MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-fourth Session
February 7, 2007

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 8:15 a.m. on Wednesday, February 7, 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
Brad Wilkinson, Chief Deputy Legislative Counsel
Lora Nay, Committee Secretary

OTHERS PRESENT:

Alice A. Molasky-Arman, Commissioner of Insurance, Division of Insurance, Department of Business and Industry
Janice C. Moskowitz, ACAS, MAAA, Lead Actuary, Property and Casualty Section, Division of Insurance, Department of Business and Industry
Chip Wallace, Provider Communications Director, Nevada Mutual Insurance Company
Richard C. Bray, Executive Vice President, Nevada Mutual Insurance Company
S. Daniel McBride, M.D., F.A.C.A., Chairman, Nevada Mutual Insurance Company
Fred L. Hillerby, Director, Independent Nevada Doctors Exchange
Bill Bradley, Nevada Trial Lawyers Association
Lawrence P. Matheis, Executive Director, Nevada State Medical Association

CHAIR AMODEI:
Today we will revisit the issue of medical liability, the availability of insurance for medical providers and information concerning rates.

ALICE A. MOLASKY-ARMAN (Commissioner, Division of Insurance, Department of Business and Industry):
With me today are Janice C. Moskowitz and Charles B. Knaus, State of Nevada actuaries for the Division of Insurance, Department of Business and Industry. They work on a daily basis with medical malpractice and will answer complex questions.

I will read my prepared written testimony (Exhibit C), and you have a PowerPoint handout (Exhibit D). I have also submitted a copy of the order which enabled the privatization of Medical Liability Association of Nevada (MLAN) into Independent Nevada Doctors Insurance Exchange (INDEX) (Exhibit E) and a handout titled Medical Professional Liability Insurance (Exhibit F, original is on file in the Research Library).

SENATOR WIENER:
I have a concern about regulation by the Division. Slide 6 of Exhibit D says, "Will be subject to full regulation by the Nevada Division of Insurance." Have you had continuing authority over MLAN? The way your statement is phrased, I get the impression you have not had authority.

MS. MOLASKY-ARMAN:
We have had continuing authority because MLAN was established by a regulation of the Commissioner. Independent Nevada Doctors Insurance Exchange will remain under the supervision and regulation of the Division.

SENATOR MCGINNESS:
You indicated five insurers were willing to write policies in Clark County. Are there any problems with writing in rural Nevada? Do doctors in rural Nevada have any problem getting coverage?

MS. MOLASKY-ARMAN:
We are not aware of any problems.

SENATOR CARE:
Referring to Exhibit D, you indicated that in 2005 Nevada Mutual Insurance Company (NMIC) and MLAN had 65 percent of the market share and you are waiting for statistics due in March to see more current data; am I correct?

MS. MOLASKY-ARMAN:
We will have more current data as of March 1. The account for the University of Nevada School of Medicine went out to bid and another carrier successfully obtained that contract to insure the largest account and the largest number of doctors in Nevada. The contract did not go to either MLAN or to NMIC.

SENATOR CARE:
Does the Department have anything in place that considers the teetering threshold of a market share by any one or any two carriers? The problem in 2002 was St. Paul Insurance Companies, Incorporated had a large share of the market in Nevada when they pulled out. Why would we have allowed that to happen in the first instance? Does your office have any mechanism to check when a particular carrier garners a certain percentage of the market before you approve any rate application or do you let the market determine rates?

MS. MOLASKY-ARMAN:
We encourage a competitive market. We monitor not just medical malpractice but any line of insurance and try to make certain insurers are not undercutting prices in order to gain a larger market share. We do not permit inadequate rates that are unfairly competitive.

SENATOR CARE:
In your judgment, has that happened?

MS. MOLASKY-ARMAN:
No, we have not seen this situation in medical malpractice.

SENATOR WIENER:
Before St. Paul Insurance Companies, Inc. left—we had a hemorrhaging of carriers—and prior to the crisis addressed in our 18th Special Session, what was the peak number of medical malpractice carriers in Nevada?

MS. MOLASKY-ARMAN:
Page 2 of Exhibit D shows the peak number of authorized insurers in 2003 was ten.

SENATOR HORSFORD:
Page 2 of Exhibit D says there are seven active authorized insurers. Can we get a list of who those seven are?

MS. MOLASKY-ARMAN:
Yes, we would be happy to provide that list.

SENATOR HORSFORD:
Exhibit D says all seven insurers are willing to write; does that mean they are all providing some amount of coverage?

MS. MOLASKY-ARMAN:
Yes.

SENATOR HORSFORD:
Slide 8 of Exhibit D indicates NMIC and MLAN represent 65 percent of the market share. Is it possible to provide us with information on the seven carriers and the market share for each?

MS. MOLASKY-ARMAN:
We will not have such information until after March 1; then we will report all insurers and show their premium volume. With a low number of insurers, it will not be difficult to put together a schematic showing the premium and market share for each.

