MINUTES OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR

Seventy-fifth Session
May 13, 2009

The Senate Committee on Commerce and Labor was called to order by Chair Maggie Carlton at 12:46 p.m. on Wednesday, May 13, 2009, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412E, 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 Maggie Carlton, Chair
Senator Michael A. Schneider, Vice Chair
Senator David R. Parks
Senator Allison Copening
Senator Dean A. Rhoads
Senator Mark E. Amodei
Senator Warren B. Hardy II

GUEST LEGISLATORS PRESENT:

Assemblyman William C. Horne, Assembly District No. 34
Assemblyman James Ohrenschall, Assembly District No. 12

STAFF MEMBERS PRESENT:

Kelly S. Gregory, Committee Policy Analyst
Daniel Peinado, Committee Counsel
Suzanne Efford, Committee Secretary

OTHERS PRESENT:

Jon Sasser, Washoe Legal Services
Ernie Nielsen, Washoe County Senior Law Project
Jason Firth, Nevada State Bar Intellectual Property Section
Daniel Wulz, Legal Aid Center of Southern Nevada, Inc.
Graham Galloway, Nevada Justice Association

Samuel P. McMullen, Las Vegas Chamber of Commerce
Josh Griffin, MGM Mirage
Scott Anderson, Deputy for Commercial Recordings, Office of the Secretary of State
Rusty McAllister, Professional Firefighters of Nevada
James Jackson, Coalition of Appraisers in Nevada
Gail J. Anderson, Manufactured Housing Division, Department of Business and Industry
Lisa Black, Nevada Nurses Association
Beatrice Razor, Legislative Liaison, Nevada Nurses Association
Stacy Shaffer, Service Employees International Union Nevada
Bobbette Bond, Health Services Coalition
Jim Wadhams, Nevada Hospital Association
Judy Dosse
David Pierson, President, Sierra Mobile Park
Michael Phillips, Manufactured Home Community Owners' Association
Marolyn Mann, Executive Director, Manufactured Home Community Owners' Association
Steve Marzullo
Bob Varallo, Nevada Association of Manufactured Home Owners, Inc.

CHAIR CARLTON:
We will open the hearing on Assembly Bill (A.B.) 22.

ASSEMBLY BILL 22 (1st Reprint): Revises provisions relating to certain trade practices. (BDR 52-428)

JON SASSER (Washoe Legal Services):
This bill was requested by Washoe Legal Services, the Washoe County Senior Law Project and the Legal Aid Center of Southern Nevada. Assembly Bill 22 is a consumer-protection measure that does basically three things. It provides two additional tools to consumers who have been victims of deceptive trade practices. It allows them to sue for statutory damages and to seek equitable relief. It also creates a new deceptive trade practice, primarily affecting seniors, which was requested by the Washoe County Senior Law Project.

Deceptive trade practices are defined in chapter 598 of the *Nevada Revised Statutes* (NRS). It includes 50 specific acts aimed at deceiving and taking unfair advantage of consumers. Included are practices such as, telephone solicitations

after 8 p.m., hiding water damage to goods, doing business without a license and intentionally misrepresenting the nature of goods.

The Office of the Attorney General (AGO) has the power to investigate and seek both criminal and civil penalties for deceptive trade practices. However, due to their staffing limitations the office focuses on larger schemes involving larger amounts of money. Therefore, they can only scratch the surface of the many smaller matters that occur daily.

Recognizing these limitations, the Legislature has already created a private right of action to sue for violations of chapter 598 of NRS, which is found in NRS 41.600. Current law also allows a prevailing consumer to recover actual damages and to be awarded attorney's fees under chapter 41 of NRS. Also, under appropriate circumstances, exemplary and punitive damages are available under chapter 42 of NRS. However, consumers frequently have few actual damages and cannot prove the fraud which is necessary to get punitive damages. While the AGO can seek a civil penalty of $5,000 per violation, the AGO has limited staff to pursue these cases. Therefore, "bad actors" have few disincentives.

The statutory damages and equitable relief authorized by A.B. 22 would give consumers the tools and incentives to pursue these "bad actors." In section 1, the statutory damages are spelled out. The maximum statutory damages amount is $5,000 per violation.

There is also a defense laid out so damages are not automatically awarded at $5,000. If the actions were not intentional or technical in nature or resulted from a bona fide error, notwithstanding the maintenance of procedures to avoid these violations, there is no recovery of these statutory damages.

Section 14 adds equitable relief powers to the court. That means the court is not limited just to awarding money damages. For example, if someone was tricked into making a bad deal, in violation of the chapter, the court could rescind that deal, which might be a better remedy than awarding someone a few hundred or few thousand dollars.

Finally, A.B. 22 creates a new deceptive trade practice in section 5.5. Currently, NRS 598.092 states, "A person who engages in a 'deceptive trade practice' when in the course of his business or occupation he: [subsection] 8. Knowingly

misrepresents the legal rights, obligations or remedies of a party to a transaction." But, as you will hear from testimony by Mr. Nielsen and others, that definition misses cases where the "bad actor" does not knowingly misrepresent, but takes advantage of the victim's inability to understand due to mental, physical or language barriers.

ERNIE NIELSEN (Washoe County Senior Law Project):
We provide legal services for low-income seniors. We have seen quite a few consumer issues. The statutory damage provision in A.B. 22 was necessary because, time and time again, we see people come in where the actual dollar losses were not so great, though the emotional harm and all of the attendant problems associated with being deceived were there.

We also saw that the AGO was not taking these cases because they did not have enough staff and therefore, their remedies, which are substantial, could not be brought into place. If you do adopt a statutory damages provision, you will substantially enhance compliance with the law. You will also be able to complement what the AGO is doing so there can be complete prosecution of wrongdoers in this State, both from the AGO public side as well as from the private enforcement side. Many of these cases could easily be remedied if we have the equitable relief provision by forcing the commercial entity to agree to "unwind" the contract.

Subsection 11, page 4, plugs up a hole that now exists in the use of NRS 41.1395, the "Exploitation of Seniors and Vulnerable Persons Act," which is very difficult to apply to a commercial setting. Subsection 11 plugs up that hole. We routinely see people in our office who have some limitations and clearly display those limitations. They are in contracts they should not be in and did not anticipate being in.

For example, we had a woman who was looking for a particular automobile. She actually was working with a dealership. They did not have the automobile she wanted so they sold her a different one. Two days later they called her and advised her they had the automobile that she wanted and asked if she still wanted it; she said she did. They brought the automobile to her house and had her sign papers, and all the while she was thinking that they were going to take back the other car. But after she finished signing the documents, they drove off. She asked about the other car, and they told her she now owned two cars. We were able to force the dealer to "unwind" the deal after a lot of back and forth.

That is an example of the kind of exploitation of seniors that takes place in the commercial sector.

We request that you process this bill.

SENATOR COPENING:
Mr. Nielsen, is the language in that section strong enough? So many seniors are taken advantage of. It is not that they have any incapability. They are just trusting, older people. Is there anything more that could be stronger to protect these people?

On the other end, I know you cannot say because I am a senior I did not understand. I know there is a delicate balance there, but did you explore stronger language that might specifically address the seniors?

MR. SASSER:
This language was heartily discussed by Mr. McMullen and me. We spent several days on it. Unfortunately, those last few words in section 5.5, subsection 11, line 15, " ... or as another similar condition," were not part of our discussion but were added in. I do not know that they detract or harm anything.

We were trying to get a causal connection in the language between the infirmity and the inability to understand the language, and someone taking advantage of that. This is our best effort to encompass that.

SENATOR COPENING:
One of the things we do have are laws specifically for the protection of seniors. There may be another way to attack this should a senior be taken advantage of.

CHAIR CARLTON:
Mr. Sasser, do I understand you that "or as another similar condition" was not your language?

MR. SASSER:
That is correct.

CHAIR CARLTON:
Was that language proposed by anyone involved in the negotiations on this bill?

MR. SASSER:
Not to my knowledge.

CHAIR CARLTON:
We can look into it and find out the ramifications of that language. If it is not necessary to the bill, then we can address that.

This bill was one of those you thought you had worked out. When it got passed out of the Assembly, were you still aware of opposition to the bill? Had that changed?

MR. SASSER:
It had been my understanding that there were still some parts of the bill that Mr. McMullen may not be happy with.

JASON FIRTH (Nevada State Bar Intellectual Property Section):
I am here to speak about the proposed amendments to A.B. 22 regarding trademark laws.

CHAIR CARLTON:
Thank you, Mr. Firth, we will get to you in just a moment. Gentlemen, are you aware of the amendment to this bill that is going to be proposed? Did the people who are proposing share it with the proponents of the bill?

DANIEL WULZ (Legal Aid Center of Southern Nevada, Inc.):
I have submitted written testimony in support of A.B. 22 (Exhibit C).

MR. SASSER:
I spoke to Mr. Griffin, and he assures me that the amendment has nothing to do with the substance of A.B. 22 and does not harm it in any way. If it were to harm its chances of passage, he would withdraw it. With those assurances, I think we are fine.

GRAHAM GALLOWAY (Nevada Justice Association):
This bill is good consumer protection and good consumer legislation. Our organization fully supports its passage.

SAMUEL P. MCMULLEN (Las Vegas Chamber of Commerce):
We are not opposed to this entire bill. On page 4, subsection 11, line 15, we just do not know what that language does or does not do. What we tried to work for was something meaningful and perfected enough to withstand any other challenge.

Sometimes we make these things too vague and actually hurt their ability to be utilized. I am not sure what "or as another similar condition" means. You could create some real confusion in this. What we had done before, which was adequate, was to indicate that whether it was due to the illiteracy or taking advantage of a mental or physical infirmity that took away the person's ability to either understand the agreement or understand the terms, would solve as much as possible to cover most of the things. I do not know what that other language adds, and frankly it was a bill drafter's addition. If that could be clarified or deleted, I do not think it would harm the effect of this. We tried to make sure there are no other conditions that would take away the ability to understand the language or terms of any agreement.

On the other side, you are telling a business person, here are the rules; if you cross this line, it is a deceptive trade practice. When you do that you really have to clearly define the line so they know. You certainly do not want a very valid protective device like this blown out in court because it was vague. Someone will challenge this if you give them a chance. Correctly crafting this is exactly what we were after.

I have no problem with section 14, subsection 3, paragraph (b) about the equitable relief. The ability of someone to craft effective relief is a really important addition to this bill.

The intention of this bill, which is certainly worthy, was to try to ensure, if the system was not taking care of people, to "incentivize litigation" to help resolve these issues. Our position from the start is that there are very effective deceptive trade practice mechanisms in the statutes. If those are not adequate, they should be made adequate.

The real problem for us is with section 1. It tries to incentivize these corrective lawsuits by saying you can get statutory damages. It says in addition to your damages and equitable relief which might be necessary, we are going to add on

the possibility of another statutory penalty just to either penalize you or to compensate the victim or whatever.

Any time you do something where you give statutory damages, you run the risk of creating a discretionary system which may or may not have an exact relationship to the act or violation. That is why we have always worked so hard on chapters 597 and 598 of NRS. They are hard-fought issues because it is a question of balance.

The other thing is that it creates something more than was asked for, and that is a real incentive for class actions and large actions. If you can get statutory damages in addition to the actual damages or injury that someone has suffered, then you do incentivize a number of cases that are far outside the scope of what we would like to see. We would like to see section 1 eliminated.

The second reason for eliminating section 1 is that subsection 2, line 10, could clearly be read, even though it looks like it is discretionary, to mean that the only defense you could have against a statutory damage claim is that it was not intentional, to prove it was technical in nature and resulted from a bona fide error. In the effort to create an affirmative defense, they may have actually limited it to the point where a business could not defend itself unless all three of those things existed. I do not know if that is the only level of defense you would like to allow to businesses, but while we are trying to make sure deceptive trade practices are reduced as much as possible, we do not want to limit the terms upon which a business could say that is not a deceptive trade practice.

There already is a process which unfortunately, as with most governmental processes, is probably not adequate to the task of all of the claims and challenges in front of it. But there is an actual procedure for these cases to be addressed in current law without trying to incentivize them through statutory damages.

We are opposed to the inclusion of section 1, but the rest of the bill is very valuable, and we would be happy to support it.

CHAIR CARLTON:
Mr. Peinado, when I read section 1, subsection 2, paragraphs (a), (b) and (c), I did not read them as "and." I do not know if the intention was for them to be "and." In your reading, is it "and," or is it one or the other?

DANIEL PEINADO (Committee Counsel):
Yes, the reading is "and." It is conjunctive that each of those conditions must be met. That was as in the original proposal.

CHAIR CARLTON:
Mr. Sasser, was that the intent?

MR. SASSER:
Yes, it was.

SENATOR COPENING:
In paragraph (b), what does "Was technical in nature ... " mean? Are we talking about a grammatical error or a monetary error?

MR. SASSER:
Yes, if you have a form which does not comply with the law or something like that, it would address that. The language came from two places, from the defense in the Federal Truth in Lending Act damages and from chapter 604A of NRS which deals with predatory lending.

SENATOR COPENING:
Are there any situations where there would be a deceptive trade practice that may not be technical in nature?

MR. SASSER:
Yes, there are some. For example, if I just flat out intentionally mislead someone and trick them into buying something, that would not be technical in nature.

SENATOR COPENING:
That was my concern. Do all three need to be in place in order for it to be considered a deceptive trade practice?

MR. SASSER:
That is the affirmative defense. They would have to prove all three. I certainly do not have "heartburn" over paragraph (b). Sometimes you can do things that are not intentional, but if you have procedures in place that are clearly illegal and you have been so negligent that you have not set up any procedures to make sure these errors do not occur, that should be a deceptive trade practice.

MR. MCMULLEN:
I would just like to clarify one thing. Section 1 provides that the consumer would have to make a basic case that there was a violation of one of the deceptive trade practices. What is really happening here is they are turning the burden of proof to the business. It has to make an affirmative defense that all three of those things existed. Theoretically, you could argue that without those, just because there was a pure violation without any mitigating circumstances or anything else that is not allowed in subsection 2, you would be held liable.

If they want to make sure that the deceptive trade practice is not intentional, the way to do that would be to increase the penalties for the more egregious behavior. It is hard to understand on what basis statutory damages are necessary unless it is more than just a regular deceptive trade practice with the regular remedies. That has been difficult for us in the halls to understand, other than to incentivize the lawyer to step up and protect somebody's rights if the process is not doing it.

SENATOR COPENING:
Mr. McMullen, I would like to go back to the example Mr. Sasser gave about the elderly woman not realizing she was buying two cars, while the salesperson clearly understood what was going on. To my understanding, section 1 would allow that woman to receive extra compensation for the trouble. Is that correct?

MR. MCMULLEN:
Yes, it is.

SENATOR COPENING:
Do you have a problem with that? If someone was intentionally wronged, and in addition went through a lot of angst, do you not see it as fair for that person to receive up to $5,000? I understand your concerns about incentivizing, but do you not believe a victim, having gone through that, deserves something?

MR. MCMULLEN:
Let me direct your attention to section 14, page 11. There already is the right to bring a suit. It clearly allows the remedies that begin on page 11, line 20, if you are the prevailing party. It already allows for any damages. People are pretty creative about the causes of damages and the compensation for them.

We have no problem adding "equitable relief." That would be the kind of thing that "unwinds" transactions. Then line 24, page 11, allows costs in the action and the reasonable attorney's fees. There clearly is already the ability to bring a case. The theory of that section is there ought to be as least some objectiveness to the level of damages. That is why those things are there.

If you just want to say, in addition, we are just going to add another amount up to X, then that is what this will do. You have to decide whether that is right or not and whether or not that is something you want to allow.

The point is, if that is to really deter them and make sure these things are not done, we ought to look at the system we have. Filing a lawsuit and getting statutory damages is probably the worst way to deter these practices. It should be done in advance through the process that is here in the deceptive trade practices. If not, then it is not working. It should make that process work better. There has to be a better way to do that. That is why having government take over deceptive trade practices ensures that someone does not have to hire a lawyer to get their full recompense, get the transaction "unwound" and get things where they should be.

CHAIR CARLTON:
We have now reached the stage where we have a proposed amendment to A.B. 22.

MR. FIRTH:
I have submitted written testimony (Exhibit D) and a proposed amendment (Exhibit E, original is on file in the Research Library).

CHAIR CARLTON:
Was this provision in any other piece of legislation this Session that you know of?

MR. FIRTH:
I do not believe so.

CHAIR CARLTON:
Mr. Griffin, was this encapsulated in any other legislation that has been considered this Session?

JOSH GRIFFIN (MGM Mirage):
Obviously, oftentimes in this process these kinds of issues come a little bit late. When we started looking for a germane vehicle, there were some that had very similar issues on the Assembly side that had already passed deadlines and had been killed. There was some other legislation, but by the time we got engaged, it was no longer an active vehicle.

CHAIR CARLTON:
But you had not had this in any other piece of legislation that did not make it past a deadline.

MR. GRIFFIN:
No, we did not.

CHAIR CARLTON:
I want to be sure that it was not taken from one bill that was dead and put into another bill that is alive.

MR. GRIFFIN:
There was a bill in the Assembly that had a lot of similar issues. It was not the same language.

CHAIR CARLTON:
Mr. Firth, would you please explain to us the purpose of your amendment?

MR. FIRTH:
The main provisions of the proposed amendments to A.B. 22, Exhibit E, would update Nevada trademark law to be similar to other states in the federal system, while maintaining a cheap, fast and easy method to get trademark protection. This should make Nevada trademark registrations more attractive to out-of-state companies that form Nevada corporations or limited liability companies (LLC). Currently, Nevada is probably second only to Delaware as being a preferred

state in which to incorporate. Many out-of-state companies will incorporate or form Nevada LLCs.

Currently, they do not frequently take advantage of Nevada trademark registrations because our system is so different, in nomenclature and forms, from what practitioners in other states are familiar with. That results in Nevada companies doing trademark searches to clear a new name, finding insufficient information about who is using what trademarks. Bringing our law 20 to 30 years forward and making it similar to other states will allow practitioners from other states to more easily file trademark registrations. It will give companies doing business in Nevada a better notice of who is using what trademark.

Unlike the federal system, the various state law systems of trademark registration are really just notice systems. The secretaries of state, as long as the forms are filled out correctly, will grant a trademark registration, as opposed to the federal system which undergoes significant analysis and review before registrations are issued. This gives you a state law system that is inexpensive and provides a registration quickly so other people in the state can receive a notice of your use of a particular trademark. For example, a state trademark registration is usually issued in a number of weeks after the application is filed, whereas a federal registration usually takes about 18 months and is 2 to 3 times the cost. Those are the differences between state and federal legislation.

The way this makes it similar is that in most countries around the world, in most of the states and the U.S. federal government, the classifications of trademark registrations are divided according to an international system adopted about 20 years ago.

Nevada has a completely different set of classifications. By this I mean, for example, clothing on the international system goes into class 25 and trademark practitioners around the world are familiar with that. When they see a class 25 registration, they know it has to do with clothing. Because Nevada currently has a different numbering system, trademark searches on which big database owners conduct searches and then give reports to trademark attorneys, do not pick up and categorize correctly Nevada trademark registrations.

These housekeeping amendments would give the Secretary of State the ability to update the classifications to match what is used in the rest of the world, which will make practicing trademark law in Nevada much easier. It will also increase Nevada trademark filings twofold, because out-of-state companies will start availing themselves of the Nevada trademark registration system more often.

One other kind of main difference this legislation will implement is that in most states and the federal government, as part of the application process, you submit both a drawing of the trademark and a specimen of how the trademark is used. For example, if I was the Blackberry Company and I was to submit a specimen showing that my phone says "Blackberry" on it, the specimen would be a picture of the phone with the trademark. The drawing would be the very specific wording "Blackberry" and perhaps the logo.

Under the current Nevada system, those two very separate things are conflated into one filing, and they do not get refiled upon renewal. When people conduct trademark searches, it is hard to tell what a particular trademark registrant is claiming as their protectable trademark. The other main point of this legislation is to update our practices on that, which would make trademark searches much more productive.

CHAIR CARLTON:
Mr. Firth, when I look at this and hear your explanation, I see this as truly a modernization act. Would you agree with that?

MR. FIRTH:
Most definitely. Our current Nevada legislation is based on the 1979 version of the International Trademark Association's (INTA) Model State Trademark Bill (MSTB). This puts us onto the 2009 version of the INTA MSTB. It really is a modernization and harmonization with other state laws.

CHAIR CARLTON:
There was an issue a few years ago where two hotels with the same name had a problem in deciding who got to use the name. Did we realize that was the problem and this modernization act would have alleviated that issue?

MR. FIRTH:
This proposal is not a direct result of any of that sort of litigation. Those types of litigation are good examples of the types of disputes that might be alleviated if our trademark registration system is improved. It will put people who are thinking of naming a new hotel or name of a paper towel on notice of what is currently being used in Nevada in a more robust way. The goal is to avoid those sorts of very expensive lawsuits that can prevent companies from innovating or launching new products or building their new casino for several years.

CHAIR CARLTON:
The Committee will work on this bill, and it will be brought up for work session on Friday.

SCOTT ANDERSON (Deputy for Commercial Recordings, Office of the Secretary of State):
We have come forward to say we are in support of the amendment as proposed by Mr. Firth. After we were approached by Mr. Firth and the other sponsors of this amendment, we worked closely with them to make sure the amendment worked within the framework of the Office of the Secretary of State.

CHAIR CARLTON:
We will close the hearing on A.B. 22 and we will go into a work session on A.B. 151.

The attached amendment on A.B. 151 is from Mr. Nielsen of the Washoe County Senior Law Project (Exhibit F). There were no concerns about this amendment.

ASSEMBLY BILL 151 (1st Reprint): Makes various changes concerning mortgage lending. (BDR 54-567)

SENATOR COPENING:
Our notes mention one amendment, but in the testimony there was a suggestion in section 2, subsection 2, lines 17 and 18 on page 2, which reads, " ... must be printed in 10-point bold type ... " to read "at least 10-point" or "10-point or larger." That was a good suggestion.

CHAIR CARLTON:
Senator Parks, did you ask for that? Would you like that in the bill?

SENATOR PARKS:
Yes, please.

SENATOR HARDY:
This amendment dealt with making sure it did not unfairly impact nonprofit organizations that engage in this type of service.

MR. NIELSEN:
This amendment was to fix the language in the bill that did two things. One, the language intended to include all legal service programs. The way the first reprint was written, it would have excluded several that also were not housing counseling agencies. It also included governmental agencies like ours that are both legal-service agencies and housing-counseling agencies so they would also be part of that class.

SENATOR HARDY:
There was agreement with everybody else that there was no opposition to this.

CHAIR CARLTON:
Where did Senator Parks want his language inserted? Senator Copening, did you have the notation?

SENATOR COPENING:
It was on page 2, line 17 of the bill.

SENATOR PARKS:
In the amendment, it is section 2, subsection 2.

SENATOR HARDY MOVED TO AMEND AND DO PASS AS AMENDED A.B. 151.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARLTON:
Senator Copening, you were working on A.B. 152. Can you give us an update on the status of that bill?

ASSEMBLY BILL 152 (1st Reprint): Makes various changes concerning mortgage lending and related professions. (BDR 54-787)

SENATOR COPENING:
I have been in contact with Kelly Gregory, Committee Policy Analyst. We will have A.B. 152 in the Friday work session. We had to make some minor changes to the second version of the mock-up. We will have it later tonight.

CHAIR CARLTON:
Is Mr. Conklin aware of everything that you are doing?

SENATOR COPENING:
Yes, absolutely.

CHAIR CARLTON:
We will go to the work session on A.B. 162, the autism bill. Mr. Kim presented the language you have before you (Exhibit G, original is on file in the Research Library). The consensus language the groups worked on is in there, as well as the licensure issue. We had a conference call and discussed the licensing component, which was left for me to address. That language is encapsulated in there as far as who will be licensed and the new license for the board-certified assistant behavior analyst and the different people who will be licensed. Also included is a certified autism behavior analyst, how they will work together, how treatment programs will be handled and how benefit plans are done.

ASSEMBLY BILL 162 (1st Reprint): Requires certain policies of health insurance and health care plans to provide coverage for screening for and treatment of autism. (BDR 57-44)

SENATOR AMODEI:
Does this apply to government employers also?

CHAIR CARLTON:
No, governmental employees are exempt. The biggest issue in the hearing was that this will apply to only a small group of providers right now.

SENATOR AMODEI:
I find it incredible that we are excusing people who work for Nevada from having to provide this to employees who work for this State.

CHAIR CARLTON:
I share your concern about that. Committee, are you comfortable with moving this amendment today?

> SENATOR COPENING MOVED TO AMEND AND DO PASS AS AMENDED A.B. 162.
>
> SENATOR PARKS SECONDED THE MOTION.

SENATOR HARDY:
This is an emotional issue for me. I have a nephew with autism. This is not about autism; this is about the concept. I have consistently voted against mandated health benefits because they drive up the cost of health insurance. I have been very clear on the record that I would support a concept of mandatory offerings where insurance companies are required to offer certain programs and benefits so the consumer can then select those if they feel they would like to pay for them.

But we cannot ever get any traction on that. All that happens is we get beat up politically when we vote against things like this. I am going to vote to advance this to the Senate Floor for the sole purpose of making that point on the Floor.

I do not think there is any question that this drives up the cost of insurance. My heartburn with this is, yes, we are required to not include those who are exempt under the Taft-Hartley Act. That bothers me, but that is something beyond our control. What is not beyond our control, though, is requiring local and state governments to be included. What bothers me is the testimony given in the Assembly that we cannot provide this because we cannot afford it. What makes you think if the local governments cannot afford it, small business can afford it? That is totally beyond my grasp to understand.

I am going to vote to extend this to the Senate Floor. I want that vote to be considered part of the demonstration of my support for autism and what needs to be done. The other part of my reason for extending it to the Floor is to give me a public venue that will then be on the public record: to talk about this

concept that we should pass this mandate on to private businesses only, when local governments are not required because they cannot afford it. I can assure you if local government cannot afford it, businesses cannot afford it.

CHAIR CARLTON:
There is nothing in your statement that I disagree with. It pains me that there are children who need these services and we have decided we do not want to pay for it, even in the long run. We know that treatment saves millions and millions of dollars, and we are exempting state employees. I am not happy about it either. When you and I are both not happy, that tells you something is not right with this bill.

SENATOR SCHNEIDER:
I feel the same way. Autism seems to be a plague, 1 in 149 births, and we as a government do not really address it. It is shameful. I have supported this for many years. The numbers get worse every year. We have heard that an autistic child could cost millions of dollars, and that is a bill we are putting off. This is an unfunded mandate.

I agree with Senator Hardy. Businesses are strapped right now too. They cannot afford it, but we cannot afford not to do something.

SENATOR HARDY:
There is a distinction with this, which may ultimately cause me to depart from my longstanding practice against mandates. There is significant benefit to these kids when we identify autism early and when we provide treatment. That is why I voted, as a member of the Senate Committee on Finance, to continue treatment because the benefits are so significant. The work that is being done for autism is just unbelievable. Unlike things like temporomandibular joint disorders and some of these other things that are on the list of mandated benefits, autism should be covered by insurance. We have driven up the cost of insurance with so many other mandated benefits that do not fall into this category. This is something that should be available.

I do not want my comments to be viewed as anything other than what they are, a protest against the concept, the mentality that the Legislature has, that we cannot pass this on to local governments and to the State because it is too expensive. But small business can afford it. I do not get that logic. That is my only point.

CHAIR CARLTON:
I understand your concerns. I feel the same way. I do not think it is just the mandates that cause the cost of health care to go up. We have to remember that health care has become a for-profit business.

THE MOTION CARRIED. (SENATOR AMODEI VOTED NO.)

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CHAIR CARLTON:
We will go to the next bill, A.B. 173, the arson investigator bill. There were no proposed amendments.

ASSEMBLY BILL 173: Makes various changes relating to occupational diseases. (BDR 53-898)

SENATOR HARDY:
Does this bring arson investigators on par with all of the firefighters? Is that what we are doing in this?

RUSTY MCALLISTER (Professional Firefighters of Nevada):
Senator Hardy, currently there is a hole in the system from the standpoint of fire arson investigators filling two roles. They are law enforcement and also fire service. Many of them come from fire service; some do not come as line firefighters. They are fire prevention, but they still do the law enforcement details and they also go into buildings that have been burned out. Yet, they are not included. Some are included if they come from the ranks of the firefighters; but if they do not, then they are not included, even though they are doing the same job.

SENATOR HARDY:
Does this bill treat arson investigators as firefighters for purposes of presumptive benefits?

MR. MCALLISTER:
That is correct.

SENATOR HARDY:
Is that all that it does?

MR. MCALLISTER:
There was another bill draft request that was rolled into this bill initially. Two years ago, this Legislature approved a bill that said, under presumptive benefits for heart and lung, you cannot deny benefits under any other provisions of law, except NRS 617.455 and NRS 617.457. Claims will be denied under another provision of law, NRS 617.440. In the 74th Legislative Session, a bill was passed that said you cannot do that.

A certain third-party administrator in Nevada found another section of law and started denying claims under that section which is NRS 617.358. This bill says they cannot be denied under that section either.

SENATOR HARDY:
Are police, firefighters and arson investigators treated the same as firefighters under all of those scenarios?

MR. MCALLISTER:
Yes, that is correct.

SENATOR COPENING:
Mr. McAllister, can you confirm that arson investigators would have had to have been firefighters before they became arson investigators?

MR. MCALLISTER:
No, they do not have to be firefighters before they can become arson investigators. In some areas they are firefighters and in some areas they are fire prevention. They are given an additional assignment of fire arson investigators. They still have to do some Police Officers' Standards and Training, as law enforcement officers do. Under chapter 289 of NRS, the peace officer provision of heart and lung, there is a list of the types of peace officers who are covered.

Arson investigators are not listed under those peace officer categories, and they are not listed specifically as firefighters. Those who have already spent five years as firefighters are already covered. Those who have not spent five years as firefighters, but did fire prevention and have law enforcement responsibilities, are not covered. All of the state fire marshal's investigators are covered.

SENATOR SCHNEIDER:
Was there any opposition to this bill?

MR. MCALLISTER:
The City of Las Vegas testified against the bill. The City of Las Vegas already covers their fire arson investigators.

SENATOR HARDY MOVED TO DO PASS A.B. 173.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR RHOADS VOTED NO.)

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CHAIR CARLTON:
We will go to a work session on A.B. 266. This was Assemblyman Oceguera's novelty lighter bill. There was a proposed amendment from the American Civil Liberties Union (Exhibit H). Assemblyman Oceguera has approved the amendment. We do not see it as an issue.

ASSEMBLY BILL 266: Prohibits the sale of novelty lighters. (BDR 52-569)

SENATOR PARKS MOVED TO AMEND AND DO PASS AS AMENDED A.B. 266.

SENATOR HARDY SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARLTON:
We will go to A.B. 281 from Assemblyman Conklin. Committee, Senator Schneider needs to have a conversation with Mr. McAllister to clarify some things before we go on with this bill.

ASSEMBLY BILL 281 (1st Reprint): Makes various changes concerning workers' compensation. (BDR 53-57)

CHAIR CARLTON:
We will go on to A.B. 287. There is an amendment to this bill (Exhibit I, original is on file in the Research Library). Miss Gregory, would you like to go through the amendment with us?

ASSEMBLY BILL 287 (1st Reprint): Makes various changes concerning appraisals of real estate. (BDR 54-1019)

KELLY S. GREGORY (Committee Policy Analyst):
The only change appears on the bottom of page 5 and the top of page 6 of this bill. It revises the definition of an appraisal management company (AMC). It provides three new specific exemptions. One has to do with attorneys who order appraisals. One has to do with persons or entities that contract with independent appraisers, if for some reason they cannot complete the appraisal themselves. The final one deals with a person or entity who contracts with an independent appraiser for cosigning the appraisal report. These deal with independent-contractor appraisers.

These amendments were requested by the representatives of the Hong Kong and Shanghai Banking Corporation. These provisions were agreed to by Mr. Jackson, and through him, Assemblyman Horne.

CHAIR CARLTON:
That was my understanding also. There are three exemptions where this would not apply.

JAMES JACKSON (Coalition of Appraisers in Nevada):
The changes we made to A.B. 287 from the bill that was presented in the hearing are pretty minimal. The Real Estate Division may have some comments with respect to a couple of definitions.

Is there a specific question about a specific change we made?

SENATOR SCHNEIDER:
Mr. Jackson, page 6, paragraph (b), lines 1-2 of the proposed amendment reads, "Any person licensed to practice law in this State who orders an appraisal in connection with a bona fide client relationship ... ." Does this mean that the attorney is exempted out of this?

MR. JACKSON:
It means the attorney, in the course of litigation, does not have to register as an AMC. As a licensed attorney, they are able to hire an appraiser as an expert or as litigation support. That does not make them an AMC.

SENATOR SCHNEIDER:
Can they influence the appraiser?

MR. JACKSON:
Absolutely not. That is what this bill is about.

CHAIR CARLTON:
If we vote this out today, and another concern arises as it moves toward the Senate Floor, if something else needs to be addressed, we can address it on the Floor if you would like.

GAIL J. ANDERSON (Manufactured Housing Division, Department of Business and Industry):
The only thing I had a concern about was in section 5, the definition of appraisal firm. I am concerned it is not adequately defined and would recommend adding to the definition, that the principal of the appraisal firm is a Nevada licensed appraiser. The principal of the appraisal firm supervises, trains and reviews work product issued under the logo of the appraisal firm.

I want to be sure that we are excluding from the definition of an AMC those Nevada licensed or certified appraisers who use, as their business model, Nevada appraisers working for the appraisal firm as independent contractors rather than employees. That is a very common model.

The principal of an appraisal firm needs to be a Nevada licensed or certified appraiser. They also supervise training, which includes taking on interns to mentor, train and review work product issued under the logo and name of the appraisal firm. Appraisal management companies do not necessarily do those things. They serve as third-party intermediaries to procure appraisals, and they do not serve those functions.

In section 7, the creation of a special fund, I would prefer that revenues collected from the registration of AMCs be deposited to the State General Fund. The Real Estate Division has the mechanisms in place to do this. We have

submitted an unsolicited fiscal note for purposes of projected revenues. It is not a great amount, about $20,000 in the first biennium.

CHAIR CARLTON:
Did you offer that in the Assembly?

MS. ANDERSON:
No, I did not offer that in the Assembly.

CHAIR CARLTON:
Is Assemblyman Horne aware of that concern?

MR. JACKSON:
I have talked with him about that.

ASSEMBLYMAN WILLIAM C. HORNE (Assembly District No. 34):
Were there specific questions?

CHAIR CARLTON:
Ms. Anderson had a concern with section 7, about the money going into the special account and not into the General Fund. She had not raised those concerns in the Assembly. We wanted you to be aware of them as we move forward with this.

ASSEMBLYMAN HORNE:
I have been made aware of that, and I am okay with it.

CHAIR CARLTON:
Are you okay with the change in definition on appraisal firm also? Are you also aware of the language, "The principal of the firm is a Nevada licensee?"

ASSEMBLYMAN HORNE:
Yes, I have seen that and approve.

SENATOR COPENING MOVED TO AMEND AND DO PASS AS AMENDED A.B. 287.

SENATOR PARKS SECONDED THE MOTION.

CHAIR CARLTON:
Is staff comfortable and have enough information from us? We can get more information from Ms. Anderson on exact language

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR CARLTON:
We will go to A.B. 521. There are no proposed amendments.

ASSEMBLY BILL 521 (1st Reprint): Revises provisions governing coverage for cancer as an occupational disease of firefighters. (BDR 53-278)

SENATOR AMODEI MOVED TO DO PASS A.B. 521.

SENATOR COPENING SECONDED THE MOTION.

SENATOR HARDY:
It is always hard to vote against our firefighters, but I do not see enough of a nexus between the cancer and the carcinogen directly related to the occupational hazards. Therefore, I am going to have to vote no.

THE MOTION CARRIED. (SENATOR HARDY VOTED NO.)

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CHAIR CARLTON:
We will go back to A.B. 281. Vice Chair Schneider has requested this bill be moved to Friday to work on a couple of issues. We will reschedule this bill for Friday.

The work session is complete. We will go into hearing A.B. 10.

ASSEMBLY BILL 10 (2nd Reprint): Makes various changes concerning certain health care professionals who report certain information to licensing boards or other governmental entities or who cooperate in investigations of certain health care professionals. (BDR 40-219)

LISA BLACK (Nevada Nurses Association):
This bill was heard in the joint meeting of the Senate Committee on Health and Education and the Assembly Committee on Health and Human Services. More extensive testimony was presented at that time. I have submitted more extensive testimony in writing for the Committee (Exhibit J). I have also presented copies of a study that was conducted by the Nevada Nurses Association (NNA) in 2008 that queried experiences of Nevada nurses in advocating for patients in health-care situations that exposed patients to real or potential harm (Exhibit K, original is on file in the Research Library). There are a couple of the findings of the study that I want to specifically address. You have the report in front of you.

Assembly Bill 10 was introduced as part of the response to the tragic outbreak of hepatitis C as a result of unsafe injection practices in endoscopy centers in southern Nevada. What came out of that, in part, was a culture of nurses and others employed in those facilities who were told to engage in practices that were unsafe or they would lose their jobs.

Of concern in this study was more than one-third of the registered nurses who responded indicated they were aware of patient safety concerns which were not reported. It is important that health-care leaders who respond to this in the spirit of the 1999 Institute of Medicine reports are able to take steps to encourage nurses in those situations, to report rather than bury the situations that can cause harm to patients.

Assembly Bill 10 helps to bridge the gaps in the existing statutory language that was codified in NRS 449.205. It does provide some level of legislative protection for nurses who are engaged in a wider variety of essential reporting situations. Specifically, A.B. 10 provides workplace protections for nurses who report conditions about patients being exposed to substantial risk of harm or who are requested to engage in conduct that would violate the nurse's duty to protect patients from actual or potential harm. It provides protection to nurses who refuse to engage in conduct that would violate chapter 632 of NRS and chapter 632 of the *Nevada Administrative Code* (NAC), which is the nurse practice act, or that would make the nurse reportable to the State Board of Nursing. It would protect a nurse who reports the actions of another nurse or nursing supervisor who engages in conduct subject to mandatory reporting to the State Board of Nursing. It would also enable nurses to report staffing concerns or situations that reasonably could contribute to patient harm.

During the Assembly deliberations on this bill, two substantive amendments were made to the bill language. First, the language was amended to state that reportable conduct must be willful on the part of the person being reported. The second change was to state that any report must be made in good faith. Good faith was defined as honesty in fact and reporting the information.

The definition of good faith reflects a compromise in language between the bill's sponsor, Assemblywoman Leslie, the NNA, other stakeholder associations and the Legislator who proposed the amendment. The NNA accepts both of these amendments and is comfortable with that language. The bill itself is supported by a number of key stakeholder organizations.

The Committee has copies of more extensive written testimony, and we urge your support of this important patient-safety legislation.

SENATOR COPENING:
On page 5, line 24, where the time limit of 60 days is mentioned, what if the action is discovered later? For example, someone discovers something that is not right. They report it, but the person being reported does not discover that it was a bad report until a year later. Does this cover that person, even though it is more than 60 days past the date of the report?

MS. BLACK:
The intent of the bill language is that the time window would exist and commence as of the time the report was made, moving forward from that point.

The point you are making is a good one. The situation that needed to be reported may, in fact, happen a substantial amount of time after the situation took place. The intended language of the bill is to move forward as of the time of the report.

CHAIR CARLTON:
Being involved with the hepatitis C crisis through a number of legislative hearings and then working with some of the victims to help them get the health care they needed afterwards, my concern is this. I find it very hard to believe that the nurses did not understand the "one, one, one" rule. I am not even in health care and I understand the "one, one, one" rule: one vial, one needle, one patient. I think that is very explicit. They violated that rule. That

they did it would not have been willful. Under this bill would those nurses have been protected?

A nurse's job is not more valuable than a person's health. If it means they lose their job because they reported something that was wrong, with the nursing shortage that we have, it would not be too difficult for a nurse to find another job. I am very disappointed it got to the level it did before any of the nurses came forward. But I will give them credit for actually stepping up and handing over their licenses even though a number of the doctors who were involved in that crisis still have their licenses to practice, but they are not practicing. Would this legislation actually have protected those nurses in that situation?

MS. BLACK:
I would agree with you. The question was asked, during the interim as the hearings were beginning, if additional education needed to take place for nurses in terms of education for exposure prevention and exposure control. I would agree with you wholeheartedly in this.

This is a difficult situation because we are an organization that represents nurses. I agree with you that nurses are professionals who are educated in infection control. Nurses are educated to understand completely the "one, one, one" rule in a lot of detail.

Legislation moved forward in 2005 that allowed nurses to be able to say no without losing their job. It moved forward without a lot of recourse other than in a court of competent jurisdiction.

Do nurses know that "one, one, one" rule? I absolutely believe they do, or a reasonable and prudent nurse should. That is the standard nurses are held to. We then run into the issue that nurses and nurse anesthetists know the rule and are then in a catch-22 situation. Do they engage in something they are told to do which may result in harm, or do they move forward knowing something they report will cause them to lose their job? In fact, this legislation would address that situation. They would be able to report that situation without being presented with that risk.

SENATOR CARLTON:
Unfortunately, the fact is the nurse is the last line of defense. The doctor is in and out of the room. The laboratory technician is doing their job. The front desk

is doing their job. The person who really makes sure the patient is taken care of is the nurse. That we have to give them legislation to protect their jobs so they protect the patients, gives me pause. I am disappointed in that but I understand why we are doing this. I do not want to have to put someone in a position of having to choose. I got a little disillusioned when I realized that people's health was truly put at risk and was balanced with the nurses' position in their employment.

Those are my concerns. I understand what we are trying to do here. I had to put that on the record because it is a frustration that I have had ever since I sat through all those hepatitis C hearings.

MS. BLACK:
I agree wholeheartedly. The nurse is the person at the bedside who is the final advocate. We ended up with about 500 responses from the study we conducted, which was a substantial response. We had mailed about 1,700 surveys, which was a 10-percent sampling of registered nurses in Nevada. About one-third of those nurses responded that there was a substantial concern about retaliatory activity in their workplace. They did not feel comfortable reporting those sorts of situations.

That is something we hate to move forward with the need to legislatively address. It appears there is that need to move forward and legislatively address that so nurses, who are the last line of defense for the patient, are able to do that.

CHAIR CARLTON:
Is there nothing else in State law that protects them? Could they have made a phone call to the Board of Medical Examiners and filed a complaint? Is there nothing else out there that would have protected them since they valued their job more than they did that patient in front of them.

MS. BLACK:
There is limited language that is currently codified in chapter 449 of NRS that provides some limited protection for reports to medical boards and other licensing agencies. It is very limited in scope. It limits recourse to a court of competent jurisdiction. It does not address most situations in which a nurse would need to report unsafe activity. It does not address the reporting of other nurses as in the hepatitis C situation in the endoscopy centers.

The physicians were directing nurse anesthetists who were working with registered nurses. At any point the nurses who were working with those nurse anesthetists could have made a report. There is no reporting protection for that. That report would have been made to State Board of Nursing.

CHAIR CARLTON:
I am not opposed to the bill. I understand what you are trying to accomplish. I have been an employee advocate for a very long time. I know you understand my frustration because I am sure the disillusionment with the whole situation was felt by many people.

MS. BLACK:
We felt it as well.

SENATOR HARDY:
I understand the intent of this and I really have no difficulty in going as far as we possibly can in protecting people from being retaliated against for reporting something. I am troubled by the language in section 1, subsection 1, lines 39 and 40: "Refuses to engage in the conduct that would violate the duty of the registered nurse ... ."

Presumably, the conduct would be requested by a doctor or a nurse who is a superior. My concern is that we may be getting into an area where a nurse could refuse the direct orders of a doctor because they disagree with the doctor's analysis on something. Does this deal with care? That is what I am concerned about. What ensures that we are not getting into that area?

MS. BLACK:
That is an excellent question. A common misperception in the health-care industry is that nurses are always, without question, obligated to carry out an order given by either a medical doctor or a nursing superior. The reality of the situation is that nurses being that last line of defense between whatever entity of health care and the patient, nurses are held by chapter 632 of NRS and chapter 632 of NAC, to be that last line of defense. They also are held to their own scope of practice and are mandated to decline to carry out an order that could potentially cause harm to a patient. For example, a nurse receives an order for 100 milligrams of morphine, which will kill most people. If the nurse carries out that order, which was given by a physician, and that patient dies, it is the nurse who is legally responsible for having carried out that order.

SENATOR HARDY:
And that is a case where there is actual harm. Based on your experience, you know harm is going to result. The bill says actual or potential harm; and it does not just go to the patient, it is broader than that. Is it anywhere in State law that registered nurses can refuse to perform an activity which would subject them to disciplinary action by the State Board of Nursing?

MS. BLACK:
It is, but I do not know the exact section of chapter 632 of NRS or if it falls under NAC. Chapter 632 of NRS and chapter 632 of NAC specifically state that any nurse who is aware of the violations of another nurse is legally mandated to report the actions of that nurse to the State Board of Nursing or face licensure action on their own part.

SENATOR HARDY:
I appreciate that clarification. The issue of when and where it is appropriate for a nurse to interfere or question a doctor has been well vetted. That is not what this is about. I just want to make sure that in doing this we are not stepping into that debate. That is not the intent.

SENATOR COPENING:
Ms. Black, I had a little bit of a different take on it. I know with the endoscopy clinic we were dealing with a very extreme situation, but correct me if I am wrong. This would also apply to a situation if you were working under a physician, for example, who you suspected to be taking drugs, such as cocaine, on a daily basis. You felt morally you had a responsibility to report that. Is this also designed for those types of protections? That would be a perfect example of how retaliation could take place if that doctor finds out. Is it also designed for situations like that?

MS. BLACK:
Yes, in fact, that would be a situation addressed because that could potentially cause harm to a patient. That is a situation in which a nurse is legally obligated, through chapter 632 of NRS and chapter 632 of NAC, to report anything that could potentially or actually cause harm to a patient.

SENATOR COPENING:
If the nurses are indeed proven to be guilty in the endoscopy clinic, I have no forgiveness for that. They should receive the appropriate punishment. But along

those lines, in a situation where you have to report the actions of a doctor, such as suspicion they are taking martini lunches or whatever, retaliation does occur. I know that for a fact from people who have been in that situation. Sometimes these nurses are in very tough situations and sometimes retaliation can be forms of harassment.

BEATRICE RAZOR (Legislative Liaison, Nevada Nurses Association):
I have submitted written testimony in support of A.B. 10 (Exhibit L).

STACY SHAFFER (Service Employees International Union Nevada):
The Service Employees International Union (SEIU) Nevada supports A.B. 10. In May 2008, an SEIU member testified before the interim Legislative Committee on Health Care and shared her personal experience of losing her job for speaking out against unsafe practices. Due to the lack of teeth in the current legislation, her case dragged on for more than two years before she was found to have been illegally fired.

The single largest obstacle in getting health-care professionals to report unsafe practices is the fear of retaliation. Health-care professionals must feel they will be protected if they file a report, and they must know they have a course of action if they are retaliated against by their employer. This legislation begins to provide the depth that is needed to protect health-care professionals who come forward to report unsafe practices.

CHAIR CARLTON:
Did you hear the conversation we had earlier about the issues? Is there anything within that area that you would like to put on the record? You heard my concerns. Is there anything you would like to put on the record?

MS. SHAFFER:
No, our perspective is a little bit different based on the experience that our registered nurses have had. We do not represent the nurses who were involved in the hepatitis crisis.

BOBBETTE BOND (Health Services Coalition):
The Health Services Coalition was very supportive of drafting statutes that would strengthen the ability for nurses to know where to report and when to report. These were some of the issues that came out of the endoscopy crisis. While the endoscopy situation is not happening today, we went through an

analysis last summer and there were two or three things that would most help avoid situations in the future. One of the things we really wanted to explore and see happen was some better, stronger, whistle-blower protection for consumers and medical staff, which is not exactly what this is. It was considered one of the most effective ways to stop future problems like this. The added protection for nurses, the added path and primarily knowing where to go and who to contact, which did come up in testimony several times, is something we support. We are happy to see this legislation and hope it can move forward.

JIM WADHAMS (Nevada Hospital Association):
We have appeared at all the prior hearings in support of this bill. Basically, this structure has been in place for hospitals since the 18th Special Session. It was added, as to hospital-based nursing in 2002, and in the experience of hospitals and the nurses who work there has worked very well. The hospitals' nurses are the critical component of our staff, and this bill was intended to add the same kinds of protections that hospital nurses have to those working in ambulatory surgical centers and clinical practice. That is why you end up seeing three parallel sections in this bill.

I heard, with interest, the question that Senator Copening asked. I would like to draw your attention to that because there is a little subtlety that is important in that answer. I am looking at page 5, line 22, regarding the reference to the 60 days. My reading of this is a period of time in which, if the action is taken within that period of time, the person protesting the action is entitled to a rebuttable presumption that the action was done in retaliation or discrimination. If the action was taken more than 60 days later, it would not be entitled to the presumption that it was retaliation. It does not mean it would not be actionable, but it is a subtlety that maybe is more often heard in the Senate Committee on Judiciary than here, but that shifts the burden of proof. If you do not have the presumption of guilt, then you have to prove the other party intentionally did the act in retaliation. If the action occurs within 60 days, this language would create a presumption that it was done in retaliation.

That is a significant shift which did not exist in the prior law. While it is significant, we do not have a particular problem with that because of the Assembly amendments which will lead me to address the amendment that I have offered (Exhibit M). The Assembly amendments were done by other parties, but they included that the allegation must be made in good faith and provided a definition for what constitutes good faith.

Our amendment was not heard in the Assembly; it was discussed with Assemblywoman Smith. I am not suggesting that she has signed off on it, but she has been made aware of it. The amendment is in three parts, but it is the same part being repeated through the bill.

On page 5, lines 4 through 6, the current language in the bill is "If a court determines that a violation of NRS 449.205 has occurred, the court may award such damages as it determines ... " That language was in the bill prior to the addition of the good-faith requirement. To conform this to the intention of the good faith versus the retaliation, the court should have the opportunity to award the attorney's fees to the prevailing party. That is why the language in the amendment says "In an action alleging that a violation of NRS 449.205 has occurred, the court may award to the prevailing party damages including, without limitation ... ," then it lists them. The purpose of the amendment that was added in the Assembly was to conform it to the basis of the good-faith requirement on that allegation.

We are in support of the bill. This is a balancing amendment to conform to the other amendment in the Assembly, but we want the record to show that we appear in support of this bill.

CHAIR CARLTON:
Is there a basic premise in court action that allows the judge to determine who gets what at the end, depending upon who prevails? Is there something that addresses that already? In reading this language, this would make it mandatory that the prevailing party get the damages and pick up the costs and the fees.

MR. WADHAMS:
That is an excellent question. There are certain levels of civil action in our Nevada system of courts, where attorney's fees are awarded at the discretion of the court to the prevailing party. The cut-off point is in suits alleging damages of less than $20,000. That is not the issue in this matter. Otherwise, in Nevada, the rule is what has been referred to in the Committees on Judiciary of both Houses as the American rule. Parties just absorb their own attorney's fees.

This issue is a little bit different because the rebuttable presumption creates a distinct shifting of the burden of proof. In the Assembly amendment that allegation, particularly with that burden of proof shifting, must be made in good

faith. It gives the court the clear discretion, not the duty. The wording in my amendment is, " ... the court may award to the prevailing party ... " It is not a mandatory award. It definitely identifies that the court has the discretion to make an award in an action, whether the prevailing party was the whistle-blower or whether that whistle-blower acted in bad faith and the victim now becomes the institution or physician that had to respond. It is not automatic, obligatory or mandatory. It is simply discretion.

SENATOR COPENING:
Mr. Wadhams, can you tell me the difference between "If a court determines that ... " and "In an action alleging that ... "?

MR. WADHAMS:
Section 2, subsection 2, lines 4, 5 and 6 is set up so only the attorney's fees would be available to the person making the allegation. My language is grammatically restructured to accommodate that there could be, depending on how the case goes, one of two victims. Either the whistle-blower is the victim, or if there is bad faith, it could be the physician or the institution that has been alleged to be retaliating.

The principle has changed that the attorney's fees could be awarded to either party depending on whoever is determined by the court to be the victim. Basically, the difference in the language is to accommodate the alternative that the court has the discretion to award it to the party that it determines, after an action, to have been the victim of either retaliation or a bad-faith allegation.

SENATOR COPENING:
I am still not grasping it, but that is okay. I can talk to you a little bit later. I am not confused about the part that says "to the prevailing party" if that is what you were alluding to. It is the change in the words from "If a court determines" to "In an action alleging." Now we have, instead of a court saying yes we have found a violation, there is an alleged violation, yet the court is still awarding.

MR. WADHAMS:
The language in the bill in the second reprint is based on the allegation of a violation. If a violation is found, then the court may award the damages. If you read those damages, you will see they appear to be tuned towards a displacement from work. The reason I changed that was because the bill now requires and has an obligation on the person blowing the whistle to do so in

good faith. If they do not, they would then be responsible for acting in bad faith.

We could put a couple of sentences there, one saying, "If a violation is found, then this happens," and, "If the violation is not found and it is determined that the allegation was made not in good faith, then this happens." It is really a grammatical structuring. I certainly defer to the Committee. But I hope I have the principle correct, if not the explanation of the language.

SENATOR COPENING:
You do, and I understand it now.

CHAIR CARLTON:
Mr. Wadhams, your second explanation gives me pause, because now we have another thing that a nurse is going to be taking into consideration, in the back of her mind, when she is choosing between the patient and her job. Are we making this worse? In your client's mind, you are probably making it equitable. In my mind, when I hear this, it is going to be one more thing the nurse is going to consider before she drops the dime. It seems as though you are trying to move forward, but instead going two steps forward and one step back.

MR. WADHAMS:
This is new language that will apply in all three settings: hospitals, clinics and ambulatory surgical centers. The law we have lived under for the past seven years does not have any reference, in particular, to the awarding of attorney's fees. It was strictly at the discretion of the court.

What causes this to be an issue is the amendment in the Assembly. I apologize for not having all of the previous reprints in front of me. The language on good faith was added and there is a requirement that this allegation be made in good faith which means honesty, in fact, in reporting of the information or in the cooperation of the investigation concerned.

Based upon that language, there is now an issue. The Assembly language without my amendment, indeed, raises the bar so allegations are not made casually. That is the Assembly language that appears in the second reprint.

CHAIR CARLTON:
Is that with the "willful" language in it?

MR. WADHAMS:
That is with or without my amendment. The amendment changes the dynamic because of the good-faith obligation and the particularity with which it is expressed. There is a standard set on whistle-blowing so it is not casual or frivolous.

We have not had that experience in hospitals. We have lived under an early version of this law for seven years. With this change, the tightening and strengthening of the language, we are offering this amendment to balance with the language of the good-faith requirement that becomes an obligation of the person making the allegation.

CHAIR CARLTON:
We will close the hearing on A.B. 10 and open the hearing on A.B. 454.

ASSEMBLY BILL 454 (1st Reprint): Revises certain provisions relating to housing. (BDR 10-839)

ASSEMBLYMAN JAMES OHRENSCHALL (Assembly District No. 12):
I am presenting A.B. 454, which has to do with mobile home parks. I was approached to introduce this bill by Jon Sasser, Washoe Legal Services, and Ernie Nielsen, Washoe County Senior Law Project, based on needed changes in the law and on an eviction case that occurred in my district.

It is a very simple bill and is what has survived from the Assembly after a lot of compromise. Section 5 specifies that, if you are going to be evicted, it is going to be for one of grounds set in statute, and it also clarifies existing law.

Section 6 attempts to bring about a level of parity. If you are an apartment renter right now, and your landlord decides to go through a summary eviction, and you lose at justice court, the current process is that you can post a $250 bond to appeal to district court. If you are a mobile home resident and rent a lot in a mobile home park for your mobile home, which you have tens of thousands or hundreds of thousands of dollars invested in, if you want to appeal to district court, you must post twice the amount of the judgment and the costs. You have a lot more at stake in a mobile home park. You have invested a lot more to purchase the mobile home that is in the park. That is the reason for this bill.

MR. SASSER:
The bill is in two parts. I will address the noncontroversial part of the bill, which is section 5. Section 5 came to be because Judy Dosse contacted both Assemblywoman Buckley and Clark County Commissioner Giunchigliani regarding a court decision that she had just endured. All of us, over the years, had interpreted chapter 118B of NRS to state that if you own your mobile home and you are renting a space in a mobile home park, you can only be evicted for cause.

In regular landlord/tenant law, chapter 118A of the NRS, there is no-cause eviction. If you get a 30-day notice and you are not in the middle of a lease and your landlord wants you to vacate at the end of 30 days, then an eviction can be filed against you.

In the mobile home context, the law as we had read it required that you do something wrong. There is some reason or cause for your eviction. There are two sections of the law, NRS 118B.190 and NRS 118B.200, that are at issue and how they relate to each other.

In Ms. Dosse's case, she received a 45-day notice to vacate the park and an allegation that there was cause to evict her. I have submitted the decision of the court and some exhibits (Exhibit N, original is on file in the Research Library). The court found there was not cause to evict her under the statute but because she had simply been given a 45-day notice, she could be evicted.

Included in my exhibit, Exhibit N, there is a Legislative Counsel Bureau (LCB) legal opinion that Assemblywoman Buckley had requested in 2004. The LCB Legal Division agreed with the reading of the statute that we had always followed, that there must be cause in order to be evicted from a mobile home park.

Section 5 is one of those times in the law that we are saying, "This is the law today, and we really mean it." The way we say "we really mean it" is today the law says, "Notwithstanding the expiration of a period of a tenancy ... the rental agreement prescribed in NRS 118B.190 may not be terminated except on one or more of the following grounds ... ," and the grounds are listed. We are adding some words in there that say "we really mean it." That is: "Even if you got the 45-day notice in NRS 118B.190, that is not sufficient; you have to have one of those grounds." That is our attempt to say "we really mean it," and that

someone who has invested money in the purchase of a mobile home and putting it in a park cannot be evicted from that park unless there is a reason or cause to do it, not just on a mere 45-day notice.

JUDY DOSSE:
I have submitted written testimony in support of A.B. 454 and some additional documents (Exhibit O, original is on file in the Research Library).

MR. NIELSEN:
I will address the "stay bond" provision that is described in section 6. A "stay bond" is a bond you pay to be able to stay in your apartment or mobile home during the appeal period. The basic premise of this is that in landlord law, in a summary eviction process, which is the process used to evict people in apartments, there is a $250 "stay bond." If you have to use the plenary eviction process, the full eviction process, which is what you have to do if you are evicting somebody from a mobile home park, then the "stay bond" is two times the judgment plus costs. In the justice court, attorney's fees are considered costs. So you can imagine how quickly that bond goes up. It is probably cost prohibitive. That means most people do not appeal the evictions they get from mobile home parks.

If you were going to appeal, it does not make any sense to not get the stay. If you appeal and you have to leave your home, you are going to be confronted with having to pay two costs for housing. You are not going to be able to pay your lot rent, and you will most likely lose your mobile home through a lien process. That is why it is very important that we think about bringing parity to the two systems, the summary eviction system and the plenary eviction system. There is much more at stake for someone who has invested thousands of dollars in a mobile home.

One of the things people might argue about this bill is that it is going to let people stay in a park who are really "bad actors." I should point out in NRS 118B.190, there is a provision that allows a temporary writ of restitution after three days' notice for people who are in violation of a number of things. If someone is really doing something bad, they can be removed, even before the trial, on the merits in the eviction case. They can be removed within three days of the time the complaint is filed through a temporary writ of restitution.

Another provision in section 6 is that you cannot just pay the bond. You have to keep on paying your rent.

CHAIR CARLTON:
Is it correct that they cannot be terminated except for "one of the following"? We have this whole list of things for which they can be terminated. Is there something that is not on this list?

MR. SASSER:
Yes, Madam Chair.

CHAIR CARLTON:
It seems to me that almost anything you can think of could come under one of these things. How are we actually protecting anyone with this?

MR. SASSER:
The issue is whether you have to have done one of these things on the list in order to be evicted or whether the landlord can simply give you a 45-day notice without any reason and evict you after 45 days. This is how the court interpreted current law. That is a wrong interpretation and LCB Legal Division agrees with us in the counsel's opinion that was supplied to you as an exhibit in my testimony, Exhibit N. We are trying to clarify what already is current law but apparently a couple of the justices of the peace have not read it in the same way that LCB does or that we do. We are saying you cannot evict someone by just giving them a 45-day notice; they must have done one of those bad things on the list in order to be evicted.

CHAIR CARLTON:
If they have a one-year lease or whatever, would they have to wait for the lease to expire before they could ask them to leave? There has to be a way for someone who owns the property to have the person they do not want there leave. There has to be a legal way, an appropriate way, to say we no longer want you to be here even though they are paying lot space rent.

MR. SASSER:
We are trying to clarify current law that in this situation, just because someone is a landlord and they do not like a resident, they cannot just get rid of the resident for that reason, as you can in regular apartment rental. The resident would have had to have done something wrong or else they get to stay as long

as the landlord continues to operate this as a mobile home park. You can choose to not operate it as a mobile home park. There has always been recognition that because these people own their homes, they have a higher level of rights than a tenant in an apartment.

CHAIR CARLTON:
In the case of a lease, it is a one-year lease and the one year is up. The lot space rent rises.

MR. SASSER:
There are provisions for raising rent. If you do not pay the rent, then you can be evicted for nonpayment of rent. There are provisions for changing the rules. If you go through the correct procedures, you can add a new rule that the tenant must comply with. It is not like you are locked in forever to the original agreement. There are ways to change things, but the resident has to have done something wrong in order to be evicted.

DAVID PIERSON (President, Sierra Mobile Park):
We seem to be bordering on issues of favoritism or personalities here.. Could you clarify that a little bit more?

CHAIR CARLTON:
Who are you asking?

MR. PIERSON:
I have read the grievance of Judy Dosse against the management, and it seems to me to be more a matter of a personality conflict.

CHAIR CARLTON:
Assemblyman Ohrenschall, do you understand the question?

ASSEMBLYMAN OHRENSCHALL:
I think I do. From what I understand, what this bill is trying to accomplish is that if the landlord is going to evict a mobile home resident, it is going to be for one of the reasons in statute, not because of a personality conflict or because they do not like a mobile home park resident.

MICHAEL PHILLIPS (Manufactured Home Community Owners' Association):
We are opposed to A.B. 454. We tried to work with the sponsor of this bill. I have been talking with Assemblyman Ohrenschall throughout the Session. I also suggested we have a meeting between us and the proponents of the bill to try to work out any differences, but that meeting never took place, which was unfortunate.

MAROLYN MANN (Executive Director, Manufactured Home Community Owners' Association):
We oppose A.B. 454 because this bill rewards bad behavior and harms our residents. We are talking about a tenant who is disrupting the peace and quiet enjoyment of the community by their contacts and everything from gangs and drugs to messy yards and fire hazards. They are violating community standards, lowering the quality and value of other tenants' homes and, in some cases, forcing some tenants to live in fear.

Mobile home park owners cannot use a quick, summary eviction as do apartment owners. Mobile home park tenants can only be evicted for cause as outlined in NRS 118B.200, even if it is a month-to-month tenancy. You have to understand, it is already taking months to go through the eviction process because of all of the due processes that mobile home park residents are already afforded.

These notices that were just mentioned, the 5, 10 and 45 days, are notices, not evictions. You are not evicted in 45 days. Remember, during this time, if the tenant feels the eviction is unjustified, they have the protections of chapter 118B of NRS along with free investigation process and guidance from the Manufactured Housing Division. That is something apartment renters do not have.

After there has been a full trial and reviewing of the evidence and the tenant loses, this bill will allow them to turn around and, for only $250, force the park to start all over again. Only this time the appeal costs are going to be doubled. As was stated, they have to post two times the amount of the judgment for the appeal. This assures that, should they lose again, the money is there to cover the costs of the appeal.

It is my understanding that judgments like these are almost never overturned. However, while this appeal process is ongoing, other residents in the park are

going to be forced to continue to live with this tenant for another six months or more. Park tenants and management want the same thing. We do not want people postponing a righteous eviction. This bill endangers the very people it is supposed to help, and I encourage your no vote on A.B. 454.

CHAIR CARLTON:
Would you walk me through the process? Can you explain what happens in the time frame when you have an incident, so I can understand how these two fit together?

STEVE MARZULLO:
The process involved in the termination of a mobile home park resident's tenancy is prolonged and subject to a great deal of due process, far more than an apartment tenant. It begins with a notice to cure. That notice could be for failure to pay rent, a nuisance, substantial interference with peace and quiet enjoyment, or any other reason under the statute which requires a 45-day notice to comply.

You begin by saying, "This is what you are doing wrong, and this is what you must do to fix it so you can keep your rental agreement." At the end of the notice period, if it is not complied with, then the park has to file a full complaint for unlawful detainer, not a summary eviction. That is a lawsuit which has to be served by a process server, it has to be filed in a court, and a hearing has to be applied for. Once the lawsuit has been filed and the hearing is applied for and agreed to, usually a 60- to 90-day process in Clark County, then there is a full evidentiary hearing.

The evidentiary hearing could be subject to a jury trial if the litigant so chooses. It could even be slowed down if discovery was ordered by the court or requested by the defendant. At that point, you will have a full trial on the matters set forth in the original notice that said this is what you are doing wrong and this is what you have not cured.

At the end of the trial, the judge makes a decision. If the landlord prevails, a judgment is issued with a writ of restitution that says you must get out under these circumstances. Attorney's fees are also awarded. What is going on here today is that after this lengthy process that involves the due process that we mentioned, the advocates of this bill wish an appeal to go forward without any cost.

The landlord has already spent months and thousands of dollars to do the termination, not just with the notice but with the full hearing. Now to go to appeal for $250, everything gets stopped and you would have to start all over again. You would require a court record of the proceeding. That is additional thousands of dollars. Any appeal that goes up must have a transcript from below. If appeals could be processed for only $250, we would have to pay all this money to have these records preserved in the event that it went up on appeal. That is the process.

Ms. Dosse's testimony that she was terminated without cause is a complete mischaracterization. There was clear cause. She was given a 45-day notice that asked her to please sign the new rental agreement. It must be understood that the park where Ms. Dosse lived changed their rental agreement. Instead of including utilities in the base rent, they separated base rent from sewer, trash and water; this is a practice encouraged by the industry and allowed for in chapter 118B of NRS. When parks do that, chapter 118B of the NRS requires them to adjust the base rent down to reflect the amount that the water, trash and sewer used to cost. There would be a lower base rent and separate charges.

Ms. Dosse refused to go along with that new document. There was a new base rent, and she refused to sign. She did not get a 45-day notice that said she was being evicted. She got a 45-day notice that said she would have to leave unless she signed the new agreement. Over 300 people signed that agreement. There has not been a problem with the agreement. The Manufactured Housing Division approved the agreement. There was no unconscionable change in provision from the park to the tenant, other than the separation of utilities from base rent.

CHAIR CARLTON:
Is this a six-month process?

MR. MARZULLO:
No. I would say, in fairness, that it is about a 90-day process. It can be elongated to six to eight months if the litigant requests a jury trial or postponements are sought by the defendant. The court has to be convinced in the motions to prolong that there is a legitimate defense.

CHAIR CARLTON:
In most cases, it would be a 60- to 90-day process.

MR. MARZULLO:
No, in most cases, it would be a 90-day-plus process. The 60 days would be far too short.

BOB VARALLO (Nevada Association of Manufactured Home Owners, Inc.):
The Nevada Association of Manufactured Home Owners (NAMH) represents residents who live in land-lease communities throughout the State. We are responsible for the existence of chapter 118B of NRS.

The executive board of NAMH opposes this bill as it is presently written. In that regard, I have discussed this with Assemblyman Ohrenschall and others. Had Assemblyman Ohrenschall come to us in the very beginning when this bill was proposed and discussed it with NAMH, we could have worked out something that would be much more reasonable than the bill you see today, or at least it would not be so offensive to us.

The bill as presently written provides $250 for an appeal; to us, this means it provides protection for the lawbreaker at the expense of the law-abiding person living in the community. The majority of us are law-abiding, but we do have lawbreakers who live in these communities, more so in family communities than in age 55-plus communities. Nonetheless they do exist, and we as residents expect the right to have the peace and enjoyment of our communities. For an individual who breaks the law, goes to court, is found guilty and evicted under the process, to have to come up with only $250 to stay in the community is not fair to residents, management or the landlord. It strains the relationship between the landlord and the resident. The residents are going to go to the management saying we have this individual in the community; we thought he was evicted, and now he is back until his appeal runs out.

Mr. Marzullo spoke about additional costs. The costs will be borne by the landlord and management. If there are two or three cases of this nature in a community in a year, if I am the landlord, as a businessman, I would try to recover my losses in some way. I will do that by increasing rent. The rest of the community has to bear the burden and share the cost of this individual who is allowed to stay in the community when he should not have been.

Rent does not necessarily increase when there is a new rental agreement. Rent increases with a 90-day notice. Rules and regulations require a 60-day notice and a meeting of the tenants. In Nevada, there is no doubt that our biggest

concern as residents is rent. We as an organization have attempted in the past to get a rent-justification bill. We have been unsuccessful. Our residents' number-one priority is rent, and here we are looking at the possibility of an increase in rent because a situation has developed which changes the law in chapter 40 of NRS and allows someone to stay in the community. Rent increases usually are reasonable and normally once a year.

CHAIR CARLTON:
We will close the hearing on A.B. 454. Having no further business, the meeting of the Senate Committee on Commerce and Labor is adjourned at 3:50 p.m.

RESPECTFULLY SUBMITTED:

Suzanne Efford,
Committee Secretary

APPROVED BY:

Senator Maggie Carlton, Chair

DATE: