MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fourth Session
March 23, 2007

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9:03 a.m. on Friday, March 23, 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 Valerie Wiener
Senator Terry Care
Senator Steven A. Horsford

COMMITTEE MEMBERS ABSENT:

Senator Dennis Nolan (Excused)

GUEST LEGISLATORS PRESENT:

Senator Joseph J. Heck, Clark County Senatorial District No. 5
Assemblyman Joe Hardy, Assembly District No. 20

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Committee Policy Analyst
Brad Wilkinson, Chief Deputy Legislative Counsel
Lora Nay, Committee Secretary

OTHERS PRESENT:

Warren Volker, M.D., Premier Physicians Insurance Company, Incorporated, A Risk Retention Group

Timothy McFarren, M.D.
Sandra Koch, M.D., The American College of Obstetricians and Gynecologists
Dan Musgrove, M.D., Associate Administrator, External Relations, University Medical Center of Southern Nevada
David C. Fiore, M.D.
Patrick T. Sanderson, Laborers' International Union Local 872
Lawrence P. Matheis, Executive Director, Nevada State Medical Association
Bill Bradley, Nevada Trial Lawyers Association
Ron Dodd, Municipal Judge, City of Mesquite
Christi Kindel, City Attorney, City of Mesquite
Jay D. Dilworth, Municipal Court Judge, Department 1, City of Reno
Reba June Burton
Russell M. Rowe, American Council of Engineering Companies of Nevada
Timothy Rowe, Associated General Contractors Nevada Chapter
Gary E. Milliken, Associated General Contractors Las Vegas Chapter
Fred L. Hillerby, American Institute of Architects

CHAIR AMODEI:
We will begin the hearing on Senate Bill (S.B.) 174.

SENATE BILL 174: 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 JOSEPH J. HECK (Clark County Senatorial District No. 5):
I will read my written testimony for the record (Exhibit C). I provided a packet of support material (Exhibit D, original is on file at the Research Library).

SENATOR CARE:
Is this legislation for the benefit of the doctor, patient or both?

SENATOR HECK:
It benefits both. The primary intent is to take care of the patient. Patients do not necessarily receive the emotional and mental side of the care they require when something goes wrong. In states where this legislation has been enacted, there has been a demonstrated decrease in malpractice suits. Research has shown the reason why most people file a malpractice suit is because of anger. If anger can be removed by being forthright with the individual and taking care of the

problems that arise from error, the vast majority of cases do not go on to filing a malpractice.

SENATOR CARE:
Page 2, line 8 of S.B. 174 encompasses expressions of "apology, regret, fault." Is there a difference between physicians who say, "I'm sorry" or "I'm sorry because I screwed up"?

SENATOR HECK:
For the purposes of this bill, there is no difference. The idea is to have patients know a mistake was made, apologize and then do what is in the best interest of the patient. The doctor is admitting fault.

WARREN VOLKER, M.D. (Premier Physicians Insurance Company, Incorporated, A Risk Retention Group):
I practice in Las Vegas and am Chairman of Premier Physicians Insurance Company, Incorporated (PPIC) formed by doctors and licensed to write malpractice insurance. Premier Physicians Insurance Company allows dialog between the physician and patient if there is a bad outcome. We have an active risk management program. Senate Bill 174 protects and strengthens the physician and patient relationship.

Early in my career, I was reprimanded for consoling grieving parents. Under PPIC, we coddle the patient and physician relationship. We encourage doctors to express feeling. There is no existing safe haven for physicians to express how they feel, which sometimes gives the impression doctors are cold.

SENATOR WIENER:
I have a contrasting example. Compare a doctor who performs a medical procedure in good faith and something goes wrong to a doctor who knowingly performs surgery in an inebriated state; are they both allowed the same privilege and protection? That concerns me.

SENATOR HECK:
The way the law is written, yes. If an inebriated physician told the patient he made a mistake and should not have operated, his admission is not admissible in court. That does nothing to allay the patient's anger who may file a malpractice suit. The bill would not prevent a suit; it protects an admission under knowing and willful circumstances.

