs nationwide. He said OB-GYN practitioners felt the most psychologically damaged by the last few years of the insurance coverage debate and the environment it created. Mr. Matheis said the State would not have sufficient numbers of OB-GYN physicians, would have to recruit new physicians and hope actions taken by the Legislature and the voters of the State of Nevada would help change that psychology.

Vice Chair Washington called on Bill Bradley, Nevada Trial Lawyers Association.

Mr. Bradley said the Trial Lawyers attended the meeting to answer Committee questions in regard to issues on how this legislation impacts access to health care and justice. He said the Nevada Trial Lawyers Association's focus was both areas. He said the Trial Lawyers believed in a healthy medical environment in Nevada to make sure citizens could obtain quality health care, but the association was very concerned about the catastrophic impacts on victims' rights created by Ballot Question No. 3.

Mr. Bradley stated if any of the Legislators believed the enacted legislation was identical to Medial Injury Compensation Reform Act (MICRA), they were badly misinformed. He said the media report that the law in Nevada was identical to the law enacted in California was not correct.

Mr. Bradley said when speaking of challenges to this law and the court process, it was true that a law similar to A.B. No. 1 of the 18th Special session was declared constitutional in California; however, in other states similar laws were found not to be constitutional. He said there were differences created by the overreaching mechanism of MICRA on victims' rights, particularly in regard to paying their medical bills and their wage loss. This was something that was not seen in other states and would probably need to be decided in Nevada. Mr. Bradley said the way Ballot Question No. 3 and Ballot Question No. 4 were written, victims could potentially not recover their medical bills and/or their wage losses, much less any damages for pain and suffering. He said the Trial Lawyers would like to explain the differences to the Legislators, and pointed out it was erroneous for Legislators to believe people would still be able to recover their medical bills and their wage losses.

Vice Chair Washington, referring to the Committee Policy Brief, Senate Committee on Judiciary, February 2005 (Exhibit G, original is on file at the Research Library), asked whether it was Mr. Bradley's handout. Mr. Bradley responded, no, he believed it was compiled by Nicolas Anthony, Committee Policy Analyst. Vice Chair Washington pointed out to the Committee there was a spreadsheet attached to Exhibit G that noted any significant differences between California's MICRA legislation, Keep Our Doctors in Nevada (KODIN) Initiative Petition 1, Ballot Question No. 3 and Nevada's A.B. No. 1 legislation. He asked Mr. Bradley whether he had seen Exhibit G. Mr. Bradley replied yes, and said he had discussed with Mr. Anthony areas the Trial Lawyers Association believed would have the most profound impact.

Mr. Bradley said the most profound impact was the elimination of joint and several liability in the context of medical negligence. He said before the passage of Ballot Question No. 3 and Ballot Question No. 4, joint and several liability meant that if one of the defendants was unable to pay the damages awarded by a jury, then the other defendants would have to pay. He said that was important in the context of medical negligence actions occurring in a hospital. He said the majority of medical negligence errors occurred in a hospital setting where there was often a failure to communicate between hospital personnel and physicians. Mr. Bradley said consequently, a person could be catastrophically injured as a result of miscommunication. He said in the case of a catastrophic injury to a young person or a person who earns significant wages, the elimination of several liability could make it impossible for the victim to recover full damages.

Mr. Bradley told the Committee that the impact of Ballot Question No. 3 and Ballot Question No. 4 on housewives, the elderly and children was profound. He said housewives, the elderly and children no longer had the rights they had before the passing of this legislation.

Mr. Bradley explained the impact of the legislation on a case of an infant born with catastrophic brain damage due to negligence because of miscommunication who would require a lifetime of care. He said the future costs of taking care of that child would be millions of dollars. Mr. Bradley said typically, the child would be cared for at home, or hopefully, in a first-class facility, but many times at the urging of a malpractice insurer, this child would be warehoused in a coma-like setting. Mr. Bradley said for this explanation he would disregard the general damages such as pain and suffering, and loss of love, society, companionship and wages. He said he just wanted to discuss the future cost of care for such a child which an individual could assume to be around $6 million. He said juries were asked to apportion fault, apportion a percentage of fault to the physician, apportion a percentage of fault to the hospital staff who were involved in the catastrophe. He explained if the jury found the physician 70 percent at fault and the hospital 30 percent at fault, then the court allocated damages based on the allocation by the jury.

Mr. Bradley said under A.B. No.1 of the 18th Special Session the doctor's 70-percent allocation would be $4.2 million, and the hospital's responsibility would be the balance. He explained under MICRA and A.B. No. 1, the physicians of Nevada were required to carry coverage of $1 million. He said that physician would pay the $1 million, the balance would be paid by the hospital, and that child's

medical bills were guaranteed to be paid. Mr. Bradley stated under KODIN, that would no longer occur. He continued, because of the elimination of joint liability, the hospital's exposure was limited to $1.8 million, and it would write a check for this amount and divorce itself from the problem. Mr. Bradley said at this point the mother of this child was confronted with a horrible choice. The doctor said he was prepared to pay his $1 million. Mr. Bradley said the conversation he has to have with that mother goes something like this, "If you want to accept that physician's $1 million, then your child's future cost of medical care would have to compromised by three-fourths, because if the $1 million was paid, there remains $3.2 million in future medical care that has no source of payment." He said the mother was confronted with the issue of accepting that percentage from the physician and allowing that physician to return to his or her practice and living a comfortable and prosperous lifestyle at the cost of her child's health care, or pursuing that physician individually for the balance between physician's coverage and what was owed.

Mr. Bradley stated the Nevada Trial Lawyers Association predicted that in those catastrophic situations there would be no choice but to pursue those physicians individually for the unpaid balances.

Mr. Bradley emphasized, the afore mentioned situation did not exist in California. He said that profound impact on our traditional system of justice, where the special damages were paid, have to be looked at very carefully by the court system.

Mr. Bradley asserted that was the fundamental problem the Nevada Trial Lawyers Association saw with the legislation. He said because of caps, persons such as housewives, children, elderly citizens and those in nursing homes would most likely not be able to seek justice as they had in the past.

Senator Nolan commented the example Mr. Bradley used was one of the worst-case scenarios where there was a small child needing intensive care for his or her lifetime. Mr. Bradley said, unfortunately, in the context of medical negligence, whether it was a young person or a middle-aged person, when these errors occur, the damages were often so profound that the above-mentioned scenario would play out.

Senator Nolan said the required amount of insurance through A.B. No.1 and KODIN did not limit a physician to carry only $1 million in coverage. He asked whether Mr. Bradley believed physicians and hospitals would do the right thing and carry

more than the minimal required coverage. Mr. Bradley replied when discussing this situation with friends who were physicians, he had told them if they worked in a hospital setting they should think very hard about doubling or even tripling their coverage. He said that recommendation defeats the actions taken to stabilize the costs of medical malpractice premiums. He asserted he did not believe the physicians understood that their bill gave the hospitals and HMOs a great deal, with significant rate reductions, and left the physicians out in the cold; so prudent business practices for physicians who practice in hospitals would be to double or triple their coverage.

Senator Nolan said he would like a representative of the Nevada Mutual Insurance Company to brief the Committee on what physicians were doing to cover more than just the minimum allowed by law.

Mr. Bradley said the other impact he did not believe physicians recognized was that under the ballot initiatives, future payments could be made periodically. He explained one situation created by the language of Ballot Question No. 3 and Ballot Question No. 4 was if the amount were paid over a period of time, the physician remained personally liable for each one of those payments for the life of the injured child. In that scenario, the physician's credit report would show the judgment against him for as long as that child was alive. Mr. Bradley said that judgment would affect the physician's ability to purchase a home, car, or any credit-related loans for the life of the child.

Vice Chair Washington asked, in considering the joint and several liability decision by a jury, if there were other doctors cited in the judgment, would the joint and several liability be spread out among those physicians as well as the hospital. Mr. Bradley responded, yes if there were a doctor A, doctor B and a doctor C, and the jury determined the hospital was 30 percent responsible for the injury, it would allocate percentages of fault to each physician. He said any time a judgment exceeded the amount of a single physician's coverage, that physician had a personal exposure problem, and the client would have to make a decision between sacrificing quality health care for their loved one or pursuing the physician individually.

Vice Chair Washington asked, based on passage of A.B. No. 1 of the 18th Special Session, if there had been any market stabilization. Mr. Bradley replied the stabilization happened as James Wadhams and Robert Byrd of the Medical Liability Association of Nevada predicted. He said it was true no cases had yet proceeded

from legislation, however, A.B. No. 1 was designed to provide stabilization and still protect victims' rights. He continued, the Nevada Trial Lawyers Association believed there was stabilization, and there would have been further stabilization without going to such a draconian system which had such a far-reaching impact on the majority of victims of medical malpractice.

Vice Chair Washington said there were four bills on the docket that contained language to reinstate the medical board and asked where the Nevada Trial Lawyers Association stood on that issue. Mr. Bradley responded the Nevada Trial Lawyers Association would be opposed to reinstating the medical board. He said it was important to remember all of the Legislators had been led to believe California was the model to follow in medical malpractice reform. He stated all the screening panel could accomplish would be to further eliminate victims' rights to legal counsel. He said California did not have a screening panel, and one of the most underappreciated impacts of the panel was the significant cost of preparing a panel complaint. He said that was why the insurers and physicians requested the elimination of the panel. Mr. Bradley said the Legislature should be very careful about building so many hurdles and roadblocks to the courthouse. He said from personal experience since the passage of the ballot initiatives, his office had not accepted a case for review, much less prosecution, nor had any of the other lawyers who testified in front of the Legislature and practiced in the area of medical negligence. He said to put in the additional hurdle of a screening panel when the damages were so limited and the access to attorneys was limited would render many of these laws unconstitutional. He said the Nevada Trial Lawyers Association did not believe any more roadblocks need to exist. He said the model Nevada Legislators had been led to believe worked so well in California did not have a panel.

Senator Nolan asked whether Mr. Bradley meant to imply that because of the cost caps, lawyers were no longer taking cases that did not involve lost wages and other economic damages. Mr. Bradley replied first of all, his firm had not accepted a case for review. He said before the firm accepted a case, it reviewed the case and had experts review it and advise as to the case's merit. Mr. Bradley continued with information there were several provisions on the ballot initiative that were ambiguous, such as the effective date. He said these ambiguous items were causing a great deal of confusion in the legal community. He said his firm and the firms he respected in the State, north and south, which before the ballot initiatives had a significant presence in the medical malpractice arena, had not accepted any cases for review. He explained this was because A.B. No. 1 presented such hurdles

and created so many difficulties to prevail, it simply did not make sense to take those cases. There were truly only two kinds of cases left in Nevada, and those were the catastrophic cases involving injuries to young people and catastrophic cases involving significant wage earners. He said those were the only cases that existed after the passage of the ballot initiatives.

Senator Nolan said because claims and injuries still occurred, people would continue to seek relief, and still expect to hire attorneys who could represent them in those cases. He noted it seemed once the attorney performed a review to determine whether there was merit in a case and the case got through the courthouse doors, the process was the same, with the only difference being the limitations on awards. Senator Nolan asked whether the judge's hands were tied, or if the juries were given different instructions subsequent to A.B. No. 1. Mr. Bradley answered in the affirmative. He said juries were not informed of the caps on pain and suffering. Mr. Bradley explained the Nevada Trial Lawyers Association had presented testimony by jurors expressing their outrage during that testimony when they explained the jurors did what they felt was right in the courtroom, only to return home to read in the newspaper that after they left, the judge followed the law and reduced the damages the jury had awarded.

Mr. Bradley said the Committee needed to realize there had been caps placed on attorney fees as well as damages. He said no one felt sorry for lawyers under the guise of "let's put more in the plaintiff's pocket," but the truth of the matter was attorneys were still businessmen and women, and with the limitation of fees and the elimination of subrogation rights, there were a host of issues not present in A.B. No. 1 that made the majority of these cases no longer viable for attorneys to pursue.

Dr. Fischer said the screening panel that was in existence prior to the insurance malpractice crisis did not stop the crisis from happening. He commented there were some problems concerning the panel. Dr. Fischer said the Nevada State Medical Association supported the medical legal screening panel, and it was their position the screening panel needed to be revised to address problems with the panel's process. He said since the elimination of the panel in 2002, there had been an increase in the number of court cases filed, particularly in Clark County. He said if the Legislature wanted to revisit the pretrial screening panel, the Medical Association would be happy to assist. He said the physicians in northern Nevada felt the medical legal screening panel provided a process for weeding out cases that had no merit. Dr. Fischer said because both parties, three juris doctors and

three physicians were screening potential claims, if the panel found a claim was in error, then it was fairly certain the claim would be lost in court.

Dr. Fischer stated the panel did serve a purpose, and if it were ever to be reinstituted, the process of guaranteeing patients access to the court system could be worked in such a way it would serve the purpose of both the medical profession and the patients' rights.

Vice Chair Washington stated the Legislators were grateful to both Dr. Fischer and Mr. Bradley for coming before the Committee so the Legislators could endeavor to strike a balance that would serve the public best, between not only those who provide the services, but also the potential victims and patients.

Mr. Bradley identified Attorney John Echeverria and noted he could be a resource for the Committee, as he had been involved in the 18th Special Session and had practiced law under MICRA in California and now practiced in Nevada. Should the Committee have questions about how the sections of the ballot initiatives that mimic MICRA work, Mr. Echeverria could help them understand the impacts.

John Echeverria, Attorney, indicated he worked in Reno full-time and would be available for the Committee. He said he would like to address Senator Nolan's question in regard to patient access to the courtroom.

Mr. Echeverria said under MICRA, attorneys could not take cases, even though meritorious. He explained those cases would never be settled; the insurance company would make the patient try it because those companies knew their maximum loss was $250,000. He said attorneys were turning cases down, such as he had a few days earlier regarding the death of an elderly woman who was operated on in an emergency room to do a hip replacement. The surgeon who operated on her was not an orthopedic surgeon; he severed her femoral artery, and she died within 20 seconds. He stated that case could not be successfully prosecuted because it was uneconomical to do so, and that was the catastrophic effect of this kind of legislation.

Senator Nolan said the cap was for noneconomic damages, and he could only guess what the economic damages were when associated with a catastrophic act such as Mr. Echeverria described. Senator Nolan said if the case had merit, there should be criminal sanctions as well, if the case was that flagrant. Senator Nolan asked Mr. Echeverria whether he knew any qualified attorney who would take such

a case on contingency. Mr. Echeverria replied he was aware of none because there were no economic damages in such a case. He said the woman was retired, so she was not earning income, and there were no future medical expenses because she died. He said the total amount available for recovery was capped at $250,000 in California and $350,000 in Nevada. He said the cap prevents this case from being economically pursued because the attorney's fees were also limited. He continued the victim's family would require $50,000 or more to pursue such a case which would come from the $250,000. Then, the attorney's fees would take some off of that, which would result in a negligible net return to the family. He said the lawyers he knew in California did not accept those noneconomic cases. Mr. Echeverria said statistically, most medical malpractice cases were won by the defense. The egregious cases had a better chance of winning; however, the attorney would not know whether he would win the case. He said the attorney could spend two or three years of his time and the client's time pursuing a case that was noneconomic, and that would not make sense.

Senator Nolan asked what cases under MICRA were not capped. Mr. Echeverria replied all the noneconomic damages were capped, which meant all of the pain, suffering and discomfort. What were not capped were the past and future medical expenses, and the past and future earnings losses. He said those were the only cases in California being pursued. He said an attorney could only afford to take a case on behalf of a victim if the victim was a substantial wage earner or if there were future, catastrophic medical expenses involved in the case. Mr. Echeverria stated the effect of such legislation was to eliminate lawsuits that involved no economic damages.

Senator Nolan asked where the fees for a catastrophic medical malpractice case of a significant wage earner would come from. Mr. Echeverria said the fees come from the entire award. He said the damages available for recovery were assigned to two categories, the economic and the noneconomic. He said the economic losses were not limited, and those were the medical-care costs and earnings losses. He said the noneconomic damages were capped, the pain, suffering and discomfort or the loss of decedent care, comfort, society, protection and support. He said an attorney would review a case where the economic damages were substantial and only accept cases where the economic damages were very large.

Mr. Bradley requested Senator Nolan to ask The Doctors Company or an insurer's representative to explain how many times in California the insurers paid in settlement the cap that exists in California. In California, the cap was $250,000

whereas in Nevada, it was $350,000. In a case such as Mr. Echeverria mentioned, or a stay-at-home mother or a child, the injury was egregious, a normal human would be offended by the conduct; you go to the insurance company and explain the case was egregious and it seemed in everyone's best interest to resolve this early, pay the $350,000 cap so as not to incur attorney's fees, not make the family go through this and have a quick resolution to the claim. Mr. Bradley said that was the original function of the screening panel. He said why would an insurer pay the statutory amount when that was the most it would ever have to pay. He said if the insurance company got lucky and the jury went the other way, then the insurance company would not have to pay any amount. Why would anyone ever pay the most they would ever have to pay without waiting to see what factors would affect the amount they would have to pay?

Mr. Bradley enjoined the Senator to contact the insurance companies in California and have them provide him a list of cases where the insurance company paid the full statutory amount in an egregious case in a matter of weeks. He said he would love to see that information, because the Nevada Trial Lawyers Association knew that mentality would carry over into Nevada.

Senator Horsford said the medical malpractice forum gets framed as doctors versus the victims and their attorneys. He asked what role the insurance industry played in being able to provide affordable medical malpractice insurance for physicians to protect themselves. He said the case was not always the most egregious thing, sometimes it was a simple mistake and those doctors should be able to seek affordable insurance in order to protect themselves. Senator Horsford pointed out the insurance companies do not testify at these hearings and he was disappointed one of the main parties in this legislation was not there to participate in the discussion of the issues. Mr. Bradley emphasized the insurance industry never comes to the Legislature to present any elucidation on these kinds of legislation. He said insurance companies were in business to make a profit, as were all businesses, the corporate mentality of making a profit overrides social policy each and every time. He pointed out there had been an interim committee where everyone tried to focus on the insurance company's role and to create penalties for bad insurance behavior.

Mr. Bradley explained the screening panel had a provision where there would be a settlement conference in which a trial judge would decide the case should be settled for "X." He said, as he recalled, every case that had a screening panel determination and subsequent settlement conference was rejected by the insurance

company even though the doctor wished to settle. Those cases went to trial, and a substantial verdict was returned. The insurance company would then go to the insurance commissioner and claim it was getting killed in the State of Nevada and needed help. He said when the State tried to impose reasonable penalties for poor insurer conduct through correspondence, the Legislature was informed if it did that, the insurer would just leave the State.

Mr. Bradley told Senator Horsford that the Senator had identified the problem: the insurance companies' domination and control of the market.

Vice Chair Washington stated the representative of the Doctors Company did not come to the meeting, but had submitted a letter signed by Robert D. Francis, Chief Operating Officer (Exhibit H).

Vice Chair Washington commented to Mr. Bradley that Mr. Bradley had alluded to the fact that doctors could settle before having to go to trial, and stated MICRA had stipulations for binding arbitration with the contract being accepted or negated within 30 days. He said KODIN had no specific language for binding arbitration, and A.B. No. 1 of the 18th Special Session was not yet effective. The Senator asked Mr. Bradley where the Trial Lawyers' Association wanted to go with the issue of binding arbitration.

Mr. Bradley said he wanted everyone to understand there were two major decisions to make before a case could be settled. He said in every medical malpractice policy was the stipulation that the physician had to consent to a settlement. He said the first step was obtaining the physician consent, which was very difficult sometimes because there was a huge difference between appropriate medical care with a poor outcome and inappropriate medical care with a poor outcome. He said physicians did not often understand the difference and constituents did not understand the difference. Mr. Bradley reiterated the first step in resolving a case was to obtain the physician's consent. If the physician refused to consent, no matter what the insurer may want, that case would not be settled. The second step in resolving a case, once the physician consented, was for the insurer to consent. He commented one of the biggest disputes that exists in this arena was often the conflict between the physician and his insurer.

Mr. Bradley stated that in the case discussed earlier, in regard to the cutting of the femoral artery of the elderly lady that cost her life, he was sure the physician would have liked to settle and move on. However, he said it was his belief the

insurance company would tell the doctor it would not pay the settlement because the most it could lose was $350,000. The doctor would have to sit in the courtroom for two weeks, be away from his office and go through the stress of a trial because it would most likely only cost the insurance company the same amount.

Mr. Echeverria said the MICRA provision in California permitted a physician or his patient to enter into an agreement that sends the case to arbitration. Some physicians and hospitals had chosen to do so, but not all physicians chose to go through arbitration. He said he believed that option was deliberately left out of KODIN because some physicians and insurance companies did not like those constraints. He said in some cases, arbitration provided a faster final resolution to the cases.

Vice Chair Washington asked whether the arbitration was binding in light of the 30-day cancellation clause cited in Exhibit G. Mr. Echeverria stated the agreement to enter into arbitration was the contract that the sentence referred to. He said the agreement to enter arbitration could be revoked within 30 days, but if the agreement was valid when the negligence occurred, then it would go to arbitration which was binding.

Senator Nolan said in his experience the controversy was not whether the accusation was right or wrong, but the real debate was the risk versus the cost. He said the physician and the insurance company may be vindicated and assured the physician did no wrong; however, the cost of taking the case to court could outweigh the cost of settlement. Mr. Echeverria said he agreed with the Senator and added the other issue that occurred was the problem of a majority of these cases happening in a hospital and the miscommunications between the physician and the hospital staff. He said what delayed the settlement of cases was the ongoing fighting between the insurer for the physician and the insurer for the hospital. He cited the scenario of the elderly lady and many such egregious cases where there should be early resolution, and said the finger-pointing among the defendants prolonged a lot of these cases to an extent that was unbelievable. He said over time the hope was that the numbers would balance out at 50-50, but it was impossible to get those cases resolved when the finger-pointing among the insurers occurred. He said most times, the division of responsibility had to be decided by a jury, and this scenario should be very scary to physicians.

Vice Chair Washington closed the hearing on the medical malpractice presentation and opened the hearing on Yucca Mountain and other litigation issues.

Ann Wilkinson, First Assistant Attorney General and Legislative Liaison, Office of the Attorney General, said she was testifying on behalf of Attorney General Brian Sandoval and introduced Marta Adams, Senior Deputy Attorney General, Office of the Attorney General, as the expert on Yucca Mountain.

Reading her written testimony, "Attorney General's Testimony Before the Senate Judiciary Committee, February 9, 2005" (Exhibit I), Ms. Adams said the Legislature asked for an update on the status of State litigation efforts to defeat the proposed high-level nuclear waste repository at Yucca Mountain noting recent decisions favoring the State of Nevada's position.

Vice Chair Washington asked the Committee members to hold their questions until Liesl Freedman, Solicitor General, Office of the Attorney General, had given her testimony. Ms. Freedman said her office was currently handling 1,100 litigation matters. She proceeded to read her written testimony, "Attorney General's Testimony Before the Senate Judiciary Committee, February 9, 2005" (Exhibit J).

Senator McGinness asked Ms. Adams whether the U.S. Congress could change the radiation standards. Ms. Adams replied Congress could do so, however, she said she believed even President George W. Bush made commitments about allowing the court process, as well as science, to run its course. She said U.S. Senator Harry Reid was poised to vigorously fight any attempt to downgrade those standards. Ms. Adams commented that in the short term, the Office of the Attorney General was not anticipating any changes.

Senator Wiener explained that originally there was supposed to be a repository in the East and one in the West. She said she attended the meeting where the U.S. Department of Energy dropped the project in the East and determined all of the waste would be deposited in the West. Senator Wiener asked what the scientific definition of unacceptable radiation at peak levels was and what it really meant.

Ms. Adams said the radiation standard set by Congress was to address the period of peak doses of radiation out to whatever period of time there would be a release in the repository. She said the reason Nevada had stuck to its position so

adamantly was that no man-made material could really protect this waste which remained lethal way beyond what was imaginable. She noted the U.S. Environmental Protection Agency (EPA) standard for ambient levels and groundwater extended to whatever time was necessary for peak doses. She said although the objection was no one could protect this kind of waste for that long, there was a standard for a waste inspection tomography facility that could.

Ms. Adams stated Nevada maintained that, because of the fractured condition of Yucca Mountain, the seismicity, being the frequency or magnitude of earthquake activity in a given area, and the extremely corrosive quality of the groundwater, there was no way Yucca Mountain could provide the necessary level of protection for the public.

Senator Wiener said Ms. Adams answered her question, since it did not matter how far out the radiation emanated; it was the sustained emanation for long periods of time that could not be contained. Senator Wiener stated the waste could not be contained within the geological conditions of Yucca Mountain.

Ms. Adams said the State's tests showed the corrosive quality of the groundwater could break down the containers in much less than the 10,000 years in discussion. She said the opposition to the Yucca Mountain repository was trying to refrain from saying this waste must definitively be secure from the public in 10,000 or 100,000 years because the metal in question could not do so.

Senator Wiener said, as a demonstration of the integrity of the protection system, the Savannah River Project was used as an example. She said unfortunately for that project, the containers were leaking after only five years. Ms. Adams responded there were no facilities that did not leak.

Vice Chair Washington said to note that the Committee was now a subcommittee at 10:23 a.m.

Senator Horsford wanted to know what other avenues the State was exploring to oppose the case for using Yucca Mountain as a nuclear waste repository, in addition to the EPA issue. Ms. Adams responded the State was pursuing every avenue possible. She said there was a highly qualified team of experts gearing up for a trial-like situation in defending the State's case against the use of Yucca Mountain for a nuclear waste repository. Ms. Adams said the Attorney General's Office was prepared to litigate at every opportunity that presented itself on this

issue. She said the rumor was the Department of Energy intended to file a license application for the use of Yucca Mountain, and the Office of the Attorney General would seek to block that filing on the premise that failing to have an adequate EPA standard in place should make that licensing application unacceptable.

Senator Horsford asked what had been explored in the direction of opposition in the transportation field; since Nevada owned its highways, could the State prevent the waste from being transported on the highways of Nevada? Ms. Adams replied one of the pending cases before the United States Court of Appeals for the District of Columbia's Circuit was to challenge the U.S. Department of Energy's site selection of the Caliente rail corridor. She said because of the limitations set by the Interstate Commerce clause in Article I of the *Constitution of the United States of America*, it was difficult for a state to prevent these transportations from occurring through its territory.

Ms. Adams stated the Office of the Attorney General was looking at transportation as a key element in opposition to the waste dump. Vice Chair Washington pointed out there were also funding issues involved in using transportation as a deterrent to the Yucca Mountain Project, and the State had to be careful in how it presented that opposition.

Vice Chair Washington asked whether the federal budget included funding toward the project. Ms. Adams responded that in the 2006 proposed budget, there was a line item of $3.5 million that would include assistance to the State of Nevada for pre-licensing activities. She said if the U.S. Department of Energy tried to file a licensing application without meeting proper EPA standards, the Attorney General's Office would certainly file a challenge to prevent that from happening.

Vice Chair Washington inquired whether the U.S. Nuclear Regulatory Commission (NRC) had responded to the issue. Ms. Adams explained the NRC was in an unenviable position, as it was like the judge of the situation and the judge was not supposed to be prejudging anything before the issue was officially submitted to the NRC. She said the State of Nevada had issues with regard to the NRC meeting with the Department of Energy, and their too-cozy relationship.

Ms. Adams assured the Committee there were a number of avenues her office was pursuing in opposition to the Yucca Mountain project, and the Office of the Attorney General would keep tabs on all of the known avenues.

Vice Chair Washington asked what the economic impact was to the rural counties of Nevada in preventing the Yucca Mountain Project from going forward, as some of the rural counties planned to use the project and the transportation of wastes for economic gains. He inquired where the Office of the Attorney General stood on the rural counties' economic situation. Ms. Adams replied, as a mouthpiece and not a policy setter in the Attorney General's Office, she could only offer her observations. She said Lincoln County was seriously divided on the intermodal benefit to its economy. She stated the recent floods in the area showed the proposal to use the area as a staging ground to move the wastes from the train to trucks for the final part of the trip to a depository at Yucca Mountain had proven quite explicitly it was not feasible. She said the staging area was underwater and there were photographs showing how vulnerable the area was to flooding. Ms. Adams said the Office of the Attorney General needed to employ a statewide perspective to issues of transportation and other things that could have a negative impact on the tourist economy in Nevada. She said there were many aspects more global in nature than the local view, and the Attorney General's Office needed to respond more to the statewide effects of such a project than to the local effects.

Vice Chair Washington asked whether there was any intermodal transportation of nuclear waste materials at present. Ms. Adams responded there were radioactive materials on the highways at present, but nothing in terms of high-level wastes. She pointed out the safety record touted by the transporters was not as good as they were claiming.

Vice Chair Washington commented there was an ambiance of a get-the-money attitude in the public and asked what the Office of the Attorney General's policy was on answering such leanings. Ms. Adams said first of all, there were no offers on the table, and secondly, why would the State negotiate when it was winning in a situation where the project itself was ready to crumble. She said no economic incentives could override this project that created hazards beyond our imaginations. Ms. Adams emphasized the federal government had failed to make this project work. She said the EPA standards were set the way they were because the mountain itself was inadequate. Ms. Adams stated the site was not a good place to put nuclear waste, despite the history of why and how it was chosen. She expressed there was no amount of money in the world that could be exchanged for the safety of future generations.

Vice Chair Washington asked what was to prevent those future Congresses from proceeding with the repository at Yucca Mountain based on the need to obtain

more energy. Ms. Adams replied the project would probably exceed both the $58 billion set by the federal government which exceeds what is in the Nuclear Waste Fund. She asserted the nuclear industry itself was backing away from this project. She said the nuclear industry was presently investing in dry-cast storage on nuclear plant sites which were miles and miles of secured facilities. She said the NRC was asserting the material was safe where it was on-site in the dry-cast facilities. Ms. Adams pointed out under the current plan, the wastes would take 40 years to arrive in Nevada in the first place.

Vice Chair Washington commented in looking at the whole picture, the odds were stacked against Nevada. He said the Attorney General's Office seemed optimistic about winning this issue. Ms. Adams recommended the Senators keep tabs on what the Nuclear Energy Institute was saying because it was trying to back up and she said that was very telling.

Vice Chair Washington asked whether the Attorney General's Office anticipated any bills or bill draft requests (BDR) in regard to the issue of open meeting laws. Ms. Wilkinson replied there were five BDRs pending on that issue and one was Senate Bill (S.B.) 6 proposed by the Attorney General's Office. She said besides the BDRs from the Attorney General's Office, there were several Legislators who had proposed legislation on the same issue.

SENATE BILL 6: Grants subpoena power to Attorney General to enforce Open Meeting Law. (BDR 19-101)

Vice Chair Washington asked whether there was any language in the pending BDRs that had to do with frivolous filings for open meeting laws or for adding legitimacy to the claims that were being filed. Ms. Wilkinson replied the Attorney General's focus was on the enforcement side of the issue and the mechanisms that would make the process smoother and clearer for both sides.

Vice Chair Washington said he believed it was up to the Attorney General's Office to determine what was a legitimate case or not a legitimate case. Ms. Wilkinson replied generally, the process worked in a way where the Attorney General's Office received a complaint from members of the public or perhaps members of a body who attended a meeting and believed there was a violation of the law. She said her office would then have to investigate and perhaps file litigation if there was an infraction.

Vice Chair Washington asked whether there was structure in the BDRs that prohibited or enhanced the enforcement process. Ms. Wilkinson responded S.B. 6 would give the Attorney General's Office the power to subpoena and would help with the enforcement issue. She said the other four bills were still being put together.

Vice Chair Washington adjourned the hearing at 10:41 a.m.

RESPECTFULLY SUBMITTED:

Johnnie Lorraine Willis,
Committee Secretary

APPROVED BY:

Senator Mark E. Amodei, Chair

DATE: