

**MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY**

**Seventy-fourth Session
April 3, 2007**

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 9:02 a.m. on Tuesday, April 3, 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
Lora Nay, Committee Secretary

OTHERS PRESENT:

Jim Gibbons, Governor, Office of the Governor
Phillip A. Galeoto, Director, Department of Public Safety
Kathy A. Hardcastle, Chief District Judge, Department 4, Eighth Judicial District
John R. Johansen, Highway Safety Representative, Office of Traffic Safety,
Department of Public Safety
R. Ben Graham, Nevada District Attorneys Association

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Cotter C. Conway, Washoe County Public Defender
Jason M. Frierson, Clark County Public Defender's Office
Scott Canepa, Nevada Trial Lawyers Association
David Brown, Former Assemblyman; State Contractors' Board
Keith L. Lee, State Contractors' Board
Renee Parker, Chief of Staff, Office of the State Treasurer

CHAIR AMODEI:

We will open the hearing on Senate Bill (S.B.) 471.

SENATE BILL 471: Revises provisions relating to the registration of sex offenders and offenders convicted of a crime against a child. (BDR 14-1426)

JIM GIBBONS (Governor, Office of the Governor):

It is a pleasure to be before your Committee in support of S.B. 471. I will read my written testimony into the record ([Exhibit C](#)).

PHILLIP A. GALEOTO (Director, Department of Public Safety):

The role of the Division of Parole and Probation is managing individuals for reentry into the community and making it as successful as possible, for as long as possible, to reduce the rate of recidivism. Our responsibility is protecting communities from potential violations and criminal activity. Senate Bill 471 is comprehensive and closes loopholes. Before sex offenders come out of incarceration, we make certain where they are going to be registered by directing them to appropriate law enforcement agencies. Just as important is the biological specimen databank. Their records are available nationally and internationally. We can track individuals, as needed, to make certain we know who might be responsible for criminal activity.

This bill provides financial support for local law enforcement agencies who register offenders coming from out of state. A proposed amendment ([Exhibit D](#)) allows local law enforcement to collect and retain the same fee of \$150 charged to individuals living in-state.

CHAIR AMODEI:

We will close the hearing on S.B. 471 and open the hearing on S.B. 277.

SENATE BILL 277: Authorizes the court to assign certain offenders to a program of treatment for certain offenses. (BDR 43-888)

SENATOR WIENER:

I support S.B. 277. The Clark County District Attorney's Office has been engaged in the Serious Offender Program for about eight years. The District Attorney said we needed statutory support, and S.B. 277 will codify the program.

KATHY A. HARDCASTLE (Chief District Judge, Department 4, Eighth Judicial District):

Senate Bill 277 allows Nevada courts the ability to identify and treat felony driving under the influence (DUI) offenders who are severe public safety risks. This program targets those with chronic drug and alcohol problems who repeatedly make the decision to drive. In 1998, possible solutions were discussed about the ever-increasing revolving door of felony DUI offenders who were rapidly repeating offenses despite a prison term and statewide release programs established for felony DUI offenders developed in 1993. Hence, a pilot project was implemented to determine if diverting felony DUI offenders into an intensive therapeutic program before imprisonment would benefit the state.

After initial success in 1999, the Office of Traffic Safety recognized the program's potential and awarded Clark County a three-year grant. The Serious Offender Program has continued success and received national recognition from the National Commission Against Drunk Driving. The National Highway Traffic Safety Administration identified the Serious Offender Program as a national best practice program.

Section 1, subsection 1 of S.B. 277 requires treatment programs must be certified by the Department of Health and Human Services, Health Division, which provides appropriate consistency and accountability treatment services. The program must last at least three years. Research demonstrates the longer a person remains in treatment programs, the better the outcome. Under section 3, the offender must pay program costs. Serious Offender Program costs are \$5,924 in the first year, \$3,244 in the second and \$2,594 in the third, for a total cost of \$11, 762.

Section 1, subsections 2 and 3 provide a mechanism for entry into a program of treatment, subsection 4 allows a suspended sentence up to five years. We

encourage you to consider changing "must" to "may" on page 3, line 9 to allow judges to not reward a failing DUI felony offender credit for time served in the program. We will mandate house arrest for six months. Section 1, subsection 4, paragraph (c), subparagraph (3) reduces the felony third violation to a DUI second except for enhancement purposes. If the offender picks up another DUI, it is automatically a felony.

Subsection 5 follows the current admission procedures set forth between courts and the treatment community. We require DUI coordinators who are licensed alcohol and drug counselors to provide screening and evaluation. Subsection 6 requires six months of house arrest. Costs of house arrest are covered by the offender. House arrest fees have a sliding scale so no one is turned away from this program because they cannot afford it.