SENATOR HORSFORD:
Slide 4 of Exhibit D shows The Doctors Company was approved for a 14-percent change. Are their rates competitive or are they still considered high?

MS. MOLASKY-ARMAN:
This chart shows a 14.6-percent decrease in their rates. Their rates are relatively high in comparison to the rates of the other insurers.

SENATOR NOLAN:
Does The Doctors Company cover a specialty market that, willingly or not, pays higher premiums? Even though The Doctors Company has reduced their premiums significantly, are they still higher than the other companies?

JANICE C. MOSKOWITZ, ACAS, MAAA (Lead Actuary, Property and Casualty Section, Division of Insurance, Department of Business and Industry):
The Doctors Company markets through several national programs. There are a few specialty groups where the rates are slightly more competitive because they give a discount through these programs. The Doctors Company is not writing a lot of new business. They have kept many existing doctors.

SENATOR NOLAN:
What information do you use when you make a rate comparison?

MS. MOLASKY-ARMAN:
In ascertaining whether a rate is going to be approved or not, we do not compare one insurer's rates with another's. We base the decision from data presented by the insurance company.

SENATOR NOLAN:
As you evaluated rates, what criteria have you used when there has been a 14-percent decrease in overall rates?

MS. MOSKOWITZ:
The company provides the information. We usually check the calculations. In some cases, we compare specific rates across companies to see if a rate seems high or low. We look at the rate for equivalent coverage in its comparable territory, and we make a comparison for some classes. I usually compare classes with a greater amount of risk such as internal medicine, obstetrics and gynecology (ob/gyn), general surgery and common classes like pediatrics and family medicine. In the case of The Doctors Company filing, the 14-percent rate decrease is an overall average for all classes.

SENATOR WASHINGTON:
Slide 9 of Exhibit D gives statistics after the initiative ballot measure called Keep Our Doctors in Nevada (KODIN) was passed by the voters. Slide 12 indicates frequencies and claim severities are lower based on an average payment of $305,000 after KODIN and an average payment of $105,000 after

A.B. No. 1 of the 18th Special Session. Why are the payments higher after KODIN and fewer cases closed? Is there a disparity in the severity of cases?

MS. MOSKOWITZ:
Medical malpractice cases are volatile, and there is substantial variance in their results. We cannot say much about the claims after KODIN because our sample size of only four claims is not particularly meaningful. The sample size of 21 claims after A.B. No. 1 of the 18th Special Session is more meaningful; although, if there is one especially large claim, the results will be skewed.

SENATOR WASHINGTON:
If you are indicating the frequency and severity of the claims are lower, there is something askew between $105,000 and $305,000.

MS. MOSKOWITZ:
Right, the $305,000 is not meaningful because it is based on a sample size of four claims. There are significantly more closed-claim data and analysis in the report Medical Professional Liability Insurance, Exhibit F. The problem is the KODIN cases are recent and most of them have not yet closed. It takes a few years for claims to get through the system. We will have more data to report as the claims arrive. We are monitoring, and I will do additional reports by the end of February to update this information for you.

SENATOR WASHINGTON:
You indicate it is too soon to evaluate the impact of noneconomic damage caps. Are there any numbers you could provide to illustrate what the true impact of the cap versus pre- and post-A.B. No. 1 of the 18th Special Session?

MS. MOSKOWITZ:
Some claims data are in the report, but their volume is small. Any conclusions are tentative because of the small sample size and the more complex cases take longer to settle. Bias might be in the sample if it represents cases which are easier to settle.

SENATOR WASHINGTON:
How many cases are in the pipeline now?

MS. MOSKOWITZ:
We only get reports on closed cases; we do not know how many are open.

SENATOR WASHINGTON:
Are you using Nevada Supreme Court data?

MS. MOLASKY-ARMAN:
We are unaware of any action before the Nevada Supreme Court.

SENATOR WIENER:
In reference to the general area of family practice, one of my concerns is ongoing education of the professionals. Are there incentives such as continuing medical education (CME) credits? If doctors attend certain classes, could they get a reduction in rates? Could doctors be incentivized to participate in ongoing sensitivity training for their practices? Continuing medical education credits may help resolve or prevent issues that raise malpractice.

MS. MOLASKY-ARMAN:
We provided a complete report (Exhibit G, original is on file in the Research Library) written by Janice C. Moskowitz and submitted to the Director of the Legislative Counsel Bureau (LCB), Lorne J. Malkiewich, in December. Its title is "2006 Annual Report on Loss Prevention and Control Programs of Professional Liability Insurers Pursuant to NRS 690B.370." The report recounts the effects of S.B. No. 250 of the 72nd Session.

SENATOR WIENER:
An incentive for a doctor to attend something on a regular basis to help reduce anxiety between physician and patient and learn better techniques for addressing injury or loss could be a 2-percent or 5-percent reduction in premium.

MS. MOSKOWITZ:
All carriers offer risk management programs. The common discount for participating in a program is 5 percent. Seminars, self-study programs and programs offered by a vendor are methods to help doctors manage their practices and reduce losses. Many companies now offer CME credits; the Division does not require companies to provide these credits. Continuing medical education credits must be approved through the medical boards, and I do not know that process.

CHIP WALLACE (Provider Communications Director, Nevada Mutual Insurance Company):

Nevada Mutual Insurance Company was formed Battle Born, true to our state's motto. With little more than good intent, a good plan and our good name, we literally raised the money, built the company, launched a growth campaign and engaged special session legislation simultaneously. It was a tumultuous time and those were not easy tasks. Richard Bray, who cofounded the company along with me and a few other key people, has over 20 years of medical malpractice insurance experience. Dr. McBride, also present to address your questions, is a respected general surgeon, a member of the Board of Medical Examiners, Governor of the Nevada Chapter of the American College of Surgeons and Chairman of NMIC.

It is a career highlight of mine to sit before you, five years later, after personally and on behalf of a company making many promises and commitments to not only you but to doctors in our communities, leadership of the Division of Insurance and those hospitals and physicians asked to loan the money needed to get NMIC off the ground. We have lived up to our promises, and we will continue to do so for years to come.

Today, NMIC has at over 1,700 insureds, over $32 million in gross written premiums and over $55 million in admitted assets. Solely owned by the doctors of the State of Nevada NMIC is a leader in the state's medical malpractice marketplace. We are proactive with regulators and willing to participate in proceedings such as these for the betterment of the state and our health care delivery systems. Our investments are conservative, our finances in order and our regulatory compliance up to date. Nevada Mutual Insurance Company's operations and finances are transparent. Our operations are overseen by management, the Board, our reinsurers and the Division.

Our sound state of being is part of the stabilization of the Nevada marketplace and ultimately our health care delivery systems. We are excited with NMIC's prospects for 2007. The NMIC board will meet within the next few months to review our financial condition for addressing repayment of start-up surplus loans, reducing premiums to our insureds and considering a dividend return to NMIC's insureds. We will approach the Division to analyze our condition and discuss our options.

SENATOR CARE:
In previous testimony, a couple of witnesses suggested since the Nevada Supreme Court had not ruled on the constitutionality of KODIN—whether it is a deprivation of right to trial by jury by having a cap on noneconomic damages—enough uncertainty was rendered to indicate premiums would not be reduced as quickly as people would like. Is this so-called uncertainty still a factor in the calculation of rates either for increases or decreases?

MR. WALLACE:
There are many answers to your question. We took a position to be financially conservative, consolidate our legal panel, aggressively manage claims, reduce broker commissions and be assertive in our customer service in order to retain business. So far, this has been the guide to our financial success. It is unwise to assume there will not be a challenge and we would lose.

RICHARD C. BRAY (Executive Vice President, Nevada Mutual Insurance Company):
Insurance is driven by actuarial sciences. Where and why actuaries come up with assumptions is confusing, complicated and difficult to understand. I am not an actuary. The science bothers me because they apply trend data and inflationary rates from the past to the future. From a technical or statistical perspective, it is too early to say we can substantially reduce rates because of tort reform. It has not been tested; however, trends are developing within the industry, loss is stabilizing and we are not experiencing substantial increases in claim frequency.

Much of what happens with rates and pricing is predicated upon what occurred previously and not on guessing what may happen in the future. We are stepping back and reviewing our first few years of operation. Physicians own this company; to conservatively say what we give back or what they take back without impairing the company puts it in a tough position. What the future offers, from a claims perspective, depends on how aggressive we are in risk management and in working with our physicians. Dr. McBride and our insureds are proud to be owners of NMIC, and they participate in our risk management programs. It is fantastic if we can help them.

MR. BRAY:
In the summer of 2002, much was made about the immediate situation and the need for immediate relief. Nobody was talking about what was to happen if this legislation was enacted or how soon rates would either stop rising or maybe

even decrease. No one was suggesting action could not be taken because there may be a future Nevada Supreme Court challenge. We cannot continue to use the possibility of a constitutional challenge as an excuse for not predicting rates.

MR. WALLACE:
Nevada Mutual Insurance Company is the first and only company to consider the impact of tort measures, seek opinions and reduce malpractice premiums. We did respond to trends as a result of tort measures, and we are living off them today. The market is responding by reducing malpractice premiums, and we are seeing those impacts. There is trepidation, but there is some rate repeal.

SENATOR WIENER:
When I asked about the education component, you stated you are not in the business to do this. It is a component because you are reducing liability when you have education. What incentive do you use, in terms of premium reductions, for doctors who participate in education programs?

S. DANIEL MCBRIDE (M.D., F.A.C.A., Chairman, Nevada Mutual Insurance Company):
From a physician's point of view, continual education about managing risk and reducing the potential for claims is hammered into us since leaving medical school. Since joining the Board of Medical Examiners in 2005, I proposed the Board become involved in physicians' education and outreach concerning what the Board does to help physicians reduce claims. We started a seminar called "How to Protect Your Medical License" in conjunction with other seminars with our company and with MLAN. The seminar is enthusiastically received and provides two hours of CME in ethics and education. It is one of the best things we have introduced because it ties in the standards of the medical profession with the Board and with risk management and liability, a strong part of the educational component.