TIMOTHY MCFARREN, M.D.:
I speak in support of S.B. 174. It is important for a physician, as a patient advocate and as a patient safety issue, to be able to speak candidly and honestly to a patient without fear of reprisal when there is a bad outcome. This is a patient safety issue. A patient's knowledge of what happened can be used to save their life in the future.

SANDRA KOCH, M.D. (The American College of Obstetricians and Gynecologists):
I am Chair of the Nevada Section of The American College of Obstetricians and Gynecologists. I support S.B. 174. Physicians should be able to apologize to their patients when something goes wrong. Trust is at the center of the physician-patient relationship; patients want to hear "I'm sorry," and they want to know what happened and why. Physicians are told by risk managers not to apologize and write off bills. When a baby has died, it is an act of human kindness not to send the parents a medical bill for services rendered, but risk managers tell us we cannot do that because it is an admission of guilt.

This legislation will enhance patient outcomes by protecting the sacredness of the physician-patient relationship from outside intrusions. It will encourage physicians to improve their communication with patients in difficult times when outcomes are less than perfect. It will improve the quality of health care for Nevadans with no extra cost.

DAN MUSGROVE, M.D. (Associate Administrator, External Relations, University Medical Center of Southern Nevada):
University Medical Center with its trauma center, burn center and emergency room deals with some of the toughest cases imaginable. This bill strengthens the communication between doctor and patient. Outcomes do not always happen as expected or wanted. We support S.B. 174.

SENATOR CARE:
I commend Senator Heck for bringing this bill forward because it injects a new debate that should have been part of the 18th Special Session when the focus was on frivolous lawsuits. Today, we hear doctors make mistakes and want to discuss that in a frank manner with their patients.

Say you have a trial and a doctor admits he screwed up and apologizes; if his statement is made in the presence of a jury, would that be admissible? What if a doctor is overheard to say he apologized but did not mean it and only

apologized because he did not want to get sued? Would his statement be admissible? I do not expect an answer.

DAVID C. FIORE, M.D.:
I am speaking as a private citizen. I teach an introductory course on patient care. We work on communication skills and humility, but there is the theoretical and then reality. A lawyer lectured on malpractice and advised students, "Never say I'm sorry." As a physician leader, I am proud of physicians in Reno and Carson City, but mistakes are made. The damage done to physicians who want to apologize and are not allowed is disturbing. The damage includes families and patients. Apologizing decreases medical malpractice suits and claims. We need S.B. 174 for healing.

SENATOR WIENER:
What about a willful, knowing incident where the doctor used poor judgment and put his patient at risk?

DR. FIORE:
This bill prevents an apology. For a physician who makes a gross negligence, the apology is not the issue. Other factors could be used. That physician may be immediately taken off staff whether he apologizes or not. The act is not protected, only the apology.

PATRICK T. SANDERSON (Laborers' International Union Local 872):
I am testifying as a private citizen. When a family member dies and the doctor apologizes, it makes all the difference in the world. I have had two parents die, and both of their doctors told me they were sorry. Lawsuits are filed because of frustration from the loss of a loved one. It is important to know somebody cares. There is nothing worse than a cold-blooded, coldhearted doctor who shakes your hand and says good-bye.

DR. KOCH:
In no way are the acts of a drunk doctor who harms patients protected from this law. Staff is required to report an inebriated physician, and a system is set up for people in the medical field who have problems with substance abuse. If a doctor harmed a patient and told the patient he was drunk, made a mistake, created harm and apologized, that patient appreciates the apology. The physician may still get sued, but there will be a different feeling about the outcome of that situation.

The doctor has to accept the fact of his behavior. It is a first step in getting rid of the problem. When there is a bad outcome, patients want an apology and an assurance this will not happen to somebody else. They want to know that the system's error has been fixed. When there is a system error and you are not allowed to publicly air it, you have a harder time finding a solution.

