

**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY**

**Seventy-fourth Session  
February 6, 2007**

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 8:09 a.m. on Tuesday, February 6, 2007, in Room 2149 of the Legislative Building, Carson City, 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  
Senator Steven A. Horsford

**STAFF MEMBERS PRESENT:**

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

**OTHERS PRESENT:**

L. Patrick Hearn, Executive Director, Commission on Ethics  
James Kosinski, Former Senator; Chair, Commission on Ethics  
Janine Hansen  
Jan Cohen, Commission General Counsel, Public Utilities Commission of Nevada  
Larry L. Pinson, Executive Secretary, State Board of Pharmacy  
Louis Ling, General Counsel, State Board of Pharmacy

**CHAIR AMODEI:**

We will call the meeting of Senate Judiciary Committee to order. Our Committee Rules appear the same as last session ([Exhibit C](#)). If no one has any objection, do I hear a motion?

Senate Committee on Judiciary  
February 6, 2007  
Page 2

SENATOR WIENER MOVED TO ADOPT COMMITTEE RULES FOR THE  
74TH SESSION OF THE SENATE COMMITTEE ON JUDICIARY.

SENATOR MCGINNESS SECONDED THE MOTION.

CHAIR AMODEI:

Is there discussion on the motion? Is anyone opposed to the adoption?

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR AMODEI:

The Committee may want to move on with the Senate Judiciary Committee Brief ([Exhibit D](#), original is on file in the Research Library).

LINDA EISSMANN (Committee Policy Analyst):

Pages 1 and 2 of the Committee Brief [Exhibit D](#) summarize the jurisdiction of the Committee; it has not changed from last session. Page 3 is an overview of significant legislation this Committee considered last session. The Committee had 136 measures combined with the Senate and Assembly that comprised about 14 percent of the bills introduced last session. Details are available in the summaries.

On page 12 are a few items the Committee may hear this session. In the interim, studies concerning pardons, sentencing, parole and probation, yielded eight recommendations for legislation; those bills will start on the Assembly side.

Pages 13 through 15 list general subject areas from the bill draft request (BDR) list and may come to the Committee. Also included are deadlines for this Committee; pages 16 and 17 are important contact information.

CHAIR AMODEI:

On page 13 regarding administrative assessments, a bill introduced yesterday dealt with this issue in some traffic context. Will you check whether this is legal and why it was sent to us?

Ms. EISSMANN:

I believe it was Senate Bill (S.B.) 58.

**SENATE BILL 58**: Provides for the imposition of an administrative assessment for certain traffic violations to be used for the awarding of grants to volunteer organizations that provide emergency medical services. (BDR 14-221)

The bill was rereferred to the Senate Committee on Transportation and Homeland Security.

CHAIR AMODEI:

Ms. Eissmann is the primary point for scheduling. I want to hear similar bills at the same time to lend continuity to the Committee.

BRAD WILKINSON (Chief Deputy Legislative Counsel):

Before we hear testimony regarding due process, the Chair requested a brief discussion of key differences between the Nevada Administrative Procedure Act, codified in chapter 233B of *Nevada Revised Statutes* (NRS) and the revised Model State Administrative Procedure Act (MSAPA).

The MSAPA is a model act proposed by the National Conference of Commissioners on Uniform State Laws (NCCUSL). This organization proposes uniform acts on various topics. The difference between a uniform act and a model act is NCCUSL uniformity due to jurisdiction. In the model act, uniformity is not compelling and states make revisions to reflect specific needs. The NCCUSL is revising the MSAPA with further changes. This Committee will consider many of those uniform acts.

I will highlight key differences between the current version of MSAPA and chapter 233B of NRS. This chapter was originally adopted in 1967 based on the 1961 version of the MSAPA. A newer version of MSAPA was adopted in 1981 and amendments made to NRS 233B reflect some provisions from the 1981 MSAPA revision.

MR. WILKINSON:

There are notable differences between the provisions of chapter 233B NRS and the latest revisions of MSAPA. *Nevada Revised Statute* 233B.122 pertains to disqualification of certain members from participating in adjudication of

a contested case. The MSAPA contains additional grounds for disqualification of a presiding officer. Specific procedures in the MSAPA allow a party to request disqualification and a presiding officer to determine whether a member is disqualified. This officer must state in writing why disqualification is or is not required.

*Nevada Revised Statute 233B.126* prohibits ex parte communications between parties. The MSAPA provisions make permissible explanation of technical or scientific information received from agency staff part of the record, and opposing party has the opportunity to respond. The MSAPA remedies for violators of the ex parte rule include disqualification of the presiding officer and sealing portions of the record pertaining to ex parte communication.

The MSAPA authorizes the presiding officer to issue subpoenas consistent with the rules of civil procedure. The MSAPA gives authorization for disclosure of witness statements, writings, investigative reports and other materials and provides for the use of protective orders where warranted. It allows the presiding officer to issue and enforce discovery orders pursuant to the rules.

Regarding availability of orders to the public, chapter 233B of NRS contains no provision addressing public inspection and copying of records; in contrast, the MSAPA includes provisions requiring an agency to index orders and records for public inspection and copying, except orders exempt through confidentiality, privilege or protected from disclosure. Justification for not making an order public must be made in writing and attached to that order. It provides that where a protective order may be adequately redacted, this order may be indexed and published, and the agency may not rely on a final order as precedent in future adjudications unless indexed and made public.

One important distinction between chapter 233B of NRS and MSAPA, according to NCCUSL, is creation of a centralized Office of Administrative Hearings (OAH) to separate adjudicatory, investigatory, prosecutorial and policy-making functions of the agency. This is one reason for updating the MSAPA; 30 states have implemented a centralized OAH.

The OAH consists of administrative law judges appointed by the governor through a judicial nominating commission or hired by competitive examination or the chief administrative law judge.

The chief administrative law judge is required to have experience with administrative law; devote full time to the duties of the office; cannot engage in the outside practice of law; may be reappointed; must be a licensed attorney with five years of experience; is subject to the code of conduct for administrative law judges; can employ support staff; supervise the OAH; appoint and remove administrative law judges; randomly assign cases received by the OAH; protect and ensure decisional independence of the administrative law judges; establish and administrate standards for equipment, supplies and technology. The chief administrative law judge also provides and coordinates continuing educational programs and services for other administrative law judges; informs judges of changes in law; adopts regulations; monitors the quality of adjudication in disputed cases through training, observation and feedback; and when necessary, disciplines for failure to meet appropriate standards of conduct and competence. The chief administrative law judge may be removed for good cause following notice and an opportunity for a disputed case hearing.

All agencies must cooperate with the chief administrative law judge in the discharge of duties of the office which includes provision of information and coordinating of schedules. An agency may not select or reject a particular administrative law judge for a proceeding. The administrative law judge shall exercise the power of a presiding officer.

Finally, the MSAPA includes provisions for adoption of administrative regulations. Those provisions are not as detailed as chapter 233B of NRS.

CHAIR AMODEI:

This comparison was requested because this Committee had jurisdiction over civil, juvenile and criminal procedures. We spoke with members of the Senate Committee on Government Affairs who had the subject matter jurisdiction in chapter 233B of NRS, but said our Committee should have jurisdiction over administrative procedures as well. Although not policy, the state of the Senate rules we have all such procedures centered in one committee. Therefore, anything that deals with administrative procedures is within the jurisdiction of this Committee.

I and other members looked at the administrative procedure and due process of the Model Act. During the next session, we may take a look at this model to

see if something can be done to standardize procedures. We now open the meeting to agencies that may have presentations.

L. PATRICK HEARN (Executive Director, Commission on Ethics):

My handout ([Exhibit E](#), original is on file in the Research Library) contains relevant administrative regulations our Commission adopted under the Nevada Code of Ethics; Attachment A is a copy of your May 2005 letter to Senator Barbara K. Cegavske with your concerns and a brief biographical sketch of myself.

JAMES KOSINSKI (Former Senator; Chair, Commission on Ethics):

Members on the Commission are concerned about procedural due process. Thomas P. Wright, former Mineral County District Attorney, appeared before our committee on behalf of public officials and indicated his satisfaction with our procedures and conduct.

CHAIR AMODEI:

There was concern at the time with the issue of ethics. This was not just about ethics, but what this entity does; your procedures should be beyond reproach. The changed regulations responded to concerns raised. Please look at page 2 of Attachment A to [Exhibit E](#), third amendment; the suggestion came from former Chair of the Commission on Ethics, Rick R. Hsu. If you start the investigation, are in charge of enforcement and of the judgment, this blurs the line of separation.