SENATOR WIENER:
We processed all the legislation through special and regular sessions. As I reflect on testimony from injured consumers, the one thread in their stories was that once their injuries occurred or their claims took root, their doctors did not return phone calls or have any contact with them. It was as though they became invisible. As these witnesses retold their stories, I saw as much pain in that lack of communication as with the physical impact of their injuries. That is a strong message coming from people who have been hurt. You are protecting

a license, which is a major component of what you address, but communication needs to be open so a connection remains.

DR. MCBRIDE:
It sounds like the seminar is more protective for the physician, but it basically teaches them how to keep out of trouble, how to practice better medicine and how not to make dumb mistakes. Communication is probably the No. 1 problem that results in a claim and in someone being upset.

The Board of Medical Examiners investigates any complaint from a patient or medical facility with the investigator reporting to one of the Board's committees. All reports are thoroughly reviewed as to whether they have foundation or not. If an instance arises such as poor communication or a doctor who behaves unprofessionally, then the Board takes action by collegial counseling, written notification or other sanctions. There are multiple levels we are trying to get through to physicians not so much as punitive but educational in nature so these circumstances do not arise as often.

SENATOR WIENER:
Are the consuming public, the victim and patient, kept in the loop as well so when they cry out for that link somebody listens and tries to make amends?

DR. MCBRIDE:
Yes. A national movement referred to as "I'm sorry" legislation protects doctors who confront patients and say they are sorry. What occurs is admitting; when that happens, it could be a legal admission of malpractice. It gets complicated because an attorney defending the physician may advise not saying anything which may aggravate the situation. The best way to deal with your scenario is for the physician to confront the patient and family, sit down and consult, and talk and share what the doctor is feeling. The most traumatic event in a physician's life is a negative outcome. It is not like they were painting a car and got a run in the paint; it is a human life, and it is extremely emotional.

SENATOR WIENER:
Let me share a personal story to illustrate why communication is important. My father was born in 1915 with a problem in his dominant arm. Based on information from my family, it was probably a limited rotator cuff. In 1921, he experienced a terrible fall down a double flight of stairs which resulted in a major injury for a child. He was hospitalized for six months and had a poor

surgical outcome as indicated by his scars. His dominant arm was crippled, and he had no use of it for the rest of his life. According to my aunt, who was the older sister, people would visit Junior, my dad, and say to my grandfather "Look what he did to your child, he has ruined your child ..., he will be a cripple the rest of his life ..., you have got to do something." This was 1921, and people were suggesting my grandfather do something, take the doctor to court and make him pay for what he did to Junior. My grandfather's response was, "He visits Junior twice a day, he cares about him, we could never do that to him."

I remembered what happened to my family as I heard over and over again from all those witnesses. Even though the liability issue is important, keep the compassion piece and do not close the door on people who have had a loss.

MR. BRAY:
We welcome you to attend one of our seminars or meetings and see what we do. The emotional impact is critical. The stress of a liability claim can cause other liabilities because a doctor has lost confidence and is concerned. We want to help doctors manage these situations as the purpose and oath physicians take is to care for people. We want to improve medical care.

FRED L. HILLERBY
(Director, Independent Nevada Doctors Exchange):
I am here as a director of an INDEX management company. I will refer to a handout (Exhibit H) during my testimony. We began business and filed our plan of operation on April 12, 2002, after the events the Commissioner described at the emergency hearing and decided there was not enough insurance available. The association known as MLAN was created, and I was appointed to the Board in June 2004.

We had insured slightly over 900 physicians. We have become aware of the competitive market; we now insure about 600 physicians after recently losing a large group. Independent Nevada Doctors Exchange is a fledgling company. Through the end of 2006, we had a total of 544 opened claims. We closed 229 of those claims of which 194, or 85 percent, were without payment. A normal expectation of claims closing without payment is 75 percent. Various things trigger a claim and when all information is eventually gathered, the claim usually gets resolved. We closed 35 claims with payment, and the average payment was $250,000. Only one jury trial indicates we are doing what we intended to do, which is settle a legitimate claim. I am pleased to report the one

jury trial resulted in a defense verdict after one hour of deliberation. Claims should sometimes not go forward. Of 315 open claims, 17 are reserved at or above $350,000.

We have 57 trials scheduled for 2007-2008 and expect to close most of those. When trial dates are set, it often gets the discovery process finalized. Once we have all the information, we can determine whether a claim is legitimate. The goal on behalf of our insured physicians and their patients is to settle legitimate claims. We do not go to court just to go to court, it is too expensive. We want to settle the claim and take care of the injured patient. Caps were not part of the one jury trial. We have no claims that have gone to the Nevada Supreme Court and are not aware of any. We are waiting to see what happens.