Section 1, subsection 6, paragraph (b) requires installation of a breath ignition interlock in a vehicle for at least 12 months. Our Serious Offender Program requires breath ignition interlock be installed for the entire term, and a breath ignition interlock be installed on any other vehicle to which the offender may have access. Subsection 6, paragraph (d) requires random drug and alcohol testing in addition to the breath ignition interlock. If we suspect a participant continues to drink, we install an in-home breath testing device. This device requires breath samples at a time determined by the coordinator for the court. A camera is located within the device, and the results are sent to the coordinator via the Web. The cost for this device at \$2 per day is borne by the offender.

Subsection 7 provides that participants can only use the provisions of the statute once. Subsection 7, paragraph (b) prohibits using the statute for those who have caused substantial bodily harm, death or vehicular homicide.

Clark County has had successful participation and outcomes with the Serious Offender Program as shown in my handout ([Exhibit E](#)). It shows program statistics for the past eight years. We had 716 participants, 171 currently active and 356 total graduates. A total of 177 offenders have gone to prison with a recidivism rate of 12 percent which is below prison outcomes. No treatment provided in prison has the impact of this program. We can save the state money in prison costs and provide value to society by convincing offenders to quit drinking and driving.

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JOHN R. JOHANSEN (Highway Safety Representative, Office of Traffic Safety, Department of Public Safety):

I am manager of the Impaired Driving Program. My testimony is presented in my handout ([Exhibit F](#)). The three charts on pages 8, 9 and 10 illustrate the problem and the success of the program.

SENATOR CARE:

Section 1, subsection 3 says "At the hearing on the application for treatment, the prosecuting attorney may present the court with any relevant evidence on the matter." It continues, "If a hearing is not held" Would there be a hearing or not?

CHIEF DISTRICT JUDGE HARDCASTLE:

Entry into the treatment program is done pursuant to negotiation. Offenders usually enter a plea of guilty and sentencing is deferred, allowing them to apply to the program. The program coordinator determines if they fall within the parameters, overviews participants and works with other treatment providers. If offenders are successful, they are allowed to withdraw their plea and the court reduces it to a second DUI. Occasionally, someone wants to make application to the program where there is no negotiation; at that time, a hearing would be set.

R. BEN GRAHAM (Nevada District Attorneys Association):

The Nevada District Attorneys Association does not support S.B. 277 but acknowledges the Serious Offender Program works. We plan to present amendments. District attorneys ask to be removed from the initial agreement provision on page 2, line 6 of section 1 by removing "provided that the prosecuting attorney agrees."

We want qualifying language included on page 3, lines 16 and 17 "for purposes of employment except those requiring carrying of firearms," which makes clear offenders are not allowed to carry firearms and associate with other known felons.

SENATOR MCGINNESS:

Would this program be available in rural counties?

MR. GRAHAM:

It would be. This proposal gives all 17 counties authority to establish this effective program.

SENATOR MCGINNESS:

I understand having authority, but in reality, it is only a two-county system. Rural counties do not have treatment resources and end up putting offenders in jail.

MR. GRAHAM:

Right now, it is a one-county system. Larger counties encourage pooling of resources in various rural counties

SENATOR CARE:

You are seeking a change to "the misdemeanor for purposes of employment." A potential employer has access to the Central Repository for Nevada Records of Criminal History to do background checks. What would the Criminal Repository say?

MR. GRAHAM:

I am not clear as to what access employers have. A provision in the record sealing statute says an offender can answer no if asked whether they have a conviction, but page 3, lines 17 and 18 say "must remain on his record of criminal history." I do not know what access an employer has to criminal history.

SENATOR CARE:

I am trying to foresee circumstances; if I am correct, employers do have access. The applicant says no felonies, and then the employer comes back and says, hey, you lied, it says felony; then the applicant says yeah, but it does not count.

MR. GRAHAM:

Our initial thoughts were to pull that whole section out.

COTTER C. CONWAY (Washoe County Public Defender):

My office supports S.B. 277. We do not have a problem with the first amendment suggested by the District Attorneys Association. Our concern with the second suggested amendment is we do not understand what the district attorneys are worried about. The incentive is to get offenders into treatment and avoid a felony. We do not support a change. If they do not want an individual convicted under this statute to have a firearm, they should add that and not use that as a limitation to the treatment of a misdemeanor.

JASON M. FRIERSON (Clark County Public Defender's Office):

We support S.B. 277 in its original form. Of the suggested amendments, my concern is incentives to complete the program and not recidivate if the felony component is a benefit to completing the program. The success and recognition of the Serious Offender Program works extremely well.

CHAIR AMODEI:

We will close the hearing on S.B. 277 and reopen the hearing on S.B. 553.

SENATE BILL 553: Makes various changes to provisions relating to construction. (BDR 3-960)

SCOTT CANEPA (Nevada Trial Lawyers Association):

The Nevada Trial Lawyers Association (NTLA) is opposed to S.B. 553 as a matter of policy and practice. Sections 2 through 7 create the construction defect equivalent of the former medical-legal screening panel. It was a failed policy and scrapped. Section 8 purports to limit the qualifications of people deemed inspectors creating a good old boy network. The bill specifically says no more than 10 percent of income may be generated as an expert witness or inspector leading to the conclusion that existing contractors in the community will be used. The inescapable result is we are going to have Joe, the subcontractor, inspecting his friend's work on Wednesday and vice versa on Thursday. Not good public policy.

I disagree with yesterday's testimony on the nature of the premise for this legislation. We heard insurance companies are telling contractors not to fix their mistakes, which is not our experience. In those instances where contractors want to make repairs, they are not involving their insurance companies. In a majority of instances, contractors are waiving the right to repair—and their opportunity to correct their own mistakes as part of a business decision—and leaving those repairs to insurance companies.

We share concerns for creating a Contractor Licensing Commission. Previous testimony stated subcontractors are making repairs yet cannot get out of a lawsuit. This problem has to do with the nature of the contract between subcontractors, general contractors or the owners.

I take exception to the idea S.B. 553 will weed out frivolous lawsuits. I served on the Governor's Construction Liability Task Force that asked the building

industry to identify cases dismissed as frivolous and instances of Federal Rules of Civil Procedure 11 sanctions issued by the judiciary or examples of attorneys representing contractors seeking Rule 11 sanctions against lawyers representing homeowners. Not a single instance was brought forward during six months of testimony. No frivolous construction defect claims need to be addressed vis-à-vis the vehicle in this bill.

In the section of the bill establishing fees initially paid by contractors, we were told the industry will pay them. We all know it is a stealth tax on homeowners because those fees are going to be passed through to new home buyers at the time of purchase. Not only is the bill in its current form contrary to the Governor's policy of no new fees, there is also a substantial fiscal note.

Sections 9 through 11 effectively abolish one sub-executive branch of government, the State Contractors' Board, and replace it with no less than three entities, adding additional time before homeowners can seek legal redress. Senate Bill 553 does not give authority to anyone to make a contractor fix anything.

In *Nevada Revised Statute* (NRS) 40, the minimum time before a party can seek recourse in our civil justice system is 150 days. This legislation adds a minimum of an additional 45 days. The time lines are unrealistic. The time needed to legitimately identify the defects, and formulate repair recommendations that will permanently cure the problem cannot be done in the proposed 15 days. On nonstructural defects, the bill says the inspector has 15 days from the date he is given the assignment to issue his report. For structural defects, the inspector has 30 days. Construction defects are complicated structural problems that may take months to diagnose and formulate repairs. Senate Bill 553 oversimplifies problems confronted by homeowners who bought homes defectively constructed.

An unclear part is when the bill seems to purport giving power to a new agency, the Nevada Construction Authority, after abolishing the State Contractors' Board. It will have no authority over contracts or people who do not have licenses. The vast majority of entities responsible for the construction and sale of residences are not licensed. They are limited liability corporations or other business organizations that do not possess a license. Licenses are contracted out. If a homeowner with a legitimate indemnity claim has to go through the

suggested process, it could be months or even years before the homeowner can seek redress through the civil justice system.

The NTLA believes this bill subverts a homeowner's right to seek justice through the civil justice system for the reasons I have described.

SENATOR CARE:

In the summer of 2002, the Legislature met for medical malpractice tort reform. I raised the issue, and the doctors made it clear they wanted to get rid of the medical screening panel. They said their reason for doing so was because California's Medical Injury Compensation Reform Act did not have a screening panel. I cited a Nevada Supreme Court case talking about the purpose of a medical screening panel, and the doctors still wanted to get rid of it. The screening panel also applied to dentists. It is just gone because that is the way the doctors, shortsighted in my opinion, wanted it.