LAWRENCE P. MATHEIS (Executive Director, Nevada State Medical Association):
Due to evolution of patient safety and quality improvement movements, these were not part of the discussions about liability. A new statewide group is applying for a grant to implement federal acts concerning more transparency. Transparency should be open communication about what happens in the health care system so families, purchasers and providers can make judgments about what needs to be done. These laws try not to have artificial impediments to fixing problems in the health care system. The managed care insurance coverage system has made continuity of relationships between patients and their physician more sporadic. The absence of communication has to be bridged technologically and by people free to talk to each other. We support S.B. 174.

SENATOR HECK:
The goal of S.B. 174 is to open communication and ensure patients receive the mental, emotional and physical support they need. Apologies need to be sincere at the time the error was recognized. It is important and reasonable to ensure provisions within the language make the apology contemporaneous. Apologies at a later time could be suspect. The only protection for the physician is the statement and actions to the patient or their family. If an apology is made as a defensive move and relayed to someone else, that information is admissible.

BILL BRADLEY (Nevada Trial Lawyers Association):
The Nevada Trial Lawyers Association opposes S.B. 174. Any bill impacting the civil justice system must reinforce the concepts of accountability and responsibility. Due to the initiative, the deck is stacked against victims of medical negligence. Joint and several liability was abolished with the expressed statements of physicians saying if they caused harm, they would be held responsible.

A sincere apology does not address patient concerns. Later, if there is a malpractice case, the patient hears the doctor deny ever apologizing, it does more patient harm than good. It becomes a judge's duty to determine whether the apology was an admission against interests and if it should be admissible. In

my experience, it is held not admissible because it is not an admission against interests.

Victims want an explanation of what happened. Cases arise in hospital settings where a lack of communication between hospital staff and physicians produces harm. The two entities cannot come together to explain what happened to a family. In certain cases, a medical malpractice will not be filed because money damages are not going to do any good. In other cases where a family loses the breadwinner, they have to proceed with a medical negligence case. Having to fight in court about what happened and learning an apology means nothing in court extensively harms the patient and the patient-physician relationship.

Another problem is the idea of transparency. Another proposed bill creates a peer review committee to investigate the circumstances of an incident. Findings of a peer review committee are inadmissible in court. Let us abolish the privilege on the peer review committee and open up this process. If the truth is known by the physicians, hospital and patient, then remember who we are missing in that conversation. The entity not here today and never here on these issues is the insurance industry.

Where things break down and there is a dispute between insurance companies representing the hospital and physician as to who is at fault and how much they will fight for years trying to resolve that issue, we should be able to tell the jury what happened and have everybody agree. If they are willing to say an apology is admissible, these issues will be resolved.

Any sincere attempt to reconnect with the victims should start with a thorough and accurate explanation of the seminal event. What will be changed to prevent the same circumstance from occurring again and how those responsible for the harm, fix the harm, opens up the process. If litigation follows, the thorough and accurate explanation those patients received at the front end of this event should stand in court because the truth is the truth.

I have never been involved in a case, either representing a physician or a victim, where an apology comes into evidence. I have taught classes at the medical school and encouraged residents and students to be candid in their explanations. That PPIC already does this without statute is responsible insurer coverage unique to the insurance industry in Nevada.

I want to address Dr. Koch's comment about writing off the medical bill. In my 25 years of practice, I have never seen a medical bill written off. I have seen the part insurance did not pay written off. I am in favor of a transparent process, but a transparent process means honesty in explaining the situation on the front end and making insurers responsible when the physicians and the hospital personnel are willing.

CHAIR AMODEI:
Senate Bill 174 says "apology, regret, fault, sympathy, commiseration, condolence or compassion." Nothing requires an explanation of what exactly happened. When you say what people want is an explanation, this bill does not deal with an explanation. This bill deals with "I'm sorry."

MR. BRADLEY:
I agree with you. Lawyers are the people victims come to because they cannot get an explanation.

CHAIR AMODEI:
This bill does not make "I'm sorry" privileged.

MR. BRADLEY:
I agree with you. Testimony from physicians said everybody wants to apologize to the patient and tell what happened and how to avoid another incident.