We have a vibrant, competitive market, and we are seeing rates lower than what we can offer as a young company. The market is good for physicians, and it is good to have physicians covered by malpractice insurance.

As of January 1, we became licensed as a reciprocal insurer. We have maintained the same board and management philosophy. We look forward to the opportunity to become more competitive. Our responsibility as an association under the Essential Insurance Act in *Nevada Revised Statutes* (NRS) 686B is to make insurance available and not compete with the private market. We found ourselves a target as newer companies saw an opportunity because our rates were not as sharply competitive. We can now compete as an insurer.

We offer risk management courses in the north and the south. We give a 5-percent discount on premiums to doctors who attend those courses. Awareness makes a difference, and we are proud to provide the discounted premium.

SENATOR NOLAN:
Why has a case not processed to test the constitutionality of statutes we enacted?

MR. HILLERBY:
For a host of reasons, there have not been a lot of claims. Since the cap only applied to noneconomic damages, we have not bumped up against it. The cap exists and influences the decisions we make concerning premiums and particular

claims. Part of the reason is timing and the kinds of cases. Frequency of claims has leveled, but the severity has risen due in part to medical costs and not to severity of injury.

SENATOR MCGINNESS:
You mentioned north and south, do you include rural areas? Are there particular problems in rural Nevada?

MR. HILLERBY:
I am not aware of any problems in rural Nevada. The majority of doctors we insure are in Las Vegas because of the demographics of the state.

SENATOR WASHINGTON:
You indicated the number of claims has gone down but the severity of those cases significantly increased. Is the selection of cases for mediation determined not only by the noneconomic cap but also by the resolve to get them closed or to trial?

MR. HILLERBY:
When we get through the discovery process and have all information in front of us, we try to get legitimate claims settled. There is reluctance by better attorneys to take on a case because of potential limits. They only take cases that make sense to them and those generally have a lot of damages involved.

SENATOR WASHINGTON:
Mr. Bradley stated a lot of the bottom-feeders would bottom out, which indicates they have become more selective. Are fewer attorneys going to litigate cases or are there not enough cases?

MR. HILLERBY:
That forecast is probably coming true but the other way around. The bottom-feeders are more prevalent.

SENATOR CARE:
One reason for fewer cases may be KODIN also capped contingency fees for attorneys under NRS 7.095. Nobody is going to take a case unless there is an economic return. When experts are retained and there are a multitude of costs, a case may not be taken. I do not know of any other instance where the state regulates terms of a contract when it comes to compensation between two

private parties. What possible impact does the cap on contingency fees have in the fact of fewer cases?

MR. HILLERBY:
I am not privy to the arrangement a plaintiff has with their counsel. Substantial expenses bring these cases forward.

SENATOR HORSFORD:
I am grappling with another side of this discussion which is more about victims and those who are injured. If a case is no longer financially beneficial to a lawyer and the situation is structured to protect insurance companies where does an injured person or victim go to get relief?

MR. HILLERBY:
I cannot answer part of your equation. I do not know how many injured patients have no one to help them. I am aware of claims that come forward and the extent of those injuries. Five years ago, there were frivolous claims. Public policy is a balancing act. We want doctors to be insured and want to protect patients who get injured.

BILL BRADLEY (Nevada Trial Lawyers Association):
It is refreshing to hear Mr. Hillerby talk about the delicate balance between physicians' interests and victims' interests in settling a meritorious case. The insurance companies referred to in Commissioner Molasky-Arman's presentation did not have the same mentality. We proved that conclusively in 2002 and 2003, but politics demanded a change.

Senator Horsford asked where a victim goes. That victim disappears in despair. One of the most difficult decisions is to tell somebody, such as a blue-collar worker who owes somewhere in the area of $40,000 to $60,000 in medical bills and has a permanent injury caused by negligence, that the system will not tolerate their claim. The reason is simple. With KODIN, the cap on noneconomic damages—called pain and suffering, disability, anguish, embarrassment, despair, loss of a loved one—applied to not only compensate the victim but also pay their lawyer. By capping those damages, a victim sees part of the monetary consequences of negligence go to a lawyer.

In order to get involved in any medical negligence case, we must have experts. The cost of pursuing a medical negligence case is somewhere in the area of

$50,000 to $100,000, usually closer to $100,000, which is the cost through trial. If the most a person recovers is $350,000 and the fee limitation applies under Nevada law, that means a lawyer is asked to put up $100,000 with a possible return of $80,000. That is serious money to a lot of people, but the economic decision a lawyer makes is, "What is my success, what is my chance of winning?" Even in a meritorious case, the profound jury nullification which occurred during the KODIN initiative has so prejudiced juries against victims that it is difficult to get an unbiased jury in the State of Nevada.

In Clark County during the last two years, there have been 40 jury verdicts in medical malpractice cases. In 2005, four verdicts favored plaintiffs and in 2006, two verdicts favored plaintiffs. I am certain some of those 40 cases were not meritorious and some of the cases lost were meritorious. Finding an unbiased jury pool in today's world is particularly difficult and extraordinarily difficult in the area of medical negligence.

I predict none of you have had the experience of a loved one impacted by a medical negligence claim. The frustration in finding a competent lawyer to pursue a case is difficult. Most good lawyers who used to do this have restricted their practices, as I have. Physicians and their insurance companies hire the best defense lawyers in the nation. On one side, it is difficult to find a lawyer to take the case; on the other, the best can be hired. The playing field is not fair.

It is especially difficult to inform the family of a child, a stay-at-home spouse or an elderly person that the law no longer tolerates their claim, because these individuals create no wage losses and medical bills are generally covered by an insurance company, Medicare or Medicaid. Even though they were significantly harmed, it makes no sense to pursue those claims, which is the primary problem our organization has with this legislation. It denies access to victims of medical negligence who deserve redress.

SENATOR HORSFORD:
Regarding the economic situation of children, stay-at-home spouses and particularly women and seniors, if their cases are not beneficial to pursue, is there tracking of how many cases fall into those categories? Do we know how many injured people never get to a jury trial?

MR. BRADLEY:
Anecdotally, our office keeps track. I disagree with the people from NMIC. Medical malpractice is a derogative and negative term and a negligence claim involving medical care is not necessarily an unfortunate outcome. Consumers have been led to believe medicine is an exact science and medical care will provide a 100-percent guarantee of getting better. That is not true. Medicine is not an exact science. There is a belief in the community that a poor outcome equates with medical negligence. It does not. In many instances, the best benefits are not realized by the physician, but the physician, and the whole team do a great job in putting Humpty Dumpty back together again. Negligence occurs when somebody does not do what an ordinarily reasonably prudent person would do under the same or similar circumstances.

Conservatively, our offices receive 30 to 40 calls a month from people who believe they are victims of medical malpractice. Out of those 30 to 40 calls, we go a second step with 2 or 3 people. If you multiply 40 times 12, the result is about 480 cases a year we are asked to review. At the end of the year, we only accept between three and five cases.

There is no real tracking. I am happy to hear MLAN talk about the transparency of their company. As KODIN progresses, we should be able to track premiums taken in and claim dollars paid. When we talk with the actuaries, it is more complicated than talking about loss-adjusting expenses. There are many different aspects of insurance. As this company matures, becomes more stable and pays off debts, its transparency may show a fair profit. Policymakers have to decide if limitations on victims' rights are fair when excessive profits are made.

SENATOR HORSFORD:
Should there be tracking? A senior constituent had an issue with an ob-gyn. She called me a week after her procedure in hysterics. Through the LCB, I put her in touch with people at the Board of Medical Examiners. Is someone tracking her case? If she never gets her case to court, is the state, through the Board or other means, tracking her case to address issues that never make it to court? This may not be germane to this discussion, but it is part of what leads to the end result which is medical malpractice cases.

MR. BRADLEY:
If your constituent reports a concern to the Board of Medical Examiners, the Board accepts the complaint and conducts an investigation. If claims for negligence are determined, the physician involved is reprimanded by the Board appropriately to change conduct. There is neither financial satisfaction nor anyone to pay the bills, but the Board probably tracks complaints. It would be interesting to find out how many complaints the Board receives, how many go to the next level, how many wind up with a reprimand and, most importantly, was the victim satisfied with the process.

The frequency of lawsuits decreased, even though our population continues to grow. I am a cynic on this issue. The quality of Nevada medical care has not improved and severity is not down. When we discuss severity, we refer to someone who is profoundly injured. The cost of caring for that person in the future is going up double digits each year, as much as 14 to 15 percent. When a major component of a person's damages in a civil lawsuit rise in double-digit figures year in and year out, premiums have to match this inflation with or without tort reform. Even though we are seeing stabilization in the market, Nevada is a difficult market because of the small numbers of physicians and claims.

After this initiative we anticipated larger insurers from other states, especially California, would come and share risks. They have not done so and we would like to find out why. I do not want to make it more difficult for MLAN, but the goal is to attract many insurers to spread risk and avoid a profound case resulting in people getting upset. A case is going to come where there was a profound injury resulting in a jury verdict with a significant damage awarded.

We will see one of those cases because eliminating the term "joint and several" in the initiative was a disservice to the medical community but benefited the hospitals and health maintenance organizations. Come that case, we will hear about a physician who, as part of a significant verdict, has to figure how to satisfy a large verdict in excess of her or his policy limits. That troubles me, as a person who represents victims, and should be of concern to every physician in the State of Nevada who works in a hospital setting.

Attorneys protect access to the courts and KODIN denies court access to people who need it most. A few lawyers are taking medical malpractice cases and trying to do their best, but the odds are against them. It is good to hear

insurance companies are doing well and showing profit. It is good to hear more companies are coming into the State of Nevada. But there is another unfortunate side to this story. Constituents of yours who are victims of legitimate medical negligence are denied access to the courts.

Concerning the medical malpractice cap on noneconomic damages, cases coming into the system may address constitutional issues. Some provisions are just bad, such as the interference with the right to contract, the inability of a jury to decide a case and a jury not informed of the cap. One frustrating situation for a jury is to spend two days arguing among themselves about what is a fair compensation a victim should be awarded for their pain and suffering. Most of you have watched *Twelve Angry Men* and can appreciate the jury dynamics of how hard it is when jurors take civic responsibility seriously and fight for what they believe. That goes on in juries of medical malpractice cases trying to decide general damages. When the jury finishes deliberation and proudly reaches a large verdict they believe provides justice for the victim, the judge politely thanks them for their hard work and excuses them. As the last juror walks out the door, the defense lawyer stands up and requests the verdict be reduced to $350,000, pursuant to the 2004 initiative which happens right then and there. Then the appeals begin. When the jurors find out their hard work was for naught, they are angry.

I see another side to KODIN. The organization I represent is proud to appear before this Committee. When Nevada victims are denied access to courts, we will speak our minds about the inequality of this legislation.

SENATOR NOLAN:
Are juries instructed by judges about the law with regard to limitations on those cases?

MR. BRADLEY:
No. They are instructed on the law, what is medical negligence, how it is defined, what is the standard of care, what are the components of damages, what causation is, whether negligence caused the damages, how to elect a foreman and how they go about conducting the process of a jury. The jury is not informed of the $350,000 cap or whether a victim is entitled to an award for substantial pain and suffering.

SENATOR NOLAN:
Do the laws concerning fee limitations apply to both contingency and hourly attorney fees, or strictly to contingency fees?

MR. BRADLEY:
The fee limitations target lawyers who represent victims. Fees for defense lawyers are not limited.

SENATOR NOLAN:
Do the fee limitations include the nature of a case or are they limited hourly and/or contingency fees?

MR. BRADLEY:
The only limitation contained in KODIN is on the size of the contingency fee a lawyer may charge.

SENATOR NOLAN:
In a medical malpractice case, attorneys on contingency do not receive payment up front. They are out of pocket for the cost of defending a plaintiff until the end, and they will not see a penny unless they prevail. They receive remuneration from the contingency award. Are there attorneys who also charge hourly fees knowing the individuals they represent do not have the money? If they were to charge fees on the front end, those accumulated fees would not be subject to fee limitations. When the case closes and they prevail, are they eligible for part of the contingency?

MR. BRADLEY:
That would be unethical and not going to happen. Your scenario has been tried in other states having contingency fee caps; those lawyers were brought before the state bar and reprimanded for evading the intent of the language of the law. The language in KODIN is specific. A lawyer representing a victim of medical malpractice may not charge more than the scale set in statute. It is something like 50 percent of the first $100,000, 40 percent of the next chunk, 33 percent of the next and finally, 15 percent of anything above $350,000. A client should never pay 50 percent of anything, but that is what the KODIN statute says.

I have a problem with the concept an insurance company can hire the finest defense lawyers who charge $400, $500, $600, $700 an hour with unlimited

fees. The doctors and hospitals get the best counsel available and the victims may not.

If you had a medical malpractice case and you came to me, I would gladly propose an hourly rate. You would be out of a job, owe the hospital and physicians hundreds of thousands of dollars and worry about your house payment, your car payment, your kids' education. The last thing you are able to do is pay a lawyer an hourly rate unless you are extraordinarily wealthy. If you are extraordinarily wealthy, you do not need us.

SENATOR NOLAN:
I am not, and I agree.

SENATOR CARE:
Am I correct, the jurisdictions are evenly divided on this issue of constitutionality?

MR. BRADLEY:
I think that is correct. The latest one I am aware of is Oklahoma, which recently declared its medical malpractice reforms unconstitutional.

SENATOR CARE:
Is KODIN written so specifically that it applies to any cause of action derived from the incident of negligence? Does any other legal theory get us outside the caps?

MR. BRADLEY:
No, KODIN was written comprehensively and concerns any fee charged or collected. It was modeled after several states' laws and done with specific intent.

SENATOR CARE:
Does it apply to third parties who may have a cause of action?

MR. BRADLEY:
Yes.

SENATOR WASHINGTON:
Is access or denial to courts because KODIN was specifically written, or is it because lawyers are more selective choosing which cases they will represent?

MR. BRADLEY:
It is because of the consequences of the legislation. It was a wonderful tagline and selling point: If we limit the amount of fees a lawyer can charge, that means more money in the victim's pocket. Sixty-eight percent of Nevada voters thought it was a great idea. Unfortunately, that 68 percent never had a member of their family affected by malpractice and believed they never would. Limiting attorney fees makes a decision more difficult for a quality lawyer to accept a medical malpractice case. This was not a coincidence. The legislation was drafted to ensure victims of small medical negligence could not access the courts. It worked in California and many other states where it passed. In Nevada, it has the same effect.

SENATOR WASHINGTON:
When we passed A.B. No. 1 of the 18th Special Session, were there limits on economic damages as well as limits on noneconomic damages?

MR. BRADLEY:
In a way, there was no cap. The noneconomic limit was defined by the physician's medical negligence policy and whatever remained under the physician's policy after the victim's wage loss and medical bills were paid. It was a good concept. It is unfortunate A.B. No. 1 of the 18th Special Session did not have a chance because it was going to work.

SENATOR WASHINGTON:
Would unintended consequences preclude a victim from access to the court based on the number or types of cases a lawyer takes?

MR. BRADLEY:
I dispute the concept of unintended consequences, as these were intended consequences. The practical aspects of KODIN prohibit small meritorious claims from seeking representation and getting justice under the system.

SENATOR WASHINGTON:
You make a good case. As we deliberated this issue during the heat of debates of the 18th Special Session, there was a balancing act. The public, physicians

and insurance providers demanded we do something. Providers and doctors were leaving the state or closing their practices, which meant the quality of health care may have diminished or increased. As a legislative body, we had to figure out how to keep doctors, provide stability for insurance companies, encourage them to return to the market, see rates drop or stabilize, ensure quality care for those needing access to our health care system and provide some remedy or relief within the mechanism of our courts in seeking justification for injuries. We did not intend to lean more on one side than the other.

LAWRENCE P. MATHEIS (Executive Director, Nevada State Medical Association):
I provided a written statement (Exhibit I). The liability issue was the last major piece that forced our health care system into a crisis. Yes, it is important to have access to the courts and health care. Finding a way to maintain both of those rights continues to be a challenge because other factors underlying the system crisis make practicing medicine, maintaining health care systems and accounting for liability more difficult. The hard market in managed care insurance, as the way we cover health benefits, has created discontinuity in care. It is hard to find people who maintain the same role of the physician over a long period of time.

One reason for more stability in rural Nevada health care over the metropolitan areas is the continuity of care. The long relationship between physicians and their patients gives both a better understanding and communication is normal. They know each other, talk freely and interact about risks and options. It is increasingly harder in the complex health care system, particularly in metropolitan areas of incredible growth where a coverage system can suddenly cut off contact with a physician or hospital the patient has been using. Many southern Nevadans are in the process of reevaluating the choice of provider and hospitals because the major insurer in that community changed its contract relationships.

Many factors are changing the health care system, and we also have the pressure of the fastest-growing population. Our health care workforce is not available in the numbers to meet the demand. A crisis occurred with the instability and loss of liability insurance coverage. The discontinuity and problem with the physician-patient relationship means the allocation and liability for medical care must be fundamentally reassessed. New models and pilot projects on developing specialty health courts are being tried nationally. We are watching

to see how effective they are and whether they encourage or discourage decision-making.

Some states have adopted laws to encourage the physician, nurse and hospital representatives to be forthcoming with patients and their families without tripping a liability cord. We need to fully explain the situation and apologize for something not used as a court measure and communicate options with the family for informed decisions. Those "I'm sorry" type laws have passed in about 18 states; we should monitor whether they work and if there is value in some or all settings.

If the people of the State of Nevada and the Legislature adopted reforms, we will see how they work. If they restore balance, that will be a good situation. If we need to readdress it down the road, we may want to weigh in on other options.

SENATOR CARE:
In the special session, sanctions were made available for a counsel who files frivolous lawsuits. Are you aware of any medical malpractice lawsuits the courts dismissed because the case was brought without a good faith basis in fact? I understand sanctions would not kick in unless the court acted first. Are you aware of any sanctions happening since 2002?

MR. MATHEIS:
I am not.

SENATOR HORSFORD:
You indicated we have returned to a pre-2002 number of doctors. What are those numbers, are they new doctors, where are they coming from and how are we maintaining those numbers? Is the future generation of Nevada physicians, medical faculty and researchers coming out of our local institutions or are we recruiting them from other states or countries?

MR. MATHEIS:
It is a mix. We do not produce many doctors, which is our shortcoming. Because of our growth, we are at a point similar to California in 1950. They did not have the greatest university in the nation until the end of the 1950s when they decided to grow many of their own workforce needs. We are importing almost all new medical, nursing and technical licensees. The Board of Medical

Examiners can provide data through 2005. We have a few new physicians, but most have mature practices.

Licensing rules were changed in 2003 to reduce barriers which has helped. We are far behind the population curve recruiting physicians. The average age of a primary care physician in Nevada is 55. Ten years from now, they are more likely to be patients than doctors. The average age of a nurse in Nevada is 52. We compete with other states and growing areas for the relatively few health professionals entering the national medical market, and we continue to have problems getting highly specialized people. The numbers say we need to grow our own. That is the issue. The liability climate, the managed care insurance climate, the stability of the community and other influences play into how effectively we can recruit. We are having trouble recruiting.

SENATOR WASHINGTON:
We are adjourned at 10:18 a.m.

RESPECTFULLY SUBMITTED:

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Lora Nay,
Committee Secretary

APPROVED BY:

_____
Senator Mark E. Amodei, Chair

DATE:_____