MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fourth Session
March 1, 2007

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9:04 a.m. on Thursday, March 1, 2007, 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 in 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

COMMITTEE MEMBERS ABSENT:

Senator Steven A. Horsford (Excused)

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Brad Wilkinson, Chief Deputy Legislative Counsel
Gale Maynard, Committee Secretary

OTHERS PRESENT:

Randal Munn, First Assistant Attorney General and Legislative Liaison, Office of the Attorney General
Kim Spoon, Nevada Guardianship Association, Incorporated
Ginny Casazza, Nevada Guardianship Association, Incorporated
Ernest K. Nielsen, Washoe County Senior Law Project
Kathleen Buchanan, Clark County Public Guardian
Lora E. Myles, Carson and Rural Elder Law Program

K. Neena Laxalt, Nevada Propane Dealers Association
Mark F. Krause, Nevada Propane Dealers Association
Graham Galloway, Nevada Trial Lawyers Association; Citizens for Justice

CHAIR AMODEI:
We call this meeting of the Senate Judiciary Committee to order. I have before me Bill Draft Request (BDR) 1-660).

BILL DRAFT REQUEST 1-660 Makes various changes to provisions governing employees who are summoned to appear for jury duty. (Later introduced as Senate Bill 208.)

Bill Draft Request 1-660 was submitted by the Office of Court Administrator, Nevada Supreme Court. Is there a motion?

SENATOR WIENER MOVED TO INTRODUCE BDR 1-660.

SENATOR McGINNESS SECONDED THE MOTION.

CHAIR AMODEI:
Is there any discussion or objections to the motions?

THE MOTION CARRIED (SENATORS HORSFORD, NOLAN AND WASHINGTON WERE ABSENT FOR THE VOTE.)

* * * * *

We will hear Senate Bill (S.B.) 89.

SENATE BILL 89: Makes various changes concerning legal representation of state agencies, officers and employees. (BDR 3-1)

RANDAL MUNN (First Assistant Attorney General and Legislative Liaison, Office of the Attorney General):
I proposed amended language for section 1, subsection 3 of S.B. 89 to include state agencies and state judges trying to avoid unintended consequences (Exhibit C). I asked the Committee the intent for written public records to the Legislature under section 2, subsections 1 and 2. I was asked to address the public records issue.

The public records statute requires everything not deemed confidential a public record. When someone comes to our office seeking defense under *Nevada Revised Statute* (NRS) 41, this constitutes the beginning of an attorney-client relationship.

The tender of defense requires the deputy Attorney General to ask questions of the person to determine if they are acting within the scope of their employment and in good faith. If they are wanting or malicious, this will exclude them to the tender of defense. Under case law, this would be a process in which mental impressions, conclusions, opinions and legal theories determine privilege. If creation of records is a public record, according to subsection 1, it will have to be drafted to avoid disclosure of attorney-client privilege and attorney work product. If the Committee intends for it not to be a public record and privilege attaches with exceptions allowed for the Legislature to participate in the privilege, the extension of that privilege may cause problems.

The Nevada Supreme Court case *McKay v. Board of County Commissioners of Douglas County*, 103 Nev. 490, 746 P.2d 124 (1987), dealt with attorney-client privilege. There is a point when legislation forces disclosure of privileged information and courts do not specify at what point the line is crossed.

Oversight by the Legislature of the Attorney General's decision to tender defense or seek outside counsel is a legitimate oversight the courts recognize. I am concerned with the number of participants.

Senator Washington requested information on section 3, weight and deference to Attorney General's opinions. Since 1922, the law has been that the Attorney General possesses the power of common law, and statutes added specify the Attorney General is the sole attorney for agencies of state government unless this Legislature decides an agency can employ its own attorney.

The language proposed will diminish the legal opinion of an agency counsel authorized by the Legislature. It would make their opinions subject to the Attorney General's and is not inconsistent with current statutes. Independently elected city attorneys and district attorneys can ask for an Attorney General's opinion, which bears weight in determining what the law is in the State of Nevada. It will not be inconsistent with current statutes. The Court ruled in

Cannon v. Taylor, 88 Nev. 89, 493 P.2d 1313, (1972), that people can rely on the Attorney General's opinions as done in good faith; they will not be exposed to liability for improper reliance on the opinion. Deference to the Attorney General's opinion may avoid dueling opinions.

CHAIR AMODEI:
There was concern about having a framework to follow for the decision to tender a defense and use outside counsel. I do not recall discussion about creating an impact on the opinion process as to everyday operations for in-house or outside counsel. There are two cases before the Committee: one involving the Colorado River Commission of Nevada and the other the State Board of Pharmacy.

SENATOR CARE:
I am trying to think of an instance where a special counsel would issue a legal opinion in the context of an advisor to a state employee in the same way a Deputy Attorney General would. I am under the impression we are talking about special counsel engaged after litigation has started. Do we have special counsel and does the Attorney General's Office represent the defendant?

MR. MUNN:
We are talking about two different subjects. The opinion process is not involved with the special counsel who is accountable to the Attorney General pursuant to a contract. Section 3 deals with specific boards, commissions and agencies entitled to employ in-house counsel; they have the option of using the Attorney General. In those circumstances, there are disagreements between advice given in-house and advice of the Attorney General. This may be what prompted section 3 of S.B. 89. I was here last session and do not recall discussion going in this direction.

CHAIR AMODEI:
Mr. Wilkinson, do you have any ideas for the Committee as to how we got a section 3 change? Was this cleanup through the drafting process?

BRAD WILKINSON (Chief Deputy Legislative Counsel):
My recollection from last session is there was a concern about situations where private counsel had expressed an opinion on the constitutionality of the statute, either in writing or verbal, and being at odds with the opinion of the Attorney General's Office.

CHAIR AMODEI:
I am unfamiliar with circumstances which would support the change in section 3. As for S.B. 89, in section 1, it gets to what we were talking about on providing some framework. Looking at S.B. 89 for potential movement, how does the Committee feel about omitting the change in section 3?

MR. MUNN:
Section 3 is not necessary.

CHAIR AMODEI:
You are comfortable with other testimony to provide a framework for outside counsel and not a resource issue.

MR. MUNN:
We support the concept and respect the Legislature has oversight of our decisions. My concern is if it is a public record, we cannot put as much information in there as we normally would. If it is not a public record and is something for legislative oversight, meaningful information should not be spread too far.

CHAIR AMODEI:
Do you think you can meet those concerns within the context of the present language?

MR. MUNN:
Yes.

CHAIR AMODEI:
What is the pleasure of the Committee on S.B. 89?

SENATOR CARE:
In section 1, subsection 3, would there be a circumstance when the defendant feels the need to sue special counsel for professional negligence?

MR. MUNN:
It would become relevant in a malpractice case.

SENATOR CARE:
It is something that could happen in the future. We have one exception with an application to withdraw as attorney of record. It is the same as suing in a fee dispute; you waive confidentiality.

MR. MUNN:
That may turn on the general law on waiver of confidentiality, but a statutory exclusion of evidence might come into play.

CHAIR AMODEI:
Do you need time to think about this?

SENATOR CARE:
You may not need it in statute except to clarify the record will be admissible in a rare case of professional negligence. I would prefer to see the language submitted into the bill.

CHAIR AMODEI:
There is a proposed amendment from Mr. Munn in Exhibit C, as well as changes from Senator Care to amend section 3 of the bill.

If there is nothing else, we will close the hearing on S.B. 89 and open the hearing on S.B. 129.

SENATE BILL 129: Makes various changes to provisions relating to guardianships. (BDR 13-1109)

KIM SPOON (Nevada Guardianship Association, Incorporated):
The Nevada Guardianship Association is a statewide organization with guardians working throughout the state.

GINNY CASAZZA (Nevada Guardianship Association, Incorporated):
I currently work as a paralegal and a registered guardian.

MS. SPOON:
What we would like to do is go through the bill and answer any questions. There is a memo (Exhibit D) showing a number of changes we would like put back, which were eliminated during the bill drafting stages.

In section 1, time limits given to guardians have not worked well. The first change is page 3, section 1, line 3, changing "60 days" to "120 days" to get information to courts with identification of the ward.

SENATOR CARE:
Are both of you guardians in Washoe County?

MS. SPOON:
My office is in Washoe County, but I am a private guardian so I can work throughout the state.

SENATOR CARE:
Is the 60-day limitation a problem statewide?

MS. SPOON:
Yes. We have guardians from Washoe County, Clark County and Carson City willing to speak on this issue.

SENATOR CARE:
Who is the guardianship commissioner in Clark County?

MS. SPOON:
I do not know, but Kathleen Buchanan is in Las Vegas. Sections 2, 3 and 4 deal with temporary guardianships. These are emergency guardianships where we do not have to go to court. A petition is presented to the judge explaining the emergency and why we need guardianship over a person. The judge looks at the petition and makes a determination. When the order is signed, a court hearing is held within ten days.

Proving temporary guardianship is a two-step process. On page 6, section 3, NRS 159.0523 deals with emergency guardianship due to potential, physical harm. On Page 8 in section 4, NRS 159.0525 is a temporary guardianship dealing with emergencies due to financial loss. Essentially, one section deals with the person, the other with the estate.

We asked for a change from the bill drafters for the financial loss period; instead, the wording was changed to make it consistent in all of the temporary guardianship statutes.

In section 4, page 8, line 28, the two-step process requires to prove facts showing the proposed ward faced an immediate risk of financial loss and lacked capacity to respond to that risk.

The problem is when we try to show a financial loss. We cannot prove this until financial statements are handed to the bank, and this cannot be done until guardianship letters are obtained. We can prove the ward lacks capacity and the risk is there, but we cannot always get the information needed to complete the first step. This has led to guardianship denials using the ten-day extension time; within those ten days, we cannot gain temporary guardianship nor the financial information or guardianship of the estate. Without this information, we cannot do placements or perform care plans; it puts the ward at risk if we cannot get guardianship of the estate.

When this bill was drafted, language was taken out. If you look on Exhibit D, we are asking section 3, page 6, lines 27 and 28 to read "Lacks capacity to respond to risk of harm or to obtain the necessary medical attention; and ... ." On page 8, line 30, the phrase should read "Lacks capacity to respond to the risk of loss; and ... ."

We can get information to the judge, but it is getting the financial documents and placing the ward at risk if we are unable to get into the estate.

SENATOR CARE:
I understand the attempt to make the language consistent. In section 2 dealing with minors, page 4, lines 40-42, do you want the language to remain the same?

MS. SPOON:
I do not see an issue with it and rarely deal with minors. It is not talking about finance but more on general guardianship.

SENATOR CARE:
Was this change requested by you?

MS. SPOON:
We only requested change on the financial; the change was made for the minor person and the estate.

SENATOR CARE:
The language in section 2, line 40, says, "Facts which show that the proposed ward [faces]." This sounds speculative. The new language says "is unable to respond to," as though there is a finding of fact.

MS. SPOON:
I am confused about this language. A minor, infant or six-year-old will not respond; therefore, how are they responding to harm? The term "faces" makes more sense.

ERNEST K. NIELSEN (Washoe County Senior Law Project):
In response to Senator Care, the word "faces" is general, and I am fine with it. Please see our concerns regarding S.B. 129 in the handout (Exhibit E).

MS. SPOON:
"Faces" makes more sense. I do not think any child is unable to respond.

SENATOR CARE:
It is under the presumption that the minor faces these risks.

MS. SPOON:
I see what the bill writers tried to do; I am not sure it is necessary in this particular statute.

KATHLEEN BUCHANAN (Clark County Public Guardian):
I agree with the terminology "faces."

MS. SPOON:
The next part on minors is page 5, line 13. Do you want to keep "may suffer"? I do not know if this needs to change.

The next subsections discuss temporary guardianships. Page 6, line 14 talks about the "two 30-day periods or for a longer period as fixed by the court." We are going to deal with two issues.

Page 6, line 24 talks about an adult who is at risk of physical harm or in need of immediate medical attention. We have no problems with this two-step process. We do not need to change this language, it does not present a problem.

MR. NIELSEN:
I agree with the deletions made for section 3, page 6. The language is fine.

MS. SPOON:
Section 4 needs changes. We have a difficult time getting records to prove financial loss. We can show the courts medical records, but to show financial loss is difficult until we get guardianship. For the benefit of the ward, we need this and have ten days to get the extension and prove financial loss.

MR. NIELSEN:
I am not sure if Ms. Spoon would like the language to remain on page 8, line 30.

MS. CASAZZA:
This is correct. We would like to keep the language on page 8, lines 27 through 30 to read, "Facts which show that the proposed ward is unable to respond to a substantial and immediate risk of financial loss; and Lacks capacity to respond to the risk of loss; and." Line 30 was stricken in the draft.

MR. NIELSEN:
There was one change in sections 3 and 4 we would like to adjust from the language in the draft. Page 6, lines 14 and 15 talk about the court extending the temporary status. There should be a cap. Currently, there is a cap after the ninetieth day. Our suggested language puts the cap at five months and could go up to six months. The first 30 days are still in statute; our suggestion is up to 2 successive, 60-day periods and showing cause for the extension. There are times when temporary guardianship needs to be extended beyond 30 days.

One issue is the process, and these extensions can be acquired by stipulation and approved by court order with justification affidavits attached to them. We are suggesting the language proposed in my handout, Exhibit E.

MS. SPOON:
We do not have a problem with the language. Last session, language was changed for the two 30-day periods after the initial 30-day extension before guardianship was put into place. We found it was still not enough and ended up with guardianships outside the statute.

We would like to keep costs down for the ward by not going back to court. Discussions have taken place with other guardianships, and there is no problem.

MS. BUCHANAN:
I have no problems with the language Mr. Nielsen suggested.

SENATOR CARE:
Regarding the third extension, would you be comfortable with language that suggested "reasonable longer period?" If this is uncomfortable, then I will go with the language you proposed.

MR. NIELSEN:
We would like a cap.

SENATOR CARE:
On page 8, section 4, line 28, did you want to delete "faces" and add the new language "is unable to respond to?" I view "faces" open to interpretation.

MS. SPOON:
What we would like to add in that section on line 28 is "Lacks capacity and is unable to respond to a substantial ... ." Mr. Nielsen mentioned the two 60-day cap; as long as there is a stipulation to save costs, there is no problem.

MR. WILKINSON:
On page 8, section 4, is there a desire to change line 28 to strike "faces" and retain line 30? I am trying to understand the conceptual difference: being unable to respond as opposed to lacking capacity to respond. Is there a qualitative difference?

MR. NIELSEN:
Initially, the language was to build up the first part of the two-step process to be something like capacity. Legally, capacity means someone no longer has the ability and requires the court make a determination.

MS. SPOON:
There are many reasons why a person is unable to respond to a financial crisis. When you are taking over someone's civil rights by entering into a guardianship, it is because they lack the capacity and the legal terminology is written into the

bill. The 30-day caps in sections 2 through 4 should be changed to 60-day caps.

SENATOR WASHINGTON:
What was the cap Mr. Nielson?

MR. NIELSEN:
Extending the time for an additional two 60-day periods resulting in a 5-month cap would extend this cap to 6 months and would be an additional 30-day extension.

SENATOR WASHINGTON:
This would mean two 60-day periods with a cap in 30 days?

MR. NIELSEN:
If we left it at the two 60-day periods, it would be a 5-month cap. I would be willing to go with that 6-month cap.

MS. SPOON:
This is agreeable. We would leave it open to the judge's discretion because sometimes it goes beyond six months. Language which states "or to the judge's discretion" might be better, especially for those temporary guardianships that exceed six months.

SENATOR WASHINGTON:
Are you requesting six months and leaving it to the judge's discretion after that time?

MS. SPOON:
I am not sure how to craft the language.

MR. NIELSEN:
We would like to have a cap and not leave it open-ended. The courts have an understanding of a time frame. Some cases go beyond; in those cases, we allowed a permanent order with a clear understanding from the court that it comes back and the permanent guardianship might change depending on factors involved after the six-month period.

SENATOR WIENER:
I have a concern with a fixed cap. Can there be language that states, "This is the cap except under extraordinary circumstances"? This would show intent with the language that the circumstance has to be extraordinary in order for the cap to be extended. Would this language address cap and extension of cap?

MR. WILKINSON:
There are other statutes with this kind of language. One proposal was "good cause," but if "extraordinary circumstances" is desired, we can add this language.

SENATOR WIENER:
That language would show legislative intent of the seriousness of a cap, "extraordinary circumstances" would have to be proven.

SENATOR WASHINGTON:
"Extraordinary circumstances" would be up to the judge's discretion; is this correct?

MR. WILKINSON:
Yes.

MS. BUCHANAN:
Guardians need a cap, and the two 60-day periods are a good cap. Language might be added to suggest at the end of the five or six months, leave it to the court's discretion. By changing the language to two 60-day time periods, we save the ward's estate by not having to go back to court after 30 days. For those cases that need an extension, we go to the courts.

LORA E. MYLES (Carson and Rural Elder Law Program):
I am the attorney for guardians in Carson City and work with other counties. There has to be a cap. I have not found a situation where a temporary guardianship required more than 60 days. It is obvious within the 30-day period if the ward requires a permanent guardian. The only situation for an extension was looking for family members, transfer of a ward to another state or transfer of estate to family.

SENATOR WASHINGTON:
Is there any concern with the language that Senator Wiener proposed?

MS. MYLES:
It needs to be worded for the judge to understand there has to be an extraordinary circumstance to continue beyond the two 60-day periods.

SENATOR WASHINGTON:
There seems to be consensus to include the language "extraordinary circumstance" to be determined by the courts.

MS. SPOON:
Yes, this language will work. In section 5, page 10, we would like to change language about guardians being involved with beneficiary accounts. There are bank accounts with beneficiaries that have cash value or insurance policies.

Sometimes, guardians need to close a paid-upon-death account designating a beneficiary. No funds are paid until then. We find ourselves in probate court to close insurance policies with cash value because it is required by Medicaid or it is the only account available. If it goes into probate, the heirs say it was their money we spent and they want it back. We have to pay.

The guardians are in a spot due to the beneficiary status of these accounts when you change the estate planning of the ward. We are asking that the language be changed as seen on Exhibit D for page 10, lines 32 through 35 and line 38.

The reason for the language change is because on lines 32 through 35, it says, "The guardian is not required to petition the court for an order authorizing the guardian to make or change the designation of a beneficiary in such assets if." We are not asking to change the beneficiary; we are asking to have access to the account and close it, if necessary, without penalty.

If it is the only asset remaining in this account, we need to close and use it for the benefit of the ward. Five-thousand dollars is the amount used for summary guardianship. If it is less than $5,000, it is changed to a guardianship through the courts, and we no longer have to do yearly accountings. To obtain benefits from Supplemental Security Income and Medicaid, we have to close insurance

policies with cash values and spend down policies over $1,500 to $2,000 to get the entitlements. We are asking for these exemptions.

SENATOR CARE:
I have a question about statutory interpretation or style. You want to replace the language in the bill with your memo, Exhibit D. If you add the word "and" at the end of line 38, does this mean this would happen in one of two cases where you have met the conditions in subsections 1 and 2 or subsection 3 alone?

MS. SPOON:
The reason we are putting the word "and" in subsection 1 is if the ward has an account over $5,000, then they can afford to go court to get it changed. If it is $5,000 or less, then it meets other statutory requirements throughout the guardianship.

MR. NIELSEN:
I proposed an alternative change based on the problem in probate court. This change is consistent with my proposal to delete the language and add a paragraph (e) to section 5 that focuses on bank accounts, life insurance policies that may have a beneficiary and allowing the ward to have access until death.

The word "assets" is broad; I am more comfortable with restricting the account types causing the problems.

MS. SPOON:
In our original draft, we specified bank accounts, insurance policies and investment funds with beneficiary status. In reading this, I am not sure if they want the language in to specify or leave "assets."

MS. CASAZZA:
The concern with being specific may lead to a long list. There are many assets that can have a beneficiary. It could cause confusion about what the guardian is allowed to utilize. Using "assets" encompasses all within the intent of what we want. If it meets the requirements, we want to enable the guardian to use the assets of the ward for the ward without going to court. I would not want something to slip through because we were too specific.

MR. NIELSEN:
Our position is to preserve choices the ward made in designating the beneficiary. If assets to support the ward are in conflict with the beneficiary, we would want the ward to be supported. I am not sure how the language should be structured.

MS. SPOON:
Section 6, page 12, line 13 contains a technical error. If you place the comma after "experimental," we cannot provide medical or behavioral treatment of the ward, and it needs to be stricken.

MR. NIELSEN:
I have no objections to this change.

MS. SPOON:
Section 6, page 12, lines 18 through 26 deal with "commitment." A guardian cannot commit a ward and was never part of that process. Only a judge can do this. There is a process before a person is committed. The ward is put on a 72-hour hold. This can be done through a psychiatrist or social worker. As a group, we would like to have the word "commitment" stricken.

MR. NIELSEN:
There is a legal process which screens involuntary commitment, so I agree to strike the word.

MS. SPOON:
Section 7, page 12, is another cleanup area. Paragraphs (a) through (g) are duplicate laws. We want to make sure the people reading the law understand there is another law more broad and explanatory. We ask "pursuant to" be put in as a reference to the other NRS.

MR. NIELSEN:
We agree with the change.

MS. SPOON:
Page 13, lines 4 and 21 were stricken and presented a problem. This section does not have pursuant to laws but an absolute. The language is broad and leaves guardians open to liability. Therefore, paragraphs (h) and (o) were incorporated in subsection 2, paragraphs (a) and (b).

MR. NIELSEN:
We do not want the guardian to do the decision making. We understand the concern of paragraphs (h) and (o) and suggest they be modified with the language "major actions" or "decisions." They should be able to act where situations change about placement from a person's home, a nursing home or out-of-state placement. We would like the guardian to come back to the courts for permission. We would like a one-word modification to (h) and (o) of "major" and delete subsection 2 entirely.

MS. SPOON:
What does "major" mean? We have a law to go to court to change an out-of-state residence. Removing a person from their home to a nursing home or from a group home to a nursing home is done constantly.

MS. BUCHANAN:
What is "major" for those who work in guardianship on a daily basis? We deal with lives with different circumstances. Incorporating the word "major" is confusing. I would like to see subsection 2 on page 13 stay.

SENATOR CARE:
Mr. Nielsen, are there circumstances where a guardian would need discretion to act in the best interest of the ward?

MR. NIELSEN:
I see it all the time and do not want to impede that. We are concerned about a broad policy change which may preclude the judge from ordering the guardian to come back to court to obtain permission to move the ward to an out-of-state placement. I am not sure if the language gives discretion to the guardian.

I have concern with section 7, subsection 2 and would like language that works for everyone that would resolve paragraphs (h) and (o).

MS. CASAZZA:
I disagree with Mr. Nielsen.

CHAIR AMODEI:
The positions have been stated. Any other arguments should be forwarded to Mr. Wilkinson.

MS. SPOON:
On page 13, line 11, we cannot do this without state law. The last change is on page 14 dealing with time limits. On line 8, we ask for 180 days. Many times, closing affairs cannot be done in 90 days, especially with major cases.

MS. BUCHANAN:
In reference to page 13, lines 23 through 28, are we going to leave this to a work session?

CHAIR AMODEI:
I understand you want what was proposed, and Mr. Nielsen is in opposition to that proposal. If you want to add to your position as to why you want the change, voice your opinion now.

MS. BUCHANAN:
I would like a friendly statute. All parties want to make it a stronger statute with more accountability. Subsection 2, page 13, only adds stronger accountability for everyone.

MS. MYLES:
The changes on page 13 are reasonable with strong limits. Certain actions taken with the ward are already incorporated into the statutes, and this leaves the small decisions in the hands of guardians.

SENATOR CARE:
This bill addresses the power of the courts; I would like to have something from the guardianship commissioner from Clark County.

MS. BUCHANAN:
Mr. Jon Norheim is the current guardianship commissioner.

CHAIR AMODEI:
We will close the hearing on S.B. 129 and open the hearing on S. B. 133.

SENATE BILL 133: Enacts provisions pertaining to civil actions involving liquefied petroleum gas. (BDR 3-77)

K. NEENA LAXALT (Nevada Propane Dealers Association):
With me today is Mark F. Krause, attorney and partner in Schlee, Huber, McMullen and Krause, P.C. I have provided the Committee with a biography of Mr. Krause (Exhibit F). Also with me is the Chief Inspector, Eric C. Smith, Board for the Regulation of Liquefied Petroleum Gas.

MARK F. KRAUSE (Nevada Propane Dealers Association):
I am here on behalf of the Propane Dealers Association. I have provided the Committee with an outline of my testimony along with information pertaining to civil actions involving liquefied petroleum gas (Exhibit G and Exhibit H).

While working on behalf of propane retailers and other associations, I have witnessed increased litigation against propane retailers and its effects. Most of these businesses are small and make up the heart of the propane industry and the association I represent.

The problem for this industry has been the person who modifies propane equipment resulting in accidents and increasing lawsuits. The gas company is unaware of changes made by the customer.

The argument is if someone else made changes to the equipment sold without knowledge of the gas company, how can they be held responsible? Efforts are constantly made to hold the dealer responsible. The dealer is often involved in litigation and found at fault when misuse of a propane product occurred.

Senate Bill 133 is a common-sense approach to a real situation. The Legislative Counsel's Digest of the bill talks about affirmative defense. It helps to make the litigation process fair by requiring the plaintiff to prove the defendant is responsible for the offense. Although the liability claim may be thin against the propane dealer, there is often sympathy for the victim and the propane dealer must prove it is innocent despite misuse or modification of the equipment by the customer.

Under the current law, a propane dealer is required to prove negligence on the part of the plaintiff. This bill creates a more specific affirmative defense by making it clearer when misuse or modification to the system occurred and caused the damages or injury.

Under this same Digest, the bill establishes a rebuttable presumption. It does not appear to be a significant break from present Nevada law. As in any bill or law being introduced, there will be opposition and assertions it takes away rights of an injured person not to be heard in court.

The language of the bill is specific. In instances, the propane companies can prove a change or modification to the system caused the accident which turns into an affirmative defense. This is true with rebuttable presumption. It gives an opportunity for the injured party to present case.

This bill is modeled after legislation in several states. Stress the importance of this bill to the industry. It is industry committed to safety. Propane dealers provide training to its employees and send information to customers on the safe use of their propane equipment. We ask the Committee to consider this measure.

CHAIR AMODEI:
The sign-in sheet will be part of the record to show others in favor of S.B. 133.

GRAHAM GALLOWAY (Nevada Trial Lawyers Association):
Is this special interest? There is no need for this legislation in Nevada. We are not aware of a mass exodus by the liquid petroleum industry, an increase in litigation against this industry or any recent case that prevents this industry from using the affirmative defenses they are referring.

The first part of the bill requests codification of affirmative defenses for the propane industry; there is a problem with this. These defenses are available to this industry without a statute and recognized by the Nevada Supreme Court. The courts recognize misuse and alteration of the product. By codifying affirmative defenses, you open the door for other industries to petition for special privileges.

The second part of S.B. 133 is problematic. This industry is asking for special treatment. They want a rebuttable presumption what they have done is proper and did not specifically address areas of product misuse or alteration. As I read the bill, it will apply to litigation involving the liquid petroleum industry and not just limited to misuse or alteration. If given a rebuttable presumption, the playing field is tilted against the individual bringing the lawsuit. That person is alone against an industry in having the burden of proof.

The legislation is not necessary because affirmative defenses are part of our common law and rebuttable presumption will not level the litigation field in favor of the propane industry.

SENATOR CARE:
How many statutory affirmative defenses are presently in court?

CHAIR AMODEI:
Mr. Galloway indicated product misuse has existing case law. The Committee will appreciate any information you can pass to Mr. Wilkinson.

We will close the hearing on S.B. 133. Seeing nothing else to come before the Committee, we are adjourned at 10:50 a.m.

RESPECTFULLY SUBMITTED:

_____
Gale Maynard,
Committee Secretary

APPROVED BY:

_____
Senator Mark E. Amodei, Chair

DATE: _____