We tried to have them enforce their opinions while having the ability to self start an investigation and be objective. This action encompassed two functions: enforcement-investigatory and judicial. It is expected that the Commission will change over the years. For the record, "it was brought up by Commissioner Hsu in the discussion two years ago and I think he was right. You do need the ability to enforce your orders without question. But the ability to be both the investigative arm and the judicial arm of a procedure is one that bares a little more thought."

SENATOR KOSINSKI:

This is the reason why the Commission has not adopted regulations providing a method for us to enforce our own opinions without violating due process.

CHAIR AMODEI:

If any more thoughts come to mind before the end of session, please let the Committee know.

SENATOR CARE:

What education is received by commissioners regarding NRS or the *Nevada Administrative Code*?

SENATOR KOSINSKI:

When a new commissioner is appointed by the Governor, he/she is provided a copy of the statutes and regulations and reviews them with legal counsel. We have no formal class; it is ongoing.

SENATOR CARE:

Based on materials I read, there are conflicting interpretations of definitions. When you discuss what a statute means, it takes you into the realm of due process.

On the issue of bias, what do we do when a commissioner comes before the legislature to testify and offers an opinion? I am in favor of one voice coming from the Ethics Commission.

SENATOR KOSINSKI:

I am not aware of that situation. The statute provides the Commission can interpret the statutes and issue opinions. A member of the Commission should not render opinions. The issue you speak of concerns the executive director rendering an opinion and raises the question of what are the boundaries of the executive director. We do not allow our staff to issue a formal written opinion to advise a public official what they are allowed to do under the statute. If further guidance is needed, you have a right to submit a request to the Commission for an advisory opinion. It is my understanding that hypothetical opinions can be used.

CHAIR AMODEI:

Commissioner William Flangas of the Commission on Ethics sent a letter to the entire body of the Legislature about his beliefs; portions of this letter may indicate strong feelings and have nothing to do with fact or circumstance. As a citizen of Nevada, he has every right to voice his opinion. The problem is by

being a voting member of the Ethics Commission; his letter may be a basis for question.

SENATOR KOSINSKI:

I was not aware of that letter.

CHAIR AMODEI:

This is about the process where the Commission renders opinions prior to completing investigations and hearings.

JANINE HANSEN:

I am a member of the Independent American Party and represent myself. There has been issue with the Commission on Ethics and due process. A decision was rendered by the district court in favor of my organization. Later, the Nevada Supreme Court overturned the decision. Based on this decision, several of our candidates received notices from the Secretary of State of a \$2,000 fine and did not run for the office. One month later, the former Secretary of State rescinded the fine using the district court's decision two years prior.

I am pleased this Committee is taking a look at due process. I suggest it be a trial de novo? The decision of an administrative court can be appealed.

JAN COHEN (Commission General Counsel, Public Utilities Commission of Nevada):

I handed out a general organizational chart ([Exhibit F](#)) which shows the Commission divided into two parts: Policy/Administration and Regulatory Operations. The Commission would never initiate an investigation on its own, only through a party that wanted an investigation or a request from staff.

Page 1 is The Right to Intervene in Public Utilities Commission of Nevada (PUCN) Proceedings ([Exhibit G](#)); page 2 of [Exhibit G](#) is entitled PUCN Restrictions on Ex Parte Communications. These are often contested cases.

The last handout is entitled Restrictions on Ex Parte Communications: Statutes and Regulations ([Exhibit H](#)). This limits communications of an agency member rendering decisions in a contested case.



Senate Committee on Judiciary  
February 6, 2007  
Page 9

Substantive issues must go before the entire PUCN for a vote, and petitions are handled by the general counsel and must be acted upon within 60 days. These are general overviews of our procedures.

CHAIR AMODEI:

Regarding restrictions, in [Exhibit G](#) page 2, is there a restriction without a remedy?

Ms. COHEN:

We have never had this situation. If there was a remedy, general counsel would tell the commissioner not to speak with staff.

CHAIR AMODEI:

If the prohibited conduct occurs, there is nothing in this provision stating someone else will make judgment. It is the remedy in similar situations.

Ms. COHEN:

If a known ex parte occurred, the other party would have a right to raise this as an issue. It can be brought to the attention of the commissioner who may void the decision, ask for a new presiding officer or take it to court.

CHAIR AMODEI:

Since the context of the discussion is administrative, there is no procedure for prohibited conduct in regulation to say, "If this has happened, here is an administrative procedure, and if true, get someone new on a per-case basis."

Ms. COHEN:

We look at our regulations constantly and make the appropriate changes.

SENATOR CARE:

Senate Bill No. 428 of the 73rd Session amended NRS 233B.127. Has the presiding commissioner ever invoked passage of NRS 233B.127, subsection 4?

Ms. COHEN:

No. The jurisdiction remains with the Commission. It is more a question of, whether the party is affected by the proceedings. The jurisdiction uses its own regulations.

SENATOR CARE:

Do you know the genesis of legislation in 2005 to make these changes?

MS. COHEN:

No.

CHAIR AMODEI:

Is there any public comment on the PUCN presentation? We will close public comments. The Legislative Commission deals with regulations for out-of-country pharmacies. A question was raised on a tort-claim issue. If someone was injured by a prescription from another country, what recourses are available? The response was to pull that prescription provider's license. This Committee has dealt with out-of-state, not out-of-country, circumstances. In that case, it was about dairy; the Secretary of State's Office assured us they had the proper paperwork. I want to recap the regulations and jurisdictions for out-of-country pharmacies.

LARRY L. PINSON (Executive Secretary, State Board of Pharmacy):

Our program has nine licensed pharmacies in Canada. The program started approximately June 2006, and I requested data to see if the pharmacies were in compliance with regulations. In a 4-month period, June 2006 through August 2006, 810 prescriptions were filled. From this information, we had one complaint dealing with an error in the expiration date. The complaint was investigated and resolved.

There were complaints about the hundreds of pharmacies we do not license through the Internet. The volume of usage is down due to Medicare Part D, the strong Canadian dollar and use of Internet pharmacies not licensed through our organization offering cheaper medications.

CHAIR AMODEI:

There is a problem of non-licensed operators who are not regulated. Then there are legitimate pharmacies that filed the necessary paperwork to do business with Nevadans. If a problem results in personal injury or death of a Nevada citizen, is there any thought to a requirement for special registration through the Secretary of State's Office? Pharmacists make mistakes. We do not want a person to make a value judgment and give up rights for the price for medications.

SENATOR WIENER:

Internet pharmacy was an issue in the past several sessions, and it was my understanding we have the strongest laws in the country. Do we not have laws for remedy due to injury?

LOUIS LING (General Counsel, State Board of Pharmacy):

Yes, we do, and we use the act. When we get a notice or complaint from the public, we send an e-mail to their Internet service informing them a felony is being committed. The plug is pulled on that pharmacy's Website. Once this is done the problem is, they come back using an alias. We have never gone to the next level, which is prosecution.

The only thing we got out of the Canadian side was an agreement to adhere to our administrative laws. Meaning, we investigate matters in Nevada and they investigate matters in Canada; if a violation occurs, the pharmacy loses its license. Canada feels they should not be subject to our laws if a personal injury occurs that was not part of the legislation.

CHAIR AMODEI:

This Committee has jurisdiction over the tort-claim aspects. Based on your discussions, licensed businesses are not subject to civil jurisdiction in the State of Nevada for personal injury, and this is a concern. It is important people know through information or legislation when choosing a pharmacy.

SENATOR WASHINGTON:

Is anything established about notification that if you purchase drugs from Canada, the State of Nevada is not liable for any civil suit due to injury or damage? The public needs to know the risk in purchasing these prescriptions.

MR. LING:

Yes. The Website for the Office for Consumer Health Assistance contains a disclaimer. Anyone accessing Canadian Website pharmacies are informed the waiver applies. The waiver states you cannot sue the State of Nevada.

SENATOR WASHINGTON:

The State of Nevada is protected against civil suits due to harm.

MR. LING:

Yes. The waiver was drafted by the Governor's general counsel.

CHAIR AMODEI:

Do any other states have a program like ours for out-of-country prescriptions?

MR. PINSON:

No.

CHAIR AMODEI:

How do we compare with other states about civil process?

MR. LING:

Other states create a contract with Canadian pharmacies to serve their citizens. Nevada is the only state that licenses these pharmacies, enabling some control.

CHAIR AMODEI:

Are you aware of any gubernatorial contracts dealing with civil process?

MR. LING:

In the ones I researched, the same protections were built into those contracts; you could not sue the state. An agreement could not be reached on the personal injury issue. Canadian pharmacies may not participate in these programs if they risk exposure to personal liability.

CHAIR AMODEI:

Is it your opinion that by enacting something to cover personal liability, this may cause the pharmacies to avoid licensing and doing business with Nevada?

MR. LING:

I am basing this discussion with pharmacies we have licensed. The market is changing for pharmacies and civil liability is a concern. Market-based incentives may deal with insurance companies that want to stay in Nevada despite the possibility of your suggestion.

CHAIR AMODEI:

This program may expand in the future based on supply. Making legislation to repeal this is not a direction to pursue. When people make a choice, they make a value judgment and trust the job will be done correctly. If not, consumers need to know up front they are on their own for resolution.

MR. PINSON:

Once you sign up with a pharmacy you have to fill out a form as part of enrollment. Some registering sites are more up front in their clauses to let the patient know a problem arises; they may have to pursue remedy in Canada.

CHAIR AMODEI:

If we are the only state with a statute, we may want more of a notice besides saying read the fine print.

SENATOR WASHINGTON:

Let us go a step beyond the pharmacy to the manufacturer. If a manufacturer that has not been licensed or sanctioned by the Food and Drug Administration (FDA) is supplying a pharmacy in the three provinces, what liability and/or protection does the state have?

MR. LING:

This was important to the State Board of Pharmacy. Drugs coming into the United States have a National Drug Code number unique to that drug. In Canada, they have a Drug Identification Number (DIN) equivalent to our FDA. The only drugs sold with DIN numbers are the same drugs sold to Canadians.

We want to ensure no foreign drugs are sold to us through Canada; when we do an inspection, we look for the DIN number. If a Canadian pharmacy serving Nevada gets drugs without DIN numbers and sells them to Nevadans, it would be serious for us but more so for Canada.

MR. PINSON:

The Canadian domestic drug supply is safer than ours due to lack of secondary wholesalers and counterfeiting, unless it is coming offshore.

SENATOR WASHINGTON:

We should be concerned about offshore manufacturers because they do not have identification numbers.

MR. PINSON:

Yes, many times the drugs are sent to an alleged Canadian pharmacy. We found Websites that had nothing to do with Canada. The prescription is then shipped to some other part of the world and from there to the patient. Patients brought in prescriptions with no ties to Canadian pharmacies.

SENATOR WASHINGTON:

My doctor prescribes a drug with a dosage; what is the civil liability to the state if I misuse the prescription? How are you protecting yourself to make sure the consumer uses the drug as prescribed?

MR. PINSON:

One agreement with the pharmacies in Canada is they must counsel the patients.

SENATOR WASHINGTON:

Is the pharmacy saying they dispense drugs based on the doctor's prescription?

MR. PINSON:

No. The pharmacies call the patient to make sure they understand how to take the drug. There is an established 800 number for the consumer.

SENATOR WASHINGTON:

How does the state ensure a consumer is not doctor-shopping for drugs of habit?

MR. PINSON:

Regulation does not allow Canadian pharmacies to ship controlled substances.

SENATOR WIENER:

Regarding direct manufacturer to pharmacy, the word wholesaler was mentioned. How would this work with wholesalers? Are our laws operating well?

MR. LING:

Yes, our laws are operating well. Nevada is no longer a place for bad wholesalers, and they are no longer interested in participating in our program.

MR. PINSON:

We have one secondary wholesaler in this state.

Senate Committee on Judiciary  
February 6, 2007  
Page 15

CHAIR AMODEI:

We need answers on amenability and civil liability in terms of consumer protection. If a mistake is made due to a pharmacy operating under our existing law and the patient receives a drug from Canada that hurts or kills him, civilly, what is the procedure? Does this person have to go to Canada and hire a lawyer? If we change the laws, would this make doing business in Nevada less favorable? The Committee needs advice and would appreciate answers.

Public comment is closed. If there is no other business to come before the Committee, we are adjourned at 9:46 a.m.

RESPECTFULLY SUBMITTED:

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Gale Maynard,  
Committee Secretary

APPROVED BY:

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Senator Mark E. Amodei, Chair

DATE: \_\_\_\_\_