Let me ask you about Rule 11. Does the insurance industry lean on subcontractors to settle rather than run the risk of filing a motion to dismiss or a motion for sanctions under Rule 11? They would rather pay \$15,000 than expose themselves to a \$5 million or \$6 million judgment. Some subcontractors are named as third-party defendants in lawsuits that should not occur. It is apparent there are numerous parties to all manner of litigation in the realm of construction defects. Do you have a personal opinion whether subcontractors are needlessly named as third parties? What would your suggestion be to reduce the number of lawsuits getting filed in the first place?

MR. CANEPA:

In 99 percent of cases, subcontractors are first brought into a case vis-à-vis a third-party complaint, not from the homeowner. There is a tendency for the insurance industry to spread the risk by naming subcontractors to seek contribution from subcontractor entities. We are seeing a subrogation case played out in the primary case because insurance companies are suing each other's insureds for the purpose of obtaining money to pay the claim to the homeowner. Homeowners' attorneys do not have any role in doing that. If the claims were completely illegitimate, we would have seen identifiable effort by subcontractors to seek Rule 11 sanctions.

Is it possible mistakes are made by lawyers representing general contractors and owners in suing the wrong people? Lawyers are humans just like contractors.

Has a pattern developed where lawyers representing general contractors, developers and owners are suing subcontractors for no legitimate reason? I have not seen that, and it has not been my experience.

DAVID BROWN (Former Assemblyman; State Contractors' Board):

On behalf of the State Contractors' Board, I was tasked to make comments on provisions of concern to Board members. You asked the State Contractors' Board to produce concepts or ideas with regard to resolving the matter. There was a 6-to-1 vote in opposition to the bill among members.

Their concern was the perceived incursion into the adjudicatory process by an executive agency and dealing with rights involving private parties in a civil dispute. Third-party inspectors make either a recommendation or ruling impacting any subsequent civil matter. Under section 7, that ruling would shift the burden of proof by creating a rebuttable presumption depending on the ruling.

Another concern is section 8 with oversight of third-party inspectors. In particular, section 8, subsection 6 has the Commission reviewing financial and tax documents to determine the income ratio of gross income and income relative to third-party inspection activities.

Additionally, section 10, subsection 3 says the recommendation of a third-party inspector must address only constructional defect based upon the applicable warranty. It does not define the warranty issue making its meaning unclear to us. Most contracts are purchase agreements for a home and include a one-year warranty. Does this section cover a period or is the recommendation relative to the constructional defect based upon a one-year period which would eviscerate any statutory limitation?

Section 10, subsection 6 of S.B. 553 provides for extending the process if the third-party inspector determines more time is needed. The extension may be granted by request of either party. There is evidence in Texas these things have been protracted resulting in great discontent of the homeowner.

Section 11, subsection 1 uses the term "the recommendation shall be deemed final." We question how it relates to NRS 233B regarding judicial review. Section 18, subsection 5 incorporates a decision from the Construction Commission into NRS 233B judicial review parameters. Is a decision by one of

the third-party inspectors subject to judicial review? If that is the case, who files as it is not a typical disciplinary action? Is the homeowner or the contractor entitled to seek judicial review? Is the Commission required to defend in the matter? Extensive costs are involved in judicial review in district court and would be a financial burden on the Commission.

If judicial review is permissible, is the review based upon a limited record with no hearing? There may be a hearing if it is appealed, although it is not provided for in the statute. If there is judicial review, will it be a total and complete remedy for an aggrieved party? We had matters where a suit outside of judicial review was rejected by the court and sent back to the Board for failure to exhaust remedies. There is concern they will be foreclosed from civil litigation, and their only recourse will be through judicial review.

KEITH L. LEE (State Contractors' Board)

Nevada Revised Statute 40.6887, amended in 2005, provided for voluntary inspection by the State Contractors' Board to attempt an early resolution of a construction defect issue. Since July 1, 2005, 38 defect complaints have been voluntarily submitted for inspection by the State Contractors' Board. Approximately 80 percent were determined to have a construction defect and one of those was successfully resolved through the mediation dispute process. We need to figure out why people are not taking advantage of this process.

The State Contractors' Board has prepared a fiscal note showing a fiscal impact of \$5.2 million over the biennium if S.B. 553 is passed.

CHAIR AMODEI:

What is the current biennium budget for the State Contractors' Board?

MR. LEE:

It is approximately \$3 million per annum.

CHAIR AMODEI:

The Contractors' Board operates on \$3 million. If this bill passes, would we have to double it and add another 60 percent?

MR. LEE:

They are about \$7 million per biennium. This proposal would result in three new entities. The Contactor Licensing Commission would do exactly what it does

now and probably yield the same budget of \$7.5 million per biennium. The Contractor Commission might be a wild card. If it were to incorporate all construction defect claims, I can imagine the kind of burden that would put on any agency. I can conceive of that having at least a similar budget. Then there is the Nevada Construction Authority, which is the umbrella entity that may be that additional percentage.

ASSEMBLYMAN BROWN:

I practice law and represent contractors, general contractors, subcontractors, suppliers and, in a few instances, individual homeowners. There is an opportunity of right to repair. One case had 16 inches of subsidence in the backyard extending into neighboring yards. The homebuilder would not acknowledge the problem until counsel was brought in and sent an NRS 40 letter. It was unreasonable for them to deny responsibility, but they were playing a finger-pointing game with the pool contractor.

I usually get involved representing a subcontractor or supplier when they do not have insurance. I had one client named in a defect lawsuit because a bid was found in the documentation. He never performed work. It took at least six months to get him out of the lawsuit. This is an example of naming parties that should not be included. It is an ethics issue and tough to legislate. There should be sanctions in those instances and tools given to the judiciary for getting those parties out.

One idea is to use the mediation process more effectively. Skilled and knowledgeable mediators cost tens of thousands of dollars. If the mediation is unsuccessful, the mediator still collects his fees. At the end of mediation, the knowledge gained could be used to issue some kind of report that could be used if the matter concludes in litigation. A mediator has great knowledge with regard to specific sets of defects that could be put to use.

Our firm has a client who has gone through the subrogation process because he clearly had no liability; he had no insurance that could ante up the money. We defended him and obtained summary judgment. Legal fees were about \$100,000. We are interested in seeing what type of award the judge is returning. We hope it is not watered down. He deserves to be compensated for those fees and absolutely had no responsibility in the defect matter.

CHAIR AMODEI:

We will close the hearing on S.B. 553, and we will open the hearing on S.B. 519.

SENATE BILL 519: Makes various changes relating to abandoned property.
(BDR 10-496)

RENEE PARKER (Chief of Staff, Office of the State Treasurer):

I will read my written testimony and present an amendment to S.B. 519 and a packet of scenarios explaining why the amendment is necessary ([Exhibit G](#)). We have cash flow problems transferring unclaimed property money to the Millennium Scholarship Program. The remainder of the bill facilitates holders to get money, to return money to the rightful claimants and to give the money to the state in compliance with Governmental Accounting Standards Board (GASB) Statement 34.

Statute provides we transfer \$7.6 million of unclaimed property money to the Millennium Scholarship Program at the end of each fiscal year (FY). In [Exhibit G](#), we have three scenarios showing potential Millennium Scholarship funding. The first uses numbers provided by Global Insight giving yearly projections of money from the tobacco settlement. The second has a 10-percent reduction because during the past two years, Global Insight has been about 10 percent off, and we suspect this is probably where we will be for this year. We also show a reduction of 18 percent because for FY 2007, that is the estimate of the tobacco settlement monies. Going forward, a reasonable estimate is somewhere between the 10-percent and 18-percent projections.

If you turn to the 10-percent reduction estimate, you will see in FY 2009, we begin having cash flow problems. We do not have funding problems for the Millennium Scholarship Program. We have a cash flow problem above the line transferring the \$7.6 million at the end of the fiscal year. Spring tuition payments are due to the university earlier. In the past, the university floated us and is not happy with that scenario. The proposed amendment changes the word "at" to "by" allowing us to transfer funds to timely meet spring tuition payments.

Another proposed change is in section 1. Previously identified claimants under \$50 could be aggregated. It is difficult to identify who we are sending the money back to. The change gives a better description of items under \$50, and we are more likely to return it to rightful owners when we can identify account numbers or owners. If it is aggregated, it is limited information.

SENATOR CARE:

As drafted, does the bill contain all the language in the Treasurer's Office amendment to S.B. 103, which is the revised Unclaimed Property Act?

SENATE BILL 103: Adopts the Uniform Unclaimed Property Act (BDR 10-718)

MS. PARKER:

We made amendments to Senator Care's bill, S.B. 103, on unclaimed property that is repeated in the amendments here, including the additional amendment I provided you today.

Other than my change in section 2 with the amendment, section 2 through the end of the bill brings us in compliance with GASB 34 that changed financial reporting requirements. The State Controller's Office has determined, through their interpretation of GASB 34, this has to become its own account instead of a fund.

CHAIR AMODEI:

We will close the hearing on S.B. 519.

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CHAIR AMODEI:
We are adjourned at 10:22 a.m.

RESPECTFULLY SUBMITTED:

Lora Nay,
Committee Secretary

APPROVED BY:

Senator Mark E. Amodei, Chair

DATE: _____