CHAIR AMODEI:
The bill in front of us says "I'm sorry." What is here for a vote, unless somebody offers an amendment, is "I'm sorry." The litigation process is for testimony about the explanation in terms of finding out what happened through depositions and other expert testimony. Here in the bill is "apology, regret, fault, sympathy, commiseration, condolence or compassion." I am trying to focus on what is in front of the Committee and on our record.

MR. BRADLEY:
All the words, other than "fault," leave out the issue of explanation. I struggle with the goal to reconnect. In order to reconnect, there has to be an explanation. This bill does not do that. It makes that apology inadmissible and does not make the system more transparent to reconnect with the patient.

CHAIR AMODEI:
This bill goes both ways. The apology cannot be used by either the defense or the plaintiff. How do you read it?

MR. BRADLEY:
Testimony coming into evidence is not an admission against interests. It is a simple expression of compassion.

SENATOR CARE:
Since this is a recent movement, there may not be case law on this issue. The word "fault" falls under the penumbra of sympathy. Is there any case law? The word "fault" leaps out. Could you substitute the word "liability"?

MR. BRADLEY:
The insurers are not going to let physicians say they were at fault under any insurance policy as there is a cooperation clause. If I were advising physicians, I would recommend not saying they are at fault because they will run into problems with the cooperation clause.

SENATOR CARE:
Let us go back to the contemporaneous aspect of the legislation. A physician, who is not even thinking about insurance coverage, feels so guilty, so badly that right then and there he says, "I'm sorry, I messed up." Once he said it, that is an admission of fault and too late for the carrier to do anything about it, right?

MR. BRADLEY:
Not necessarily, it is never too late for the carrier to do something about it. "I'm sorry" does not come in under current law. "I'm at fault" comes into evidence. Once the lawyers and insurance companies convince the doctor not to admit to anything, it does not do much to reconnect and bridge the gap between physicians and their patients.

SENATOR HECK:
The last speaker pointed out why this bill is necessary. In the heat of the moment we do not want the physician at the time of an incident to say with true empathy, "I'm sorry I made a mistake," and return six months to a year or two later when it is in litigation and deny ever making that statement. Perhaps it harms the patient or the patient's family more than the actual incident. If that statement was not admissible, that issue never comes to the forefront. The

American Bar Association Health Law Section of *The Health Lawyer* in January 2007 has an entire article on whether physicians apologize for medical errors. I will read one short section:

> What are the practical implications for the physician who has made a medical error? The physician is already obligated to disclose the error—by professional ethical considerations, regulatory requirements, and statutes in many states. The requirement of disclosure makes it increasingly awkward and perhaps risky to avoid an accompanying apology. An apology meets a primary need of the patient. Denial of that need is at the top of the reasons why patients file suit. What's more, an increasing number of states have Apology Laws to protect apologies (sometimes including accompanying statements of fault) from admission into evidence
>
> In light of these considerations, the traditional view that a physician should not apologize for a medical error appears not only to be mistaken but often to be the precise opposite of good advice.

This legislation is necessary to help those who are harmed by inadvertent errors.

SENATOR WASHINGTON:
If the physician makes a claim or discloses he was at fault, should that one word "fault" be inadmissible or admissible?

SENATOR HECK:
If you provide a sincere apology—and research shows exactly what Mr. Bradley stated: the person wants to know what happened, why it happened and how to prevent it from happening again—just saying "I'm sorry" does not meet that need. They want to know the entire thing, which is part of the healing process for them. In order for that to be accomplished and explain the process, the individual has to admit fault. You cannot say, "I'm sorry that your loved one died," but if you say, "I'm sorry, and this is what happened"—through that process, unfortunately, fault is part of that disclosure—but that is what the patient or the patient's family needs to become whole.

SENATOR WASHINGTON:
I, as a consumer, might take my vehicle to a mechanic to have it repaired and in the process of repairing that vehicle, they sever a hose and cause irreparable damage to the engine. When I confront the mechanic, he admits fault and is responsible for damages caused by severing the hose. What is the difference between a physician or that mechanic admitting fault?

SENATOR HECK:
You do not sue your mechanic for damages if they take care of the problem. In the medical arena, physicians want to take care of the problem, but if we admit to a mistake, it may be used against us if a patient decides to file suit. This bill does not preclude the individual from going forward with any litigation should they so desire.

CHAIR AMODEI:
We will close the hearing on S.B. 174 and open the hearing on S.B. 216.

SENATE BILL 216: Allows certain convicted persons to make a monetary donation to a charitable organization in lieu of performing community service. (BDR 14-929)

SENATOR MCGINNESS:
Senate Bill 216 was requested only to give judges another option. I have been told it was meant for rich, fat-cat speeders or driving under the influence (DUI) offenders who want special attention. That is far from the case. Judge Ron Dodd can relate cases regarding elderly offenders who are ill and unable to do their community service. This proposal gives judges an option because community organizations may be reluctant to use these offenders for community service. Judge Dodd can tell you about out-of-state offenders who go to their community organizations to do community service and have problems because their sentence is not from a local jurisdiction.

CHAIR AMODEI:
A letter dated March 20 from Laurel Stadler as president of Mothers Against Drunk Drivers (Exhibit E) will be made a portion of our record today.

RON DODD (Municipal Judge, City of Mesquite):
I have been on the bench for 22 years and have seen changes in our society including the aging of our population. Because of that aging population, we find

ourselves in the predicament where many of these people cannot do community service. It is a frustrating experience. These people need to be responsible and do everything the Legislature mandates.

I will give you an example. An older lady on oxygen came into the courtroom. She had come to Mesquite and got arrested for DUI. Because of mandatory DUI laws, I was obliged to sentence her to 48 hours of community service, whereon she informed me it was physically impossible for her to do community service. I was in a quandary because I could not have the City of Mesquite force her to perform the community service which may result in a medical problem.

I did not have any alternatives, and that is why I am here. I assure you I am consistent and known among my peers as fairly hard-nosed. My intention is not to get anybody out of doing community service. This is not something I would use on a regular basis. It is those instances for people who cannot do community service or are from out of state.

SENATOR WIENER:
Discretion would be given to courts to allow the donation to a charitable organization when a person is incapable of rendering or performing community service. The language gives the option to do a monetary donation which is broader and makes it easy just to write a check. Are you saying this discretion would be used sparingly?

JUDGE DODD:
It would be sparingly used. I want all the discretion you will allow because situations regularly come up where I have to tweak the sentence and do things not normally done in normal situations.

SENATOR WIENER:
Would you give an example where the incapability issue is outside of medical incapability where you still want discretion for money versus service?

JUDGE DODD:
Another issue involves Mesquite as a border city. We get a tremendous number of people who come to Mesquite to party.

SENATOR WIENER:
They would be incapable because of distance?

JUDGE DODD:
Yes, they are not incapable in the sense they cannot do service, they are incapable because they want to go back to Colorado to do their community service. That is not fair for the citizens of Nevada because Nevada is where they committed the offense. I prefer to have the option, if they cannot stay another week, to have them make a donation and then go back to Colorado.

SENATOR WIENER:
I see that as an incapability because they are not physically present. That is a geographical limitation. I am concerned this language is so broad it could become a convenience. Public service was mandated because when you put in 48 hours, you remember for 48 hours what you did that was inappropriate behavior.

CHRISTI KINDEL (City Attorney, City of Mesquite):
Mesquite is a retirement community. With our aging population, we have unique problems when it comes to sentencing. This month, an older woman was in our court. She was deaf and required an interpreter. Her sentence involved mandatory community service. We have concerns about her safety when she performs her community service. With an older population, you do not want these people on the side of the highway, especially if they cannot hear. We frequently have defendants on oxygen or dealing with some form of physical disability which renders them incapable to perform community service.

Frequently, people come to Nevada and inhibitions are left behind. They do things perhaps they would not ordinarily do. We are not saying their offenses are less serious because they make a donation to a charity. We are saying for those offenses committed in Nevada, it is the State of Nevada and its citizens who should be reimbursed. They should be made whole for that offense.

I have a letter from a Colorado attorney who was sentenced in a DUI case. He is seeking permission to extend because his home jurisdiction neither understands the terms of his out-of-state sentence nor wants to accept him for community service.

Another problem is the nature of community service has changed. Technology has changed how we interact and perform tasks. In the past, someone who was not as capable physically could sit at a desk and stuff envelopes for a fund-raiser. With technology, they are not able or lack the skills necessary. It

is cost prohibitive because it requires too much supervision and training. Lawyers tell charities they are running a risk by having these people in their place of business. There are charities in the City of Mesquite that will not allow people to do community service with them anymore because of those type concerns.

JAY D. DILWORTH (Municipal Court Judge, Department 1, City of Reno):
I am opposing S.B. 216 on my own behalf. I am concerned with the philosophy. The language says if you have money, you do not have to do the community service. That philosophical situation sends a bad message. There are a number of problems with this bill. This bill involves community service orders at the desire of the judge. Who chooses the charity? Judges are prohibited by canons of ethics to solicit money for a charity. Who sets the amount? It is wide open.

While I agree there are people who cannot do community service, this bill does not say that. It says anybody can be allowed to pay a charity rather than do community service. It turns what is supposed to be a penalty around to getting a tax write-off. The purpose of penalties is for deterrence or rehabilitation. Benefit to a local jurisdiction is not one of the normal reasons for sentencing. If a person can afford to make a donation, they can pay a fine.

Reno is on a border too. Part of the problem a person faces is they are responsible to find a place in their local jurisdiction if community service is mandated. That is their problem, not mine. I did not commit the crime. I give them 30 days to find a recognized, national nonprofit charity to do their community service and get it approved. Occasionally, they do not do it and a warrant gets issued that may affect their license in their own state or they show up in a couple years and find there is a warrant for their arrest. We should not codify a situation that says if you have money, you do not have to do community service.

JUDGE DODD:
Who chooses? Who chooses now? That does not need to change. You could add an amendment saying the City of Mesquite or a local government entity picks. I do not want the responsibility of picking community service organizations. The amount is always an issue that can be addressed.

SENATOR HORSFORD:
I disclose that I serve as the executive director of a nonprofit charitable foundation. It will not affect my opinion and I will participate in the discussion.

ASSEMBLYMAN JOE HARDY (Assembly District No. 20):
The City of Mesquite is in my district, and I appreciate the common sense approach by Judge Dodd. I appreciate the bill's intent to have an additional option, certainly not to be automatic in every instance nor to discriminate by helping people who have greater financial resources. If you do something in our community, then you should do your time and do your fine in our town. The community that has been "violated" should have an opportunity to have themselves made whole. We would be amenable to an amendment. A public hearing could decide which charitable organizations could qualify.

For the record, I support S.B. 216 as does Senator Warren B. Hardy II, Clark County Senatorial District No. 12, who also represents Mesquite.

REBA JUNE BURTON:
I live in Washoe County. With changes, this bill would be especially good for rural counties which do not have a lot of places to do the community service. A fee schedule is needed. Each community could take applications for different places such as graffiti removal or the library system, but it needs to be stated. The bill does not say it is just for older people, which means anybody with money could pay their way out of community service. There needs to be strong guidelines. Can the offender write this off as a tax deduction? There has to be accountability.

CHAIR AMODEI:
We will close the hearing on S.B. 216 and open the hearing on S.B. 243.

SENATE BILL 243: Requires an affidavit and a report in an action against certain design professionals involving nonresidential construction. (BDR 2-695)

I disclose that I am a member of a law firm with members who are registered lobbyists and have worked on S.B. 243. I have filed a disclosure under *Nevada Revised Statute* (NRS) 281.501 which is on file with the Director of the Legislative Counsel Bureau as a public document. I further disclose that I have not accepted a gift or loan from the client of the law firm on behalf of this. I have no pecuniary interest, nor does the law firm, in the passage or failure of

this bill, and I do not have a private capacity to the interest of others with respect to this bill. That is as a result of the application of the Nevada Commission on Ethics Opinion No. 99-56, "In the Matter of the Opinion Request of Bruce L. Woodbury, Clark County Commissioner," where it would not, if passed, affect the clients of the law firm I am affiliated with any differently than other people similarly situated.

RUSSELL M. ROWE (American Council of Engineering Companies of Nevada):
I am here on behalf of S.B. 243 which is certificate of merit legislation. A certificate of merit requires an attorney making a claim against a design professional—an architect, engineer, landscape architect or land surveyor—to file an affidavit concurrently with the pleading stating there is a reasonable basis to bring a lawsuit in a nonresidential construction defect matter. This bill mirrors the language already in NRS 40 for residential construction defects and merely expands it to nonresidential construction defect claims, bringing uniformity to Nevada statutes. Thirteen other states have similar laws and none of those states distinguishes between residential and nonresidential construction defects. Those statutes are broader than this bill and apply to any action brought against a design professional for any claim of negligence. This bill only applies to construction defect claims and specifically nonresidential claims.

A construction defect claim against a design professional, unlike claims against a contractor or subcontractor, is a professional negligence claim. To prove a professional negligence claim, you have to show the design professional failed to meet a standard of care. There is only one way to prove that. You have to bring an expert to the hearing to show the standard of care and that the design professional fell below that standard of care. Attorneys have to find an expert to prove their case. The certificate of merit requires the expert earlier in the proceedings. They review the case to show merit to a claim and a reasonable basis to proceed with a suit.

The public policy behind this legislation is to limit meritless lawsuits against design professionals but keep access to the courts. This helps the court system because it streamlines cases by clarifying the parties, which results in fewer parties in a case, less discovery, speedier trials and greater chance of settlement, all of which help alleviate the backlog and caseload in our district courts. It does not bar access to the courts, but it does ensure cases have merit. This bill applies whether you file the claim as a plaintiff or you are a defendant making a third-party complaint.

TIMOTHY ROWE (Associated General Contractors Nevada Chapter):
The Associated General Contractors (AGC) oppose S.B. 243. There is no crisis in construction defect litigation in commercial settings. These cases do not involve multiple plaintiffs or multiple buildings. They involve an owner, contractor, maybe a design professional and one or two subcontractors. Design professionals are not brought into commercial construction cases with meritless claims. There is at least arguable merit behind the claims. Legislation is not necessary in the area of commercial construction litigation.

Another problem is an affidavit where a report is required to be filed with the court. They become a public record. I cannot understand why any engineer or design professional would want that kind of information in the public record. It will make cases more difficult to settle. From the standpoint of AGC wherein a contractor is involved in a lawsuit and there may be claims of design deficiency, these kinds of lawsuits are more difficult to settle. They often involve complex issues and problems. In some situations, S.B. 243 presents an obstacle in settling those kinds of cases.

GARY E. MILLIKEN (Associated General Contractors Las Vegas Chapter):
This legislation will significantly delay and increase costs for commercial construction and settlements or decisions as it complicates issues.

FRED L. HILLERBY (American Institute of Architects):
I support S.B. 243. Having expert testimony ahead of time or an affidavit helps clarify a legitimate claim and lead to settlements.

SENATOR CARE:
I am going to incorporate the disclosure I made the second week of the session which is on file with the Legislative Counsel Bureau. Like myself, Mr. Timothy Rowe is a partner in the firm of McDonald Carano Wilson, Limited Liability Partnership.

CHAIR AMODEI:
We will close the hearing on S.B. 243.

We have a bill draft request (BDR) from the Governor's Office with the usual disclaimers on not being obligated to support in Committee or on the floor.

BILL DRAFT REQUEST 14-1426: Revises provisions relating to the registration of sex offenders and offenders convicted of a crime against a child. (Later introduced as S.B. 471.)

SENATOR WASHINGTON MOVED TO INTRODUCE BDR 14-1426.

SENATOR HORSFORD SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS McGINNESS AND NOLAN WERE ABSENT FOR THE VOTE.)

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CHAIR AMODEI:
We are adjourned at 10:41 a.m.

RESPECTFULLY SUBMITTED:

Lora Nay,
Committee Secretary

APPROVED BY:

Senator Mark E. Amodei, Chair

DATE: