MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fourth Session
April 27, 2007

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:10 a.m., on Friday, April 27, 2007, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/74th/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman William Horne, Vice Chairman
Assemblywoman Francis Allen
Assemblyman John C. Carpenter
Assemblyman Ty Cobb
Assemblyman Marcus Conklin
Assemblywoman Susan Gerhardt
Assemblyman Ed Goedhart
Assemblyman Garn Mabey
Assemblyman Mark Manendo
Assemblyman Harry Mortenson
Assemblyman John Oceguera
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

GUEST LEGISLATORS PRESENT:

Senator Joe Heck, Clark County Senatorial District No. 5
Senator Mike McGinness, Central Nevada Senatorial District

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Risa Lang, Committee Counsel
Janie Novi, Committee Secretary
Matt Mowbray, Committee Assistant

OTHERS PRESENT:

John Martin, M.D., President, Clark County OB/Gyn Society
Keith Brill, M.D., American College of Obstetricians and Gynecologists
Wayne Hardwick, M.D., President, Nevada State Medical Association
Bill Bradley, Representative, Nevada Trial Lawyers Association
Kim Spoon, MSW-MG, Master Guardian, Guardianship Services of Nevada
Ernie Nielsen, Representative, Washoe County Senior Law Project
Graham Galloway, Representative, Nevada Trial Lawyers Association
John Riley, Principal, Representative, Churchill County School District
Rebecca Winder, Student, Churchill County High School
Ben Graham, Representative, Clark County District Attorney's Office and Nevada District Attorney's Association
Lawrence P. Matheis, Executive Director, Nevada State Medical Association
Jennifer Stoll-Hadayia, Public Health Program Manager, Washoe County District Health Department
Cotter Conway, Deputy Public Defender, Washoe County
Sam McMullen, Representative, Altria Corporate Services
Dylan Shaver, Representative, Nevada Petroleum Marketers and Convenience Store Association

Chairman Anderson:
[Meeting called to order. Roll was called]

We are going to start with Senate Bill 174 (R1).

Senate Bill 174 (1st Reprint): Provides that an expression of apology or regret made by or on behalf of a provider of health care is inadmissible in any civil or administrative proceeding brought against the provider of health care based upon alleged professional negligence. (BDR 4-794)

Senator Joe Heck, Clark County Senatorial District No. 5:
Senate Bill 174 (R1) provides that an expression of apology or regret made by or on behalf of a provider of health care is inadmissible in any civil or administrative proceeding brought against the provider of health care based

upon alleged professional negligence. This is commonly referred to as the "I am sorry" law. Traditionally, physicians have been advised not to apologize to patients for medical errors for fear that an apology would be seen as an admission of negligence and subsequently be used against the physician. This advice has come from physician educators, mentors, and attorneys. Unfortunately, this advice, which has been heeded by many physicians, results in a chilling and straining of the patient-physician relationship at the very time when the patient is most in need. Those of us in the medical profession recognize this conflict, and our moral duty to disclose an adverse event takes precedence over concerns over potential litigation. The American Medical Association's code of ethics and the Joint Commission on the Accreditation of Healthcare Organizations has specific requirements and recommendations. It is one thing to disclose that something went wrong and an entirely different thing to apologize for what went wrong and attempt to make it right. A disclosure without an apology may be inflammatory. In a context of medical errors, researchers demonstrated that what a typical patient desires most is that the physician acknowledge the error and explain it, take responsibility, apologize, discover the underlying cause, and take steps to prevent a reoccurrence.

An apology meets a primary need of the patient. Twenty-nine states have enacted a so-called apology law. I have provided a handout that lists those states (Exhibit C). These laws mitigate the conflict that a health care provider faces when trying to do what is best for the patient while avoiding self-incrimination. This legislation will encourage physicians to admit mistakes, apologize, and take the steps necessary to make the patient whole. An important point to remember is that this bill in no way changes an individual's right to action. If he still wishes to file a lawsuit, he can. It only protects the apology and the actions taken by the physician from being used against him. Also provided in the packet are articles from the *Journal on Quality and Patient Safety*, *The Wall Street Journal,* and a recent article from the *Reno Gazette Journal*, all providing more information on these laws. There is also a letter of support from Dr. John McDonald, the Dean of the University of Nevada School of Medicine.

Nevada is one of only five states that has an active statute mandating disclosure by hospitals. It is time to close the loop and enact "I am sorry" legislation so that a patient who is harmed can receive the mental, emotional, and physical care that they require in their time of need.

Assemblyman Horne:
You said that an apology may imply a negligent act. I understand that you can apologize for an undesirable outcome, but there are times when negligence does occur. How do you separate the two? A doctor can say, "I am sorry that

things did not turn out the way we wanted." That is not an admission of negligence, but if he says, "I am sorry, I made an error." That is negligence. How can we include that if the case does go to trial? The doctor would take the stand, and if he was asked if he was negligent on that day, he would be able to say he was not even though he had already apologized. It would seem that he would perjure himself.

Senator Heck:
The issue would not be one where the doctor would perjure himself by saying no. If he was asked if he made a mistake, I would expect he would answer truthfully. What this bill attempts to do is prevent the attorney from saying, "So, you admitted to the patient that you made the mistake." In some cases, a mistake may actually have been made. The idea is for the doctor to be able to say, "I did make a mistake, but I want to make it up to you now, not two years from now when it finally goes to trial and you get a lump-sum settlement." The idea is to have the person made whole mentally, physically and emotionally more quickly. If the person still decides to move forward with a lawsuit, this does not stop that. The idea is to provide the services the patient needs because of that mistake at the time it will do the most good.

Assemblyman Horne:
Has anyone considered the possibility that we may be opening the door for others who have admitted negligence? For example, if I said, "I am sorry I sped through that red light in front of your car," that statement could never be used in court.

Senator Heck:
I do not believe so. This bill is tailored to providers of health care. In the 29 states that have enacted this legislation, there has not been an extension of this legislation to any other professions or other admissions of guilt, fault, or negligence. This is specifically looking at taking care of a patient's need. Medical research shows that in these situations where an individual is harmed, they want to be told what happened, to receive an apology, and to be given what they need to make themselves better.

Assemblyman Cobb:
In your experience as a doctor, could you describe how important it is to have an ongoing relationship with someone you have treated for years, and how this legislation would help you to continue to provide good care even if a simple mistake was made?

Senator Heck:
There is a significant part of the patient-physician relationship that this hopes to further cement. You often have a long-standing relationship with a patient and sometimes something goes wrong with a treatment or diagnosis. You want to be forthcoming with the long-standing patient without jeopardizing that patient-physician relationship. There is another side. There is often a high transient rate, a high population of uninsured, and there are times where a patient-physician relationship has not been established. In those situations, you do not have the time to build a personal relationship. This law would actually help foster that relationship by a physician being able to say, "I am sorry, let us do what we can to make you whole."

Assemblyman Mortenson:
This is a good bill. I would not mind if it were extended to other situations. I was rushing somewhere and I hit a car from behind. I apologized to the woman and asked her to not tell my insurance company that I had admitted that it was my fault. I did this because I had received a paper saying that if I had admitted fault in an accident, my insurance could be void.

Chairman Anderson:
How do you separate expressions of sympathy, compassion, regret, condolence, or apology from admissions of negligence?

Senator Heck:
Currently, the patient who is harmed is not receiving any of those. If a lawsuit goes forward, those sentiments are not there because they were never offered. In the period of time from when the injury occurred to when the lawsuit is filed, that patient unfortunately is left in limbo with no opportunity to have the mistakes corrected. If a mistake was made and the health care provider admitted it and wanted to take care of the patient, then those things that were done for the betterment of the patient would not be used against them in a future lawsuit. This bill does not stop the process of discovery of the medical records or anything that has been documented. In states where this legislation has been enacted, there is a drop in medical malpractice suits because the patients are taken care of without having to resort to going to trial. Also, they are taken care of in a much more expedient manner. That shows the success of having this type of legislation.

Chairman Anderson:
Most of the states that have adopted this legislation have done so very recently. Do you perceive this as a way of heading off medical malpractice suits?

Senator Heck:
That is not the intent of the legislation. The intent is to take care of the patient who has been harmed. The reason we have seen more legislation enacted in the recent past is because the research done in this area has only come out in the last ten years. Looking at the causes of medical malpractice issues is a relatively new area of medical research.

Assemblywoman Gerhardt:
My concern is spontaneous utterances. When a situation occurs such as a mistake, the first story is usually the closest to the truth. As time goes by and attorneys become involved and people realize the potential consequences of that mistake, somehow the stories seem to soften and change. In the scenario that Assemblyman Horne was describing, when we get to trial and the attorneys ask those loaded questions about whether the physician admitted making a mistake, can we expect the physician is going to say he did not? Is that all right?

Senator Heck:
This would prohibit that question from being asked. The idea is that the admission is what is being protected. You do not want the physician to tell the patient that something went wrong and it is going to be taken care of. Then the patient moves forward with a lawsuit, and two years later the physician says that he never said that. That is not what we want to happen.

Assemblywoman Gerhardt:
I am concerned with interpreting apology, regret, sympathy, commiseration, condolence, and compassion. Nowhere does this bill say the word "mistake," which is the word that you are most often using. We hear from physicians, "I am sorry that your dad passed away; we did all we could." People express regret all the time. I do not see in here where it says "mistake." I do not want to see anything that is going to prohibit that question being asked on a witness stand. If in some context, someone did say they made a mistake and they are liable, then people deserve to be compensated.

Senator Heck:
I work in the emergency department, and I say I am sorry quite a bit to express compassion to families. I do not expect in that situation that a lawsuit is going to be filed against me. I am not admitting anything; I am just expressing compassion. I have been fortunate that those words have not been used against me. There have been situations where that very phrase has been used against somebody in a similar situation.

Assemblywoman Gerhardt:
Do we have any idea how often that situation occurs? There are many caring professionals who express caring sympathy all of the time. Part of what physicians do best is to reach out to patients. I want to know how big the problem of using sympathy against physicians in lawsuits is. Are these figures even available?

Senator Heck:
I do not have those figures. There has been research done within the Veterans Administration, as well as in one of the first large non-governmental hospitals in St. Louis which instituted this type of program. They looked at the impact on claims filed against them and patient satisfaction after the fact. They noticed that claims went down and patient satisfaction went up when these programs were instituted.

Assemblyman Mabey:
Are there any articles or studies in any journals that have addressed the outcomes that have occurred in other states that have enacted this legislation?

Senator Heck:
Yes, I have provided some articles in the packet.

Assemblyman Mabey:
Does it help a patient get over the process if the doctor is able to say he is sorry and that he made a mistake? I think it is part of the healing process. It helps the patient to know the doctor really is sorry for the mistake.

Senator Heck:
Yes, most of the impact research has been done on that topic. After an adverse outcome, the patient is not only suffering physically, but mentally and emotionally. The research has shown that taking care of the mental and emotional needs is just as important as taking care of them physically. What they want most is to hear someone say, "I am sorry. There was a mistake made." They want to be told what is going to happen to ensure that the mistake will not happen again, and what will be done to make the patient whole from that point on.

Assemblyman Segerblom:
If the physician is on the stand and the attorney asks if a mistake was made, the physician will deny fault. With this law, the attorney could not say the doctor previously said he made the mistake.

Senator Heck:
The idea behind the bill is to not allow the admission of the statement made at the time of injury to be used to counter that statement on the stand.

John Martin, M.D., President, Clark County OB/GYN Society:
We feel that S.B. 174 (R1) is important to physicians. It may seem unnecessary, but it will allow us to express condolences without future ramifications. Legal counsel and insurance companies advise us to not speak to the patient directly after an adverse outcome. We feel that S.B. 174 (R1) allows us to express empathy and condolences to family and patients.

Chairman Anderson:
What leads you to believe that the insurance companies are going to change their policies relative to advising you not to make those types of statements?

John Martin:
When we go to risk management seminars, they often advise us not to make statements. They are worried about those statements being admissible in court. They are trying to not give fodder in case it does go to court. I believe they would change if there was a law protecting physicians.

Chairman Anderson:
Do they distribute a list of states that have this legislation as part of their presentations? Do they inform you if you are in a state that allows you to make these kinds of statements?

John Martin:
I am not aware of what other states do as far as educating physicians about risk management. My only experience is in Colorado. The major insurance carrier there has this policy in place, but they actually provide expenses for patients for loss of work, et cetera. They have shown a remarkable decrease in medical liability, but a high increase in patient satisfaction with the process.

Chairman Anderson:
At these risk management programs that you attend, do they make statements relative to this issue?

John Martin:
Not the last one I attended. Risk management courses run the gamut of how to better care for patients. Previous programs that I have attended have said to contact risk management before having any contact or discussion with the family regarding the adverse outcome or if you feel you actually made a negligent mistake.

Assemblyman Horne:
There is a difference between offering condolences for an unintended outcome that did not involve negligence and actual negligent mistakes. For example, what if a patient had cancer in his right kidney and the doctor took out the left, which was clearly a mistake? In this situation, this bill would allow the doctor to say he was sorry he made that mistake and the patient could not be made whole. If the patient does not take the offer made by the insurance company and the case ends up in a trial, this bill allows the doctor to say on the stand that he was not negligent, although he, in fact, told the patient he was sorry he had made a mistake.

John Martin:
If the doctor denied negligence in taking out the wrong kidney, he is an idiot. If the patient has good legal counsel, the doctor is dead in the water. From that standpoint, a good attorney should be able to show negligence whether the doctor admits it or not. This legislation will not address the standard of care. Nationally, you are expected to perform at a certain level and if you do not perform at that level, you are guilty of negligence. This legislation merely allows my admission of remorse, condolences, sympathy, and empathy to not be admissible. The facts of the case are still allowed.

Assemblyman Cobb:
Under Assemblyman Horne's scenario, you could still point out the fact that both kidneys were removed when only one was to be removed.

John Martin:
Correct.

Assemblyman Ohrenschall:
If, hypothetically, something does go wrong and the surgeon happens to make an admission to a colleague, and that colleague happens to repeat it to the family, would that be admissible under this statute?

Senator Heck:
No, that statement would not be protected. This is specifically communication between the provider of health care and the patient or the family of the patient that would be protected. Anything else is not protected.

Assemblyman Ohrenschall:
If another doctor who was part of the surgical team, such as the anesthesiologist, told the family that the surgeon made a mistake, and he was sorry about what happened to the relative, that statement would not be admissible.

Senator Heck:
I do not know about the legality of that statement being admitted in the first place, but that would not be protected by this bill. This bill is simply looking at communication between the health care provider, the patient, and patient's family.

Assemblywoman Gerhardt:
I am confused by that answer because on page 2 at line 7 it says, "made by or on behalf of the provider of healthcare." If the nurse expressed sympathy or regret and also an admission of negligence, then the questions could not be asked in court?

Senator Heck:
The phrase "on the behalf of" is meant to refer to an entity that the health care provider is sending forward—their insurance company, for example. If the insurance company made the statement or provided the services to make the patient whole, that would not be utilized. The bill is not meant to protect any statements except those made by the physician. The phrase "on behalf of" applies if the physician goes to his insurance company and explains the situation and the insurance company goes forward to the patient or the patient's family.

Assemblyman Segerblom:
Looking at the language in Section B, it does not say the word "mistake." If the physician said, "I made a mistake," that would be protected? Or do they have to say, "I am sorry, I made a mistake?"

Senator Heck:
The original version of the bill also included the term "fault." That was removed by Senate Judiciary to clarify that the types of admissions that stated fault would not be protected. The fault itself would not be protected. For example, if I said, "I am sorry I took off the wrong leg," that would not be protected. If I say, "I am sorry there was an adverse outcome; we want to make it up to you," it would be protected.

Keith Brill, M.D., American College of Obstetricians and Gynecologists:
I have submitted testimony (Exhibit D). I represent myself as a physician, as well as the insurance company I am helping to manage, Premiere Physicians Insurance Company. When an adverse outcome occurs, we should not be abandoning our patients. In medical school and risk management seminars, we are taught not to communicate with our patients in these situations. As a physician, the communication process is our most important asset in terms of how we take care of our patients, patient relationships, and the trust factor. When there is an adverse outcome, this is the wrong time for physicians to step

out of the communication process; it ultimately leads the patient to be angry, and anger is often the cause of a litigation process.

I had two lawsuits in the past when I was a resident. One case involved a hysterectomy that involved a bladder injury. The patient suffered much pain throughout her recovery and ended up losing months of employment and income. I felt horrible and told this to my insurance company. Because I had an open line of communication with my patient, there was a favorable outcome. The patient was satisfied knowing that someone did care for her and that her physician did not abandon her. By allowing these conversations with our patients, they still feel like human beings. We should be encouraging this type of communication so the patients can receive higher satisfaction and improve the quality of their lives. By allowing these disclosures, the care of people around the country will improve by discussing these situations openly. Our goal is to improve patient care, not just reduce malpractice claims.

If you look at page 3 of my testimony, there is some data. This data presents studies that have been done which show the decrease in malpractice claims and a decrease in settlement and litigation costs, as well as the lengths of litigations.

Wayne Hardwick, M.D., President, Nevada State Medical Association:
We are in favor of this bill.

Assemblyman Cobb:
Are there any statistics on the increase of medical costs and insurance premiums due to litigation? Obviously, this bill is designed to help deal with the situation and make a person whole outside the courtroom.

Chairman Anderson:
There was a lot of testimony on that very question a couple of sessions ago. I am sure Research could find that information for you, Mr. Cobb.

Bill Bradley, Representative, Nevada Trial Lawyers Association:
We are opposed to this bill for many of the reasons that have been brought up by the Committee today. Mr. Segerblom brought up an excellent point. If the doctor admits the mistake or fault, then is put on the witness stand and denies it, I am not sure if this bill will allow the patient to get on the witness stand and say that the doctor admitted it before.

In our civil justice system today, things like accountability and responsibility are truly important. Any professional can say something and it would otherwise be admissible, but a statute prevents them from being held accountable a year

later. If we are to promote accountability and responsibility, we cannot say this is acceptable. If a physician truly feels there was an error, rather than arguing about what the words mean and spending time deciding whether it was an admission of fault or an admission of compassion, we ought to be getting past the point where there is accountability and make the person whole.

I take issue with the comments that with or without this bill, there is a driving goal to make people whole who were injured through negligence at hospitals. The entire reason I have a job is because there is not anybody who is willing to step up and say, "We are willing to help you with your medical bills, with your wage loss, with your mortgage, and with your kids' education." If that happened, I would be out of business. By making comments of a physician inadmissible, the patient is not going to be made whole. I have never seen or heard of an insurance company representative contacting a patient or me and asking if they can help a patient while we are working through this problem.

If a physician is willing to say he is accountable and did something wrong, then that physician and insurance company ought to say they do not need lawyers but that they need to make this patient whole. In the hospital setting, there are numerous errors that lead to harm. Mr. Horne's kidney example is an actual case that came out of southern California. The x-ray of the diseased kidney was flipped when put up on the board, and the wrong kidney was removed. One would think there would be admissions of responsibility in that circumstance. For many years everybody fought about whose fault it was. The surgeon blamed the person who incorrectly placed the x-ray. The radiology department thought the doctor should have known better. There is a problem when there is a disagreement about who is responsible. Insurance companies should encourage responsible behavior in physicians without this bill so they do not have to come to us.

Assemblyman Carpenter:
If the insurance companies would step up and do what was right, we would not have these problems. If there is one insurance company that is encouraging their doctors to express sympathy, what are the chances others will follow?

Bill Bradley:
Dramatic tort reform has occurred in this State and significant profits are generated by the state insurers. Insurance companies ought to be encouraging doctors to do what is right, but they will not. It is a different mentality, and it really boils down to money.

Assemblyman Carpenter:
If something like this bill really worked, it would save a lot of money, would it not?

Bill Bradley:
If insurance companies treated people fairly, we [trial lawyers] would be out of business. They do not want to. I have worked in hospitals and know about physicians and their desires. I do not understand why this idea of admitting responsibility, stepping in, and helping financially is so difficult. I have dealt with malpractice victims for 25 years. They do not come to my office to file a lawsuit; they come to find out what happened. If we were intent on informing these patients, we would have legislation saying hospitals, physicians, nurses, et cetera could come forward and explain what happened and what is going to be done to improve that. This currently takes place in the context of a peer review committee. Unfortunately, the findings of a peer review committee are inadmissible. If we were intent on informing people, there is a way to do that, but not in this bill.

Assemblyman Horne:
Is there a way to make this bill better? Is there a way to amend this bill to target the difference between a physician admitting fault and a physician expressing condolences?

Bill Bradley:
I do not believe there is. I really do not like dealing with issues in a vacuum. As many of you know, because of tort reform in this State, there is a $350,000 cap on awards, whether or not two kidneys or two legs were wrongly removed. I trust our judicial system and do not like taking a cookie cutter to every single case. I think the judges should deal with these situations on a case-by-case basis. The discretion should remain with the judge.

Chairman Anderson:
How would a physician be able to make sure their insurance company fulfilled their responsibility if the physician wanted his malpractice insurance to take care of a situation? Is there a mechanism that he could currently use?

Bill Bradley:
We are talking about whether or not a physician who wishes to express statements of fault, regret, remorse, concern, et cetera, is invalidating their insurance by violating the "duty to cooperate" clauses. I have never heard of or seen a physician who thought they would be violating those clauses by giving those statements. I do know physicians who have candidly expressed to their insurance company what happened and, over the course of time, have been

pressured to change the story a little bit. Any insurance company would be foolish to say, "If you give a sincere expression to your patient, you are in violation of the cooperation clause." That physician would have one heck of a bad faith lawsuit against his insurance company.

Senator Heck:
Regarding Assemblyman Cobb's question about costs, there is some information about decreases in associated costs in the packet I brought. Regarding Mr. Bradley's comments about never having seen physicians and insurance companies in these positions, once they have been taken care of, the patients do not go see a lawyer.

In 20 years as a practicing physician, I have had three lawsuits filed against me. Two were summarily dismissed. One was because of a mistake I made. I recognized it, went to my insurance company when the claim was filed, and told them to pay. The insurance company told me no. They also told me not to speak to the patient because it would come back to haunt me. Fortunately, the case was settled, but I have personal experience with not being able to talk to a patient and say, "I am sorry. You deserve to be compensated."

Chairman Anderson:
I will close the hearing on S.B. 174 (R1). Next we will move to Senate Bill 129 (R1).

Senate Bill 129 (1st Reprint): Makes various changes to provisions relating to guardianships. (BDR 13-1109)

Kim Spoon, MSW-MG, Master Guardian, Guardianship Services of Nevada:
I represent the Nevada Guardianship Association (NVGA), which has statewide membership, including both public and private guardians. We put together this bill to try to make Chapter 159 of *Nevada Revised Statutes* more workable for the real world of guardianships. We have worked hard to get consensus between the north, south, and rural communities. There were a few small issues brought up at the Senate hearing. Information was brought before the work session, and there was still one area of confusion. I am going to try to clarify that today.

There was one issue dealing with the extension of temporary guardianships. Temporary guardianships are emergency guardianships and by law there is one extension of 30 days and the law allows for two more 30-day extensions. For many reasons, those extensions sometimes need to go beyond all three extensions. The judge orders the extension to happen, but the law says it cannot be granted. We asked in the original bill for judiciary discretion. The law

would still state a certain number of extensions, but if good cause was shown the judge could then allow the guardianship to be extended further.

Mr. Ernie Nielson believed that there should be a cap on extensions, and the Senators asked him to come up with some language, which he did, and that is what I have brought before you (Exhibit E). During the work session, Senator Care felt that judges should have discretion and suggested Mr. Nielson's second suggestion. The motion was voted on; however, it was suggestion number three that gave discretion to judges. The second amendment made it into the bill before you. The NVGA would like to see it changed to Mr. Nielson's third suggestion or something that uses similar language.

Chairman Anderson:
You are trying to gain the opportunity for a greater amount of time. The extended time would go from 60 days to 120 days. Are the guardians putting things off resulting in the request for additional extensions? Are we serving the ward by allowing the guardians more time, or are we serving the courts and their calendars? Whose interest is being guarded here?

Kim Spoon:
Very rarely is the guardian the cause of the extension. Because of other players in the court, the ward is represented by an attorney and has the right to contest the guardianship. Evaluations not getting done in a timely manner because of finances or other reasons, or if the guardianship is contested, are the most common causes of extensions. I just got out of a guardianship where the temporary guardianship went on for eight months. This is a rare case, but it does happen. We, as guardians, were not trying to extend this; there were family member problems and contest of the guardianship. These cases can get very complicated.

Chairman Anderson:
The attorney involved may decide his workload is too large or the client may not be able to financially retain counsel. How do we solve these problems for the ward? This is the person we should be concerned about.

Kim Spoon:
I agree. The judges are reluctant to drop a guardianship in an emergency situation and leave the ward without any protection, yet they want to make sure the ward receives due process. All of the situations and consideration that make extensions necessary need to be dealt with before a general or permanent guardianship is assigned. The judges are reluctant to go forward until all temporary criteria have been met. A court order does not protect a guardian

from a lawsuit. If we are not following a law and are merely dealing with a court order, then, in an extension situation, the guardians are left unprotected. We are concerned because guardianships are often extended by judges through court orders. We want for judges to have the discretion to extend the guardianships in extreme situations.

Assemblyman Horne:
In Section 5, it talks about the exemption to petition to utilize assets. Would the guardian be able to utilize his assets as the beneficiary?

Kim Spoon:
Yes.

Assemblyman Horne:
This causes me concern. I see why this may be necessary; however, it removes a safeguard that may be in place regarding guardians who are not professionals like you. For example, an aunt could be named as the guardian of a person, and the aunt does not need to ask a judge to access the assets. This aunt may have a gambling problem, leaving the ward's assets unprotected. The requirement was to go to a judge and ask to access those assets and give reason. You are saying you want to change this.

Kim Spoon:
The reason this was a problem is because sometimes a guardian may have only one bank account which is paid upon death (POD) to a specified person. If that is the only asset available, it will be the only asset we can access. In probate the judges and attorneys for the designated relative are saying we should not have accessed the bank account. The beneficiary says we are changing the will of the ward. We are trying to prevent guardians from having to backtrack after getting the funds needed for the ward's benefit. In circumstances where there is only one asset available and the asset is less than $5,000, then we do not have to go back and do further accountings because of the expense to the ward. If there is a much larger asset, we have to go back to court. If it is a bank account or insurance policy that we have to liquidate due to their entitlements, we should be able to do that without a court hearing to help preserve the estate of the ward. The ward does not have any money which is why they are receiving Medicaid. We are asking to help the ward without increasing their court expenses, but only if there is beneficiary status on the account.

Ernie Nielson, Representative, Washoe County Senior Law Project:
Our firm represents wards in these types of cases and does not represent the guardians at all. We have a slightly different perspective on these guardianship

issues than does the Guardianship Services. I participated in the debate in the Senate Judiciary Committee meeting, but did not attend the work session. I sent to the Committee three options. In current situations where there are extensions requested beyond the 30 days, there is discretion the court uses in determining whether there is good cause to extend those guardianships. Discretion could easily be something the court does during the extended time periods even though there is a cap. I feel strongly that there needs to be a cap.

From our perspective, of the three options I presented to the Committee, option two, which is a part of the bill, is a compromise. It gives seven months or three successive 60-day periods for temporary guardianship. Good cause has to be shown for those extensions. The standard for a permanent guardianship is clear and convincing evidence that the person is incompetent. The standard for a temporary guardianship is that though it is clear and convincing, the person is unable to respond to a substantial and immediate risk. Theoretically, that means there is a scope in the temporary guardianship that is much narrower than a full guardianship, although from the ward's perspective, they have had a deprivation of their civil rights during that temporary period. Our concern is that there be a cap to prove that the person is incompetent or not. There are many issues as to how guardianships are settled. According to Judge Hardy, Washoe County Second Judicial District, 17 percent of wards are represented by counsel and 99 percent of the temporary guardianships are granted. We believe seven months is ample time to deal with the issues that come up in guardianship cases.

The second issue that I wanted to briefly mention was the issue of involuntary commitment in Section 6 on page 12 of the bill. I want you to be aware that "involuntary commitment" does not give the guardian any authority to either voluntarily place a ward into a civil commitment status or give them any special status in terms of the involuntary process. That language does not affect the guardian's rights relative to their ward with respect to civil commitment. I want to clarify to the Committee that we are not giving the guardian additional rights.

Assemblyman Carpenter:
Do you agree with the three successive 60-day periods if good cause has been shown?

Ernie Nielson:
Yes, that is something we are comfortable with.

Kim Spoon:
We are already working under caps. The judges sometimes do not necessarily follow the cap. We want to have a law that we can all work with. There will

always be situations where caps do not work and this measure will allow the judge to have the discretion for extensions in those cases. I appreciate Mr. Nielson bringing up the involuntary commitment issue. The reason we wanted the commitment process taken out is because guardians have nothing to do with the commitment process. That particular section makes it seem like we do have something to do with the commitment process.

Chairman Anderson:
I will close the hearing on S.B. 129 (R1). Next we are going to look at Senate Bill 89 (R1).

Senate Bill 89 (1st Reprint): Makes various changes concerning legal representation of state agencies, officers and employees. (BDR 3-1)

Chairman Anderson:
This bill deals with the Attorney General's Office. A representative from the Attorney General's Office made a presentation on the Senate side, and I received a letter explaining why the Attorney General felt this legislation was important (Exhibit F).

Graham Galloway, Representative, Nevada Trial Lawyers Association:
We believe this is an appropriate bill for the most part. The only part that does not make sense is subsection 3 of Section 1. This concerns the evidentiary language and indicates that the written record or report required under this bill is a public record that is open to public inspection, but in the same sentence indicates that the report or record not be admissible in any type of proceeding. It seems a person should be able to look at the record and take notes, then testify to the notes. We contacted the Attorney General's Office and had the impression that they had no opposition to the removal of that language.

Chairman Anderson:
The bill was introduced by the Senate Judiciary. Did you share your concerns with the Senate Judiciary Committee?

Graham Galloway:
You have me at a disadvantage. I am not aware whether we communicated our concerns with the Senate Judiciary Committee. If not, we will at this point.

Chairman Anderson:
I will close the hearing on S.B. 89 (R1). Now I will open the hearing on Senate Bill 14 (R1).

Senate Bill 14 (1st Reprint): Prohibits a minor from committing certain acts relating to the possession and use of tobacco products. (BDR 5-76)

Senator Mike McGinness, Central Nevada Senatorial District:
Senate Bill 14 (R1) was requested by the Churchill County School Board of Trustees. This bill was requested over a year ago in response to a "smoker's corner" near the high school. When I asked someone in the Research Division, they told me there was also a "smoker's corner" at Carson High School. Every high school seems to have one. Parents and property owners near the school expressed concern about the public perception and the impression on younger students. The school actually had an adjacent piece of property that was donated as the smoker's corner. Prior to that, the students would go across the street on private property—which was littered with cigarette butts—and the students of Lahontan Elementary School had to cross through this property.

Currently, Nevada law does not allow sales to minors, but does not address possession. Senate Bill 14 (R1) attempts to address this through a series of citations, much like a traffic ticket, but for smoking. Not only will this measure address the problem near high schools, but we should look at the health issues for young people starting to smoke. We have tried to avoid an impact on the juvenile system, so we set up a series of citations to allow minors to be reprimanded without them entering into the juvenile system. We are trying to avoid a fiscal note on this bill.

We found that 35 states prohibit the outright purchase of tobacco products. Several other states prohibit falsifying identification in order to purchase tobacco, 36 states prohibit minors from possessing tobacco products, 19 states have language prohibiting the use of tobacco products by minors, and 26 states order minors who are guilty of a tobacco-related offense to perform community service as well as or in lieu of a fine. There are 16 states requiring minors to attend smoking education or cessation programs in addition to or in lieu of penalties. Citations are issued by most states, usually associated with a fine and then graduated penalties are issued for second, third, and fourth offenses. Cessation, risk, reduction, and health classes are common penalties, and this also may be in combination with a fine or community service. Senate Bill 14 (R1) prohibits anyone less than 18 years of age from possessing, purchasing, or using tobacco products or falsely representing his age to purchase, possess, or obtain such products. A minor child who violates these provisions will be given a graduated citation of $25, $50, and $75 for the first, second, and third offenses respectively. For a fourth or subsequent offense, the minor child is subject to a fine of $75 and participation in a tobacco awareness and cessation program. Money collected from these citations will be credited to the account for health education for minors.

Finally, we did not want this to follow juveniles forever, so the juvenile court must seal the records pertaining to a tobacco-related offense upon the child's successful completion of the tobacco awareness and cessation program.

John Riley, Representative, Churchill County School District:
All of us are aware of the adverse effects of tobacco and most are aware that schools everywhere tend to tackle the problem with traditional approaches, such as enforcement of school rules prohibiting the possession and consumption of tobacco. There is also a health curriculum which teaches kids about the various ill effects of tobacco use, and, of course, there are counseling approaches. These counseling efforts can include formal, informal, individual, and group. The unfortunate thing is that when kids leave school, they may enter a community in which the sanctions against tobacco use and the efforts to curb tobacco use are not as strong as they are in the schools. I am asking for the support of S.B. 14 (R1), which will include schools in the diversion of tobacco consumption and use. This will integrate the efforts of the entire community with the school and strengthen the bond between all of the institutions within the community. For those reasons, I support this legislation and the provisions outlined by Senator McGinness.

Rebecca Winder, Student, Churchill County High School:
We have what is called a smoker's corner which is located right next to the high school. It is not on the property but adjoining it. Besides the obvious health effects on smokers themselves, they are also endangering the health of the other students who walk by with second-hand smoke. This issue was addressed by the Churchill County School Board, but the City of Fallon said it could do nothing about this issue—it would have to be fixed by changing state law. This is not only a problem in Fallon; every high school in our State has a similar problem.

As a youth from Nevada, I believe this bill is greatly needed. One of my own personal reasons is for the protection of elementary school children. We have passed many laws preventing impressionable children from being influenced. There is no prayer in schools because the beliefs of teachers can be impressed upon the children. Smoking has the same effect. When I first started my student-assistant teaching at Lahontan Elementary School, the second question that the kids asked me was, "Do you smoke?" I understand why they would ask this. The smoker's corner is located right next to their school. What if the students saw me there one day? I am supposed to be an example to them and no matter what my answer was, they would have thought that being at the smoker's corner was a cool thing to do. The effects on the high school students themselves are not good either. It is possible that they come from families where this behavior is encouraged, or at least not discouraged. There

has to be a step we can take to prevent Nevada's youth from having tremendous health problems. When you are young, it sometimes seems cool and then you get addicted and end up staying in that position. If we can fix this problem at the high school level, then kids will not pick up the habit until later in life, and they will have had more time to think about what they are doing. I also think that it is important that the fines the students will pay go towards education efforts. I have talked to many other young people outside of Fallon who asked me to let you know that this was a problem in other areas. They strongly support this bill as well and would like to see you support it.

Assemblyman Horne:
When I was in high school, there was an actual smoking section in the school, so I can appreciate the health benefits that we are trying to achieve by preventing smoking in high school. We certainly wish that our children were not smoking. Did the Committee ask about the impact on the juvenile courts? You mentioned that citations would be issued to cause the kids to pay, but if students wish to challenge a citation, they can go to court to do that. They are not barred from going to court should they receive a citation, are they?

Senator McGinness:
You are correct. There would be some impact. Originally, the bill was written stating that the minor would be under the supervision of general probation, and that had a much larger impact. We thought by using citations it would be more like a speeding ticket. None of my children smoke, but they did speed a couple of times. I went to court with them, and it was a pretty expeditious process. We felt we should avoid the fiscal note.

Assemblyman Horne:
Could this be better handled at the county level? I realize the School Board said they could not act, but it seems that barring such activity on school grounds could work. I envision an impact on a large number of students by doing this. With the addictive nature of tobacco, I foresee many kids getting first, second, and third offenses because they are not going to stop because they got a ticket.

Senator McGinness:
Obviously, the problem is proportional to the student body. School districts are allowed to ban tobacco products on the school grounds. Local municipalities and counties cannot make anything more restrictive than the State allows them. The direction has to come from the State. Rather than taking it too far, we just want to add the possession factor. It is ironic that we say kids cannot buy cigarettes, but if they have them it is all right.

Assemblyman Oceguera:
I wanted to praise Ms. Winder for a thoughtful and insightful testimony. Unfortunately, it is viewed as cool to smoke. She is showing real leadership for her peers by coming and speaking to the Committee.

Chairman Anderson:
Mr. Riley, I once taught at a high school that allowed students to cross the parking lot and stand in a corner called the smoking corner. Many kids would stand there, non-smokers as well as smokers. The non-smokers would sometimes go to the smoker's corners for socialization. Did Fallon create the smoker's corner to alleviate the trash from individuals' yards, or was it condoned by the school district?

John Riley:
The decision to have the corner was made just prior to my arrival. My understanding is that the problems associated with students leaving the school grounds and congregating in businesses and residential areas were the reasons to establish the corner. Technically, the students are smoking off school grounds. In my opinion, this was a short-sighted solution. Law enforcement could have been called in to address the other problems of loitering and littering, without addressing the tobacco problem.

Chairman Anderson:
In discussing this problem, one solution that was offered from time-to-time was the suggestion of closed campuses. I realize that this is difficult at the high school level because of differing class schedules. Was that discussed?

John Riley:
I believe it was discussed. As a long-time high school principal not just in Nevada, a number of high schools were converted from other types of buildings or have grown to the point that the infrastructure does not support a closed campus. In our case, we were a middle school modified to a high school and additional classrooms were built on the grounds. The cafeteria still barely holds 300 students. At times, we have as many as 1,350 students. Lunch would have to start at 9:30 a.m. and end at 2 p.m. to facilitate that. We have students who have off-campus assignments—work experience, jobs, et cetera. When you close any campus, there needs to be gates, checkpoints, and other things. Schools cannot afford to have people walking around and monitoring every student coming and going. If I were to build a high school, I would have it be a closed campus, not only because of the tobacco issues, but also truancy and other problems.

Chairman Anderson:
Ms. Winder, what is going to happen to the communication between students? They are still going to want to talk in a place that is away from school and get together. Have you ever been to smoker's corner?

Rebecca Winder:
No. I go by the smoker's corner coming from seminary to get to school. I am allergic to cigarette smoke. I do not see any effect—the high schools are large enough that there is plenty of room to congregate.

Assemblyman Carpenter:
Senator McGinness, could a person make a citizen's arrest under this law?

Senator McGinness:
I do not know about that.

Ben Graham, Representative, Clark County District Attorney's Office and Nevada District Attorneys Association:
The ability to issue citations is extremely limited and monitored. I do not think that a citizen could enforce this.

Chairman Anderson:
Could they hold someone while waiting for law enforcement?

Ben Graham:
If a person wants to come down to the office and fill out an affidavit, then a warrant could be issued; however, issuing a citation is very restrictive.

Assemblyman Carpenter:
We can hold someone and call an officer to then come and issue a citation. I do not see the difference between this and a citizen's arrest.

Ben Graham:
Mr. Carpenter may be referring to offenses occurring in retail establishments and regular misdemeanors. I do not know if the issue of a minor smoking rises to that level or not.

Assemblywoman Gerhardt:
I am assuming the school police are going to be able to issue the citations. Police enforcement is not going to be required.

Ben Graham:
It would be anticipated that the school police could do this. There was not a feeling that this legislation would significantly impact the juvenile systems. It is an effort to send a message.

Senator McGinness:
One concern was that this would take police away from other more important activities. Obviously, law enforcement has to make these decisions every day, and the Fallon Police Department was very supportive when we came to the School Board. Other jurisdictions may be busier and not have the time.

Chairman Anderson:
Mr. Riley, how many arrests do you think would be made before the kids would get the message?

John Riley:
When you begin serious enforcement of any rule, there is a steep learning curve up front. It then tapers off dramatically; once arrests were made and it was clear the community was serious about this, the incidents of public use and possession would taper off dramatically. Up front the arrests and fines would be high, but would not remain that way.

Chairman Anderson:
In looking at the fines, administrative assessments are going to be put on this also? This means the fine is not going to be $25.

Senator McGinness:
The reference to 62 (e) means a $10 assessment.

Chairman Anderson:
So we are talking about $35.

Senator McGinness:
We are talking about $10 extra in each instance. Originally, I thought it was to make a point, and I asked for $10, $20, and $30 assessments, and Senator Wiener suggested that fines for not wearing a bicycle helmet were larger than that, so we made it match helmet citations.

Chairman Anderson:
Are you anticipating any amendments?

Senator McGinness:
Yes, Mr. McMullen has some, and I have reviewed them superficially. They look to enhance the inability of youth to get cigarettes, so I think I am in support.

Lawrence Matheis, Executive Director, Nevada State Medical Association:
I am also speaking for the Nevada Tobacco Prevention Coalition, which includes 50 organizations that deal with tobacco-related issues. When similar proposals have been made in the past, we strongly opposed them, but for many reasons we withdraw our opposition. Through funding by Healthy Nevada, we have created cessation, preventative, education, and treatment programs, and a fairly strong law dealing with indoor tobacco use. It seems appropriate now to look at the range of other issues and other approaches to reduce the effects of tobacco abuse in Nevada. For that reason we no longer oppose this proposal.

Jennifer Stoll-Hadayia, Public Health Program Manager, Washoe County District Health Department:
We have put forth an amendment that would simply move the education and cessation requirement to the first offense. We know that providing education early and often to youth is the best way to prevent future tobacco use. We support this bill, but think it would be a better bill for prevention of tobacco use if the children were required to attend education and cessation classes at the first offense rather than the last offense. We put forth the amendment when the bill was introduced on the Senate side.

Chairman Anderson:
Why did the Senate reject it?

Jennifer Stoll-Hadayia:
It was at the work session, and at that point, there was not time to adjust the bill.

Chairman Anderson:
Has the county agreed to the unfunded mandate that would result?

Jennifer Stoll-Hadayia:
Actually, the statewide program that is available to provide education and cessation is run by the American Lung Association, and they are either already providing it in many counties or are positioned to provide it in those counties. They are funded in part by the task force funding that we receive from the Master Tobacco Settlement agreement (MSA). This is a program that is already running.

Assemblyman Horne:
Would this increase the fiscal impact? If you add this, there will have to be a court to order the cessation class upon the first offense. We are creating more court time when these students obtain their first ticket.

Cotter Conway, Deputy Public Defender, Washoe County:
I spoke to a few juvenile probation officers, and the bill actually addresses this. They are allowed to act as masters in these types of cases. They act as masters in traffic offenses and truant situations. The bill adds offenses related to tobacco. In those situations, the probation officers can take a large brunt of the work and order not only fines, but also cessation classes. If an individual is going to challenge the citation, it may need to go to juvenile court.

Assemblyman Horne:
Would a truant officer be able to issue a citation?

Cotter Conway:
I do not know how that works.

Assemblyman Horne:
Having a truant officer issuing citations then standing as master and enforcing the punishment creates a conflict.

Cotter Conway:
The probation officer and the truant officer are two different individuals.

Assemblyman Horne:
Can a probation officer issue a citation?

Cotter Conway:
I do not know the answer to that, but if they did, they could not sit in the position of the master. If they did, they would have to go to juvenile court.

I want to note for the record that I am in support of the bill and the amendment. I think we need to address the educational aspects early on because by the time we get to the fourth offense, it will be too late. We need to address the problems and force the issue on the child early.

Chairman Anderson:
I have a concern with the first offense. What if we gave the judge some discretion in the first offense and made the penalty mandatory at the second offense and beyond? Everyone should get one warning. Most people have at

least tried one cigarette. Would you have a problem if we changed it to education on a second offense and gave the judge discretion on first offenses?

Jennifer Stoll-Hadaiya:
That would be an excellent compromise. Our position is that the education and cessation courses not be the last resort, but one of the first that a judge can use. The goal is to give the minor education and refusal skills so there are not more offenses.

Senator McGinness:
I think the education portion is paramount. The reason we did not include it in the first offense is because we were trying to avoid any fiscal note. This amendment was presented to the Senate and it said that the American Lung Association is positioned to provide a tobacco awareness and cessation program for minors in all Nevada counties. I am skeptical of that. I do not know if the American Lung Association has taken a look at a map of this State, but there is a great amount of distance to be covered. That is why we gave the citations as the first few offenses. Even on the fourth offense, the judge would have the ability to say, "There is not a smoking cessation program in town, so I will continue to fine you." I hope the American Lung Association does this, but I do not believe they can.

Assemblyman Mortenson:
When Mr. McGinness was reading the fines, the first thing that popped into my mind was, "Why not the first offense?" We are hearing that there are mechanical problems that may interfere with this. If we consider only what is best for the kids, you would do education on the first offense.

If a kid is caught smoking, he will find a place to smoke where he would not get caught. If they get the education program, there is the potential for the kid to stop smoking.

[Chairman Anderson leaves the room.]

Vice Chairman Horne:
There is one more amendment to be proposed by Mr. McMullen.

Sam McMullen, Representative, Altria Corporate Services:
Altria is the parent company for Phillip Morris U.S.A. Phillip Morris U.S.A. and Altria Corporate Services was a signatory to the Master Settlement Agreement that is the agreement between the tobacco companies and the states regarding the control of tobacco and other things. As a part of that, Phillip Morris committed to making sure that youth-access prevention was included in state

law. Before you today is an amendment that shows three more items we would like added to S.B. 14 (R1) (Exhibit G). First, we want self-serve displays behind the counter. Make sure there are only face-to-face sales with proper identification. Second, put into statute that there is a notice posted that the sale of tobacco to children under 18 is not legal. Third, catch those who are being paid by kids to purchase cigarettes for them. Those are the three issues we would like to bring to the Committee to have included in the amendment.

Vice Chairman Horne:
Did you bring this proposal to the Senate Judiciary Committee? Have you talked this over with Senator McGinness?

Sam McMullen:
The Senate was trying to move the bill while focusing on the major changes, and they had no problems with these additions. The sponsor of the bill also testified earlier that he had no problems with the amendments.

Dylan Shaver, Representative, Nevada Petroleum Marketers and Convenience Store Association:
We strongly support this bill. For years it has been illegal for us to sell the product to kids, and we would like to see kids unable to possess tobacco.

Assemblyman Carpenter:
I represent an area where smoking cessation education may not be available, so I would like to go along with the Chairman's idea that, if available, they would have to take these classes.

Vice Chairman Horne:
We will have that option in the work session document.

Close the hearing on S.B. 14 (R1).

Meeting adjourned [at 11:18 a.m.].

RESPECTFULLY SUBMITTED:

_____
Janie Novi
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: April 27, 2007 **Time of Meeting: 8:00 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
S.B. 174	C	Senator Joe Heck	Information Packet
S.B. 174	D	Dr. Keith Brill, American College of Obstetricians and Gynecologists	Prepared Testimony
S.B. 129	E	Ernie Nielsen, Washoe County Senior Law Project	Proposed Amendment
S.B. 89	F	Assemblyman Bernie Anderson	Letter from the Office of the Attorney General
S.B. 14	G	Sam McMullen, Altria Corporate Services	Proposed Amendment