MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Sixth Session
March 17, 2011

The Committee on Judiciary was called to order by Chairman William C. Horne at 8:10 a.m. on Thursday, March 17, 2011, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/76th2011/committees/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman William C. Horne, Chairman
Assemblyman James Ohrenschall, Vice Chair
Assemblyman Richard Carrillo
Assemblyman Richard (Skip) Daly
Assemblywoman Olivia Diaz
Assemblywoman Marilyn Dondero Loop
Assemblyman Jason Frierson
Assemblyman Scott Hammond
Assemblyman Ira Hansen
Assemblyman Kelly Kite
Assemblyman Richard McArthur
Assemblyman Tick Segerblom
Assemblyman Mark Sherwood

COMMITTEE MEMBERS ABSENT:

Assemblyman Steven Brooks (excused)

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Dave Ziegler, Committee Policy Analyst
Nick Anthony, Committee Counsel
Lenore Carfora-Nye, Committee Secretary
Michael Smith, Committee Assistant

OTHERS PRESENT:

Sandra Payan, Private Citizen, Las Vegas, Nevada
Brett A. Carter, Attorney at Law, Benson Bertoldo Baker & Carter
Rudy R. Manthei, Medical Director, Department of Ophthalmology, Nevada Eye & Ear
Weldon Havins, M.D., Nevada State Medical Association
George A. Ross, representing HCA, Inc. and Sunrise Hospital and Medical Center
Keith Munro, Assistant Attorney General, Office of the Attorney General
Heather Procter, Deputy Attorney General, Office of the Attorney General

Chairman Horne:
[The roll was called.] We will go in order today, and we will start the hearing with Assembly Bill 149.

Assembly Bill 149: Makes various changes concerning medical and dental malpractice claims. (BDR 3-762)

Assemblyman Tick Segerblom, Clark County Assembly District No. 9:
With me today is Brett Carter from the Nevada Justice Association, and in Las Vegas, Sandra Payan is present. Assembly Bill 149 is intended to correct what appears to be an inconsistency or injustice in the way the malpractice statutes are being interpreted. For those of you who are unfamiliar with this inconsistency, there was a referendum several years ago which shortened the statute of limitations in a medical malpractice case to one year, which is the shortest statute of limitations period that can be found in law. In addition, the state law requires that when a malpractice lawsuit is filed, an affidavit from an expert must be included. The affidavit should indicate what the nature of the malpractice suit is. Combining the two requirements becomes problematic in many cases, because one year is not a very long time from the discovery of the malpractice. Many times, it takes a period of time after the discovery of the malpractice to make such a decision. Once decided, a person will have to find a lawyer. Once a lawyer is hired, the lawyer will have to retrieve the medical

records. The lawyer will then have to locate an expert who is willing to complete the affidavit. It is very difficult to accomplish everything in one year.

There have been several cases where the lawsuit was filed, but the affidavit was not attached to the complaint. You will hear testimony today about one of the cases. There are occasions, such as the testimony you will hear, where the courts will dismiss the lawsuit, even though the lawsuit was filed before the one-year statute of limitations requirement. The affidavit was actually filed within a one-year period. It is a very technical issue, and it is an injustice in some cases. We are trying to remedy that type of situation. This bill will enable the requirements for filing a lawsuit to remain within the one-year period allowed by the statute of limitations. The bill will also allow for an additional 45 days to attach the expert's affidavit. The intent remains the same, however the bill will allow for an additional 45 days for the lawyer to obtain and file the affidavit. You will hear testimony indicating the difficulty of obtaining expert affidavits. It is not that simple. Mr. Chairman, I would like to move to the testimony of Ms. Payan, in Las Vegas. Afterward, we will hear testimony from Mr. Carter.

Chairman Horne:
Yes, that is fine. Are there any questions for Mr. Segerblom? I see none.

Sandra Payan, Private Citizen, Las Vegas, Nevada:
Good morning, Mr. Chairman and the Assembly. I want to thank you very much for giving me this opportunity to speak to you regarding this matter. [Continued reading from written testimony (Exhibit C).]

Chairman Horne:
Thank you, Ms. Payan. Are there any questions? I see none. I am sorry for your loss, Ms. Payan. Thank you for testifying before the Committee this morning.

Brett A. Carter, Attorney at Law, Benson Bertoldo Baker & Carter:
I am an attorney from Las Vegas, and I represent Ms. Payan and her two siblings in regard to their mother's death. Assemblyman Segerblom explained the one-year statute of limitations. It is the shortest statute of limitations that exists for civil action in Nevada. There was a two-year statute of limitations which was changed in 2002. Unfortunately, the affidavit requirement, within a one-year statute of limitations, provides difficulty for the plaintiffs and their attorneys. In order to proceed in obtaining an affidavit, all facts must first be gathered. This process includes all of the medical records. There may be a significant amount of time before the client seeks out an attorney. In the situation of a death, it is not uncommon that the grieving process lasts for months or, in some cases, years. The grieving process will cause a significant

delay before a person will consider hiring an attorney. If a person is still being treated by the doctor that may have committed the negligent act, obviously there is a trust relationship there. The treatment may not be concluded for several months before the party involved decides to eventually contact an attorney. Gathering medical records can take several months, if not more. Having the medical records reviewed by experts may also take a substantial amount of time. The law requires that the expert be in a similar specialty practice. It is not uncommon for several experts to be required. There may be several physicians and nurses involved, making this a very lengthy process. At the time the affidavit was filed in this case, there was a two-year statute of limitations. Changing the process to a one-year statute of limitations provided significant difficulty.

I am in support of this bill because we are not asking for a significant extension. We are asking for 45 days, which will allow for a full 365 days. Right now, if a client hires us within nine to ten months after the injury, it is not enough time to proceed. An attorney cannot take the risk of gathering the records, obtaining the expert testimony, having the records reviewed, and having the affidavit written. Having the extra 45 days will allow the complaint to be filed before the one-year limitation, with the affidavit being filed thereafter. There truly is a one-year statute of limitations. The practicalities make this difficult; however, we are asking for a very reasonable accommodation, making for legislative consistency. The only other statute that exists currently that requires an affidavit, other than for medical malpractice, is for construction design professionals, which is where the concept of 45 days came from. *Nevada Revised Statutes* (NRS) 11.258 allows for a 45-day window for circumstances where the affidavit could not be attached. This is not an extension of the statute of limitations. The complaint will still need to be filed before the limitation period expires. What it allows for is the supporting evidence, such as the affidavit, to be provided up to 45 days later. That is not a significant extension. It is not uncommon that 18 months of discovery is requested by the defense during a medical malpractice case. Trials can take two to three years to move forward, which should indicate that 45 days is not a lot of time.

In addition to 45 days for the procurement of an expert, the affidavit being attached to the complaint is a rarity. Clerical errors do occur. The intent of the statute was that the case be reviewed by an expert to avoid frivolity. The expert's affidavit should prove these cases have merit and someone cannot sue a doctor or a medical professional without significant review. In my particular case involving Ms. Payan and her siblings, we obtained an expert before the statute of limitations expired. We reviewed the extensive medical records, and the expert wrote an affidavit. We were able to identify all of the

expert's opinions. The case was reviewed and was found to have merit, which was established within the body of the complaint. An exhibit was not stapled to the complaint.

Unfortunately, as the statue currently exists, the courts have interpreted that there is no opportunity to cure, even before the statute of limitations. Our affidavit was filed before the statute of limitations expired. The affidavit was filed within three days of filing the original complaint. In addition to 45 days, there is a provision stating that in situations where there is a clerical error, there should be an opportunity to cure. There was no harm or damage to the defense. When the defense first received the complaint, it contained the expert's name and opinions. They also received a copy of the affidavit, and they received the complaint within two weeks of the lawsuit being filed. They litigated the case for close to 2 1/2 years. Ms. Payan disclosed the history in her earlier testimony. There was a technicality that resulted in this case being dismissed. The courts feel their hands are tied because of the language of the statute. This bill will allow their hands to become untied. It allows for some discretion, and it allows cases to proceed under their merits and not be dismissed for the purpose of formality. I am in support of this bill and hope you will support it as well. Thank you.

Chairman Horne:
Let us say a complaint was filed at the six-month mark. Would you still have 45 days from that point as opposed to someone walking into your office 30 days before the statute of limitations runs out? Obviously 45 days will run past the statute of limitations. What about cases in the middle? In that case, will you still have the additional 45 days?

Brett A. Carter:
Yes. The provision allows for 45 days from the date the complaint is filed. Right now the complaint is being considered void if the affidavit is not attached. There is no opportunity to cure because the lawsuit did not exist. The affidavit should be filed within 45 days from when the complaint is filed. Someone can conceivably refile the complaint as another cause of action before the statute of limitations expires. It provides a window of opportunity to file the affidavit after the complaint.

Chairman Horne:
What about "physician shopping"?

Brett A. Carter:
The statute of limitations can be reduced from a year to three, six, or nine months. An additional 45 days will not make a difference. I am not saying

there are no unscrupulous attorneys. Should someone actually "physician shop" to find someone who would say what the person wants them to say, it will not produce good results. A person should go to a board certified physician who knows what they are doing. These are very expensive, tenuous, and complex cases. The fees and amount of damages are capped. The system is difficult. Could this bill prevent it? Someone could "physician shop" within the first six months. I do not believe that is a legitimate concern.

Assemblyman Ohrenschall:
If this bill passes, will it help Ms. Payan conclude the wrongful death action?

Brett A. Carter:
That is a good question. Since we are looking at the intent of the Legislature when this bill was passed in 2002, we are discussing avoiding frivolous cases and not having a case dismissed on a technicality. If the bill were to be considered retroactive, conceivably it could help Ms. Payan. Under the circumstances, there is justification for making this bill retroactive. In addition to Ms. Payan's case, there are at least three other similar cases that I am aware of. In the other cases, affidavits have been filed before the expiration of the statute of limitations. The expert opinions were in the body of the complaint; however, the affidavit was not attached. There also may be other cases that I am not aware of.

[Vice Chairman Ohrenschall assumed the Chair.]

Vice Chairman Ohrenschall:
Thank you. There are some questions from members of the Committee.

Assemblyman Daly:
The amendment to NRS 41A.071, which created the existing rule, was part of the special session and not part of the initiative that was passed. Is this correct?

Brett A. Carter:
Yes, that is correct. The voter initiative took place in 2004, but this was established in 2002 through the legislative session.

Assemblyman Daly:
Thank you. I wanted to be clear because through the initiative process, the Legislature cannot make changes for a period of time. Issues that were not anticipated consist of much of what we do in legislation. We close loopholes and repair unintended consequences. I just wanted to be sure it was not part of the initiative.

Brett A. Carter:
It was not part of the initiative.

Assemblyman Segerblom:
This is not an attempt to get around what the voters passed. A one-year statute of limitations was clearly the intent. This bill does not impact that circumstance.

Assemblyman Hansen:
I have the initiative petition in front of me. It reads very clearly, "An action for injury or death against a provider of healthcare may not be commenced more than three years after the date of injury or one year after the plaintiff discovers, through the use of reasonable diligence . . . ." Although 45 days does not seem significant, I have a problem going against a ballot initiative which was passed overwhelmingly by the citizens of Nevada. I do not want to dispute you, but this action seems like it was part of the original ballot that was approved. I do not like going against the will of the people. I would appreciate if you would address that issue.

Brett A. Carter:
The affidavit statute was part of the 2002 Legislature. It was not part of the 2004 initiative. The initiative changed the statute of limitations from "two years or no more than three years" to "one year or no more than three years." The affidavit itself was part of the 2002 Legislature. The complaint will still need to be filed within one year. This bill is based on the statute passed in 2002, which will allow us an additional 45 days to file the affidavit.

Assemblyman Hansen:
What I read is actually the ballot question text. It was on the ballot. Thank you.

Brett A. Carter:
I am sorry. Maybe I misunderstood you.

Assemblyman Hammond:
I have been hearing about this issue for the last three days. As it was explained to me, there are two parts. The first part is in regard to technical difficulties, such as filing the action and forgetting to staple the affidavit. Alternatively, the affidavit may be filed three days later. Sometimes those cases are dismissed. I have a hard time with that issue, and I understand that process. What I do not understand is the issue regarding the extra 45 days. In today's business world, attorneys specialize in a certain type of law. I would think attorneys would have a list of board certified doctors to address these types of cases in a timely

manner. If so, the extra 45 days would not be required. The extra 45 days does not seem necessary to me. Can you address that issue?

Brett A. Carter:
Most attorneys practicing in medical malpractice suits specialize in personal injury. They are very expensive cases. I have approximately six to eight medical malpractice cases currently, which probably accounts for greater than 50 percent of my case costs. Each case is so distinctly different. The attorney may require the service of many different specialists. As an example, I worked on a neurological pediatric case where we had to locate a doctor who was in Chicago. The client's medical records filled four bankers boxes. There was extensive research involved in the case. There is not always a list of doctors to refer to. Even if you can easily refer to a list, there are numerous records and documentation to gather and review. Another factor is the timing of when the client decides to contact the attorney. The average person on the street does not realize he only has one year to file a suit. To say that it is a quick process is not necessarily true in every case. Many attorneys do not take this type of case. There is just not enough time.

Assemblyman Hammond:
My difficulty with this issue is that the technology available now makes it easy to gather the information. I have 15-year-old students who can find information immediately. There may be many doctors out there, but an attorney should be able to comprise a list of doctors that can be revisited with these situations. If an attorney is filing your action in six months, why would he require an additional 45 days?

Brett A. Carter:
It is a difficult process. First, 45 days was not a number which was chosen at random. In researching the matter, we discovered only one other statute that required an affidavit. I will assume the same argument may apply with the statute we found. Why would one need an additional 45 days in those types of cases? If you are truly given the statute of limitations period, the additional time allows an attorney to take the case, file before the statute runs out, and still have an opportunity to gather the information. All I can say from personal experience is that this type of case takes a substantial amount of time. In my personal opinion, the statute of limitations should be two years, but that is not what I am here asking for. Could I compose a list of doctors? I can create a list, but are those doctors going to be available? Will the doctors be willing to review the case? Attorneys may be busy, but doctors exceed that a million times over. Trying to get a doctor on the phone, or trying to get the doctors to review records and reply, typically leads the attorneys out of state. Doctors in

Nevada do not want to potentially testify against one of their own colleagues. It is a very difficult process.

Assemblyman Segerblom:
Although an attorney may have four months to serve a lawsuit, our amendment requires the affidavit be attached to the lawsuit when it is served. There is no harm to anyone using this process. There happens to be a technical interpretation that seems to harm a few people. As far as the legal process is concerned, the lawsuit is filed and it is served with the affidavit attached. There will be no knowledge of when the affidavit is created.

[Chairman Horne reassumes the Chair.]

Chairman Horne:
Once a defendant receives the complaint, he has 20 days to respond. Perhaps we could delay that until the affidavit is received. Is that something that can be done?

Brett A. Carter:
Yes, absolutely. I believe what should happen is the defendant should have 20 days from the date they are actually served with a copy of the affidavit before he has to answer.

Assemblyman Sherwood:
One of my concerns is putting the defendant on an unfair "playing field." I understand the 45-day precedent, although we could debate the merits for the construction defect field. I am not sure I completely understand the clerical error issues. After all, the law is the law. If a party is going to claim there was a clerical error, perhaps they should have prepared a checklist, as hospitals do. Although I can understand the 45-day extension, the clerical error issue seems like opening a can of worms. The retroactive part does not seem feasible. Do you see how the clerical error issue can open up a can of worms? Are you okay with proceeding prospectively rather than retroactively?

Brett A. Carter:
Regarding the clerical error issue, currently there is a Nevada rule of civil procedure which allows when a pleading is filed, consisting of a clerical error such as an exhibit not attached, it can be cured. However, because of the way the statutes were written, the courts feel as though they have no ability, in this type of circumstance, to apply the rule that is applied in every other instance. Is there a different way to handle the matter to allow for this situation? I do not know. This bill is a method to fix this type of inequity.

Assemblyman Sherwood:
Are you saying that in every other case there is a cure, and the judge can use discretion? We hear "one-off" cases regularly and we anecdotally generalize. Now, we are taking a "one-off" and are saying that the court can cure in every other case except this specific case. There is an incredible advantage for the plaintiff to claim there was a clerical error in order to retry the case. I would like to hear from the courts regarding the issue of discretion. If we can get the courts on record establishing their feelings on this matter, maybe the clerical error issue can be discussed further.

Brett A. Carter:
I can provide you with copies of orders from three cases where the courts have said specifically that the "shall" language in the statute removes the court from discretion. The complaint is known as "void ab initio," meaning the complaint was never filed because it did not comply with the statute as read. Regardless of the intent, the court is looking at the statute as it is written, leaving the court with no power. Whether you agree or disagree with the statement, it is how the courts have ruled. We are attempting to show the courts what the true intent was and to make the repairs necessary to avoid cases being dismissed on a technicality.

In response to the retroactivity issue, it is my understanding that the three referenced cases have been affected. The cases are all still in the active appeal stage. One case is still pending for other matters. I do not think we would necessarily be reviving old cases that are no longer in existence. I would be happy to provide you with copies of the orders.

Assemblyman Sherwood:
Do I understand that you are okay with applying the bill prospectively rather than retroactively?

Chairman Horne:
I believe the bill is written in a prospective format.

Brett A. Carter:
Yes, it is written prospectively. To answer Assemblyman Ohrenschall's earlier question, I believe there is basis for it to be retroactive.

Chairman Horne:
Also, in the area of judicial discretion, judges are obligated to read a statute in its plain meaning when there is no ambiguity. When you have language such as "shall," while it may seem insignificant, the court cannot depart from the plain

meaning of a statute. When there is ambiguity in a statute, discretion comes into play. Is that true?

Brett A. Carter:
That is correct, Mr. Chairman. Instead of using the term "may dismiss," the statute uses "shall dismiss." The courts feel there is no allowance for interpretation.

Assemblyman Frierson:
I have a few clarifying questions. Regarding the voter initiative issue, it is my understanding that the voter initiative deals with an action, which is the complaint. Complaints always require subsequent documents or pleadings to be filed. Can you clarify what an action is? I think Mr. Hammond questioned the necessity of the additional 45 days to file the affidavit. I would like to make sure that I understand them to be separate issues.

Brett A. Carter:
Yes, they are separate issues. The action itself refers to filing the complaint. The affidavit is an evidentiary issue. In all other cases besides construction design professionals or medical professionals, expert disclosures were made at least a year after the action is filed. In medical cases, the defense will disclose its experts at least a year after the action is filed, but the plaintiff has the burden of filing it initially. The action will still have to be filed within the statute of limitations period. The accompanying evidentiary support will be filed within 45 days.

Assemblyman Frierson:
My previous experience in civil practice involved a case regarding community education. The people of the community were being informed of a potential lawsuit. The preparation took several months. We could not accept the case of a potential client because her injuries were not severe enough. Under existing law, the potential client would then have to locate another attorney and go through the same process. She would run up against this issue by no fault of her own. How would an additional 45 days affect someone in a similar case?

Brett A. Carter:
It will provide some additional time for the person or their attorney to file a case. When an individual comes to an attorney on a medical malpractice case, the odds are against them, even in a good case, because they are extremely long, expensive, and expert-driven cases. Most attorneys will not take the case unless the damages are severe enough to justify the time, expense, and risk. If an attorney does not take a case for any reason, the person must find another attorney that will represent the case. Each attorney seeks more information and

more documentation. After speaking with people who have dealt with several attorneys, the odds of finding an attorney to take the case become less and less. If an attorney accepts a case later in the game, a complaint can be filed within the proper time frame. The attorney will then have a little bit of extra time to have the case reviewed and to file the affidavit. Obviously, if the attorney does not receive the medical support in time, the attorney will allow the complaint to be dismissed either voluntarily or by stipulation.

Assemblywoman Dondero Loop:
For clarification purposes, would one paper not stapled to the next be considered a clerical error? Or is there a problem with an affidavit not being complete? Is it because somebody did not follow instructions? We have three different scenarios going here. Let us say that something gets lost, how do you prove that you sent it intact? How does that all happen? I am not an attorney and would like some clarification.

Brett A. Carter:
The 45 days would allow enough time to cure any of those issues. The clerical error, mistake, or inadvertence, can occur in many ways. In the present form of the statute, the affidavit must be physically attached at the time the complaint is filed, regardless of the body incorporating it. Could it be the process server that takes it to be filed? Could it be the paralegal that does not staple it together? The key here is the opportunity to cure such matters. If there were a window, we would avoid the case being dismissed on its merits. Also, we would avoid situations where there is no harm and the intent is met. Compared to medical negligence or other types of negligence, if there is no harm, the case should be cured. In this situation, the defendants would know that there are expert opinions because they have received the affidavit before the statute of limitations or within the 45 days thereafter. The attorneys will then be able to proceed with the case. I hope I answered your question.

Assemblywoman Dondero Loop:
There is a huge difference between a process server walking in without something stapled together and an affidavit not being ready. There is a big window there. If a process server delivers paperwork to someone who notices it is not all there, the process server would have a chance to go back to the office, retrieve the proper paperwork, and redeliver it. It is another matter if the affidavit is not ready because somebody else has not supplied the information within the proper time frame. I need some clarification because those are two very different issues, in my opinion. The error may be by no fault of the plaintiff.

Brett A. Carter:
Yes, I believe they are separate issues. That is the reason why there is so much discussion about the practicality of trying to get everything completed within a year. To actually afford someone the ability to file the lawsuit within 365 days regardless of the affidavit is where the design professional's statute came into play. It allowed them the extra 45 days to file the affidavit. The request is for the additional 45 days based on precedent. We can make the argument longer or shorter but it is a small window of time, yet will allow any situation to be cured. The defendant will be provided with a copy of the affidavit from the onset of the case, before it proceeds through litigation, to ensure the case has merit.

Assemblyman Segerblom:
The important thing to remember is the whole point of the affidavit is to ensure the lawsuit is not frivolous. The affidavit ensures the parties are not filing suit based on speculation of incident. The affidavit is from an expert in the same field providing expert opinion that malpractice occurred. From my perspective, whether the affidavit is attached the day it is filed, or provided 45 days later, is not a significant issue. The lawsuit will be filed within the one-year period, which the voters asked for in 2004. The affidavit is simply a technicality showing the lawsuit is not being frivolously filed.

Assemblyman Ohrenschall:
Do you find that the victims of medical malpractice know that there is a one-year statute of limitations? Are there many cases where people who decide to file after the statute of limitations has expired?

Brett A. Carter:
Most people do not know what the statute of limitations is on any claim. If people know of any, it is usually the two-year limit. For someone to know of the one-year limit would be an extreme rarity. Most often, people will not seek an attorney immediately. They will be dealing with their medical injuries, disability, or grieving for a loss. Medical care is complicated. If someone has been to a doctor and has received care, it is not always immediately known whether the care is below the standard or not. We trust our physicians, especially if they are trying to rectify the situation. It is not uncommon for a party to seek out an attorney towards the end of the statute of limitations, which makes it very difficult. In my opinion, the statute should be two years but that is not what we are here for today.

Assemblyman Hansen:
The voters gave the statute of limitations 365 days. Since the start date is somewhat ambiguous and is selected by the plaintiff, it seems to me that he

has a reasonable window to file a claim. Especially in civil courts, judges try to achieve equity and justice. The judges do not necessarily have to be as technical as they would be in a criminal case. I have a hard time believing that a judge would dismiss a situation such as Ms. Payan described on a technicality, especially since the plaintiff selects the start date. I am wondering if the plaintiff gets to make that choice, would the lawyers not advise him of the appropriate handling of time? There has to be some give and take on the situation. I look forward to viewing the documentation that you discussed previously with Assemblyman Sherwood. I would like to see those documents as well. From my observations of judges in Nevada, they seek to achieve justice and not dismiss for strict technicalities, especially in a civil case.

Brett A. Carter:
Without going into a deep history of the case, it was a shock that the court ruled such a decision. There is precedent that the plain meaning of the statute, as it is read, controls the ruling. The "shall" language is perceived as "must." As it is written, there is no way for the court to make exceptions or to get around it. Although judges try to find an opportunity to do equity, in this case, the judge must have felt his hands were tied. Regarding the one year statute of limitations, it is important to understand that it is a reasonable person standard. An attorney can have his client say whatever he wants him to say, but if the facts and circumstances of the case indicate that not only was there an injury, but the client knew or should have known the likelihood of medical error, the statute time begins to run. A person may go into surgery and afterward the doctor discusses a bad outcome or complication during surgery. Let us say the treatment continues and the person goes back to the doctor with continued problems. Months later, the doctor may take the patient back into surgery to correct the problem. Eventually, the client may decide that it is time to seek an attorney because he is doubtful or dissatisfied. Once contacted, the attorney will gather the records and research the matter. Meanwhile, the statute time will be considered to run from when the person first realized there may have been a problem during the original surgery. The statute time does not start when the person contacts the attorney. Statutory time starts when the party has a reasonable suspicion that there may have been medical malpractice.

Assemblyman Hansen:
Are you aware of cases where the judges have used their own discretion to extend the time frame?

Brett A. Carter:
It becomes a question of fact. If it became a major contentious issue, and the judge could not decide based on the facts in front of him, he may let it go to the jury to make that determination. At the deposition, if there is testimony by

the plaintiff that he knew of the injury, the judge would base the statute of limitations on that testimony.

Assemblyman Segerblom:
The problem is with the attorney trying to determine when the one-year limit will begin. With the way the law is written, the attorney may rush to get the lawsuit filed within the appropriate time frame, but if the affidavit is not attached to the claim, the lawsuit is thrown out even if the affidavit is filed two days later. It is a terrible result but that is how these decisions are interpreted.

Chairman Horne:
I see no more questions. Is there anyone else here or in Las Vegas wishing to testify?

Rudy R. Manthei, Medical Director, Department of Ophthalmology, Nevada Eye & Ear:
Good morning, Mr. Chairman and members of the Committee. I am Dr. Rudy Manthei, and I am here today on behalf of Keep Our Doctors In Nevada (KODIN), a group of volunteers committed to more affordable and accessible healthcare in Nevada, to testify in opposition to A.B. 149. [Continued reading from written testimony (Exhibit D).]

Chairman Horne:
Unfortunately, I am going to have to challenge some of what you said. I believe one of the duties of the legislative body is to revisit laws to see whether they are still working or whether there seems to be a problem. If there is a problem, we try to address it. Based on your testimony, KODIN should never be revisited. I disagree with that. Should we wait until hundreds or thousands of people are harmed before revisiting something? If we can see an issue before it happens, should we fix it? I believe that is the effort here. I do not see any indication of trying to overturn KODIN. I know that Mr. Carter said he would like to see the statute of limitations changed to two years. However, we know that is not going to happen. I will not entertain any type of amendment with regard to medical malpractice outside the revisions of this narrow bill. I hope this will give everyone some comfort.

Dr. Manthei, I understand the whole purpose behind KODIN is first providing notice. A doctor receives a complaint and has 20 days to respond to that complaint. The complaint is to provide notice that you are being sued. Is that correct? The affidavit is not to provide notice but is to provide the proof that there is no frivolity in the complaint, which would avoid the very thing we are trying to avoid based on your testimony. If you have received a complaint within the time frame of the statute of limitations, but you do not receive the

affidavit until days later, you have still been provided notice and you can see the professional's affidavit affirming negligence. How are doctors harmed in that scenario? How does this action put you at a disadvantage?

Rudy R. Manthei:
I believe the point is not for the advantage of the doctors but is actually for the advantage of the patients. Ultimately, the one-year statute of limitations is to give due process to the patients so that the process does not extend onward. The process is to try to make someone who is harmed, whole again, in an efficient time frame. The intent is not for the doctors but for the patients.

Chairman Horne:
We have heard scenarios where that is not always the case. There are situations where the patient has been unable to satisfy the affidavit at the same time the complaint is filed. You have heard Ms. Payan's story. It did not seem as though she was being untruthful. We have heard stories about a party seeking an attorney 30 days before the statute of limitations expires. I understand both sides. Plaintiff lawyers have a list of physicians they call on regularly. The only concern is whether the physician can review the medical records in a timely manner. The defending lawyers also know of certain doctors who will defend against these accusations. That is how the system works. My point is about notice being provided in time but without the affidavit. If a patient requires an additional 45 days to provide the affidavit, where is the harm? How is that overturning KODIN?

Rudy R. Manthei:
I guess my point is where does one stop, and where does one start? The statute allows for an entire year from the time of discovery. This is not from when the injury occurs. A party has three years from when the injury occurs. The statute allows for a year from the time you may feel that malpractice has occurred. That time frame is not practiced only in Nevada but has been practiced in California for some time. Of all the thousands of open cases in process, it seems to be an adequate amount of time. The purpose of the affidavit is to prevent frivolous lawsuits so the medical part can be validated. It is very complicated but where do we start and end? It has not been a problem. It has been enacted for eight years now. In all of the thousands of cases, attorneys are getting their jobs done. If they are sincere and there is a problem with the process, let us deal with the process. We should not just put a bandage on it by extending it without fixing it. That is the direction I would rather go in. I want to make the people whole. It should not be delayed. If someone figures out at six or nine months that he feels he has a malpractice suit, the clock starts ticking. As previously discussed, the

judges have the ability to determine when the process starts. The parties involved have a year from that point.

Chairman Horne:
How did it work for Ms. Payan?

Rudy R. Manthei:
I do not know that case.

Chairman Horne:
You just heard her testimony. Let us assume for arguments sake that she was telling us the truth. She walked us through how everything occurred. It was not until after two years of defense that the issue was even raised that the affidavit was not attached. It does not seem as though that is the spirit of how it should have been treated.

Rudy R. Manthei:
Would you have thought the judge should have determined that two years ago?

Chairman Horne:
The defense attorney could have raised that defense two years ago but did the defense attorney fail to do that? Or was it the judge?

Rudy R. Manthei:
I do not know. I cannot make a determination on a case that I have no information on. Dr. Havins, who is standing by to testify from Las Vegas, is a doctor and attorney. Dr. Havins will be a better candidate to comment on that issue. I do not have enough information to comment on that process. My personal feeling is that this situation should almost be considered malpractice on the attorney. It is pretty straightforward that the affidavit is required when the action is filed. If the attorney has not done that, he has violated the responsibility to his client. I cannot see how that error should ever occur because it is part of the process.

Chairman Horne:
If a lawyer asked you to review records from a case and to provide an affidavit within 30 days, would you feel as though you were under a time crunch?

Rudy R. Manthei:
With the technology and information available, I cannot see it taking more than a couple of days.

Chairman Horne:
Are there any other questions?

Assemblyman Frierson:
You have mentioned a few things that I find interesting and worthy of consideration. The first thing that concerns me is the doctors that are leaving and the intent behind KODIN. You think we need to address the problem rather than extend the time. I would presume from the presentation that the trial lawyers' position on the problem is the affidavit. The lawyers are not proposing to do away with the process, but the affidavit requirement is creating the problem. Is the affidavit required in any other state to your knowledge? If doctors are leaving because of some of the conditions that existed in 2004, presumably they are leaving to go to a better environment for their practice. Are you aware of any other states that require the affidavit?

Rudy R. Manthei:
I am not aware of any. I would have to consult with someone else, such as Dr. Havins, who may have knowledge of the information you request.

Assemblyman Frierson:
I would like to request that our Legal Division research the matter and advise us.

Assemblyman Sherwood:
For the record, the Chairman of this Committee plays it as straight as anyone in the building. If anyone has any other notion, please disabuse that because he is as good as there is in the Legislature. What I struggle with is the scope of the problem and the existing remedies. At face value, this seems to make sense. In my opinion, 365 days from the time of the accident or negligence would make sense. It may take 9 months to figure it out but as I understand it, statute allows for one year from the discovery of the negligence. Is that correct?

Rudy R. Manthei:
Yes.

Assemblyman Sherwood:
You have said there are thousands of cases. We have heard about four to six cases that have had issues within the last six years. I understand that the existing remedies for the four to six cases like this are currently on appeal. My questions are regarding the situation where there are clerical errors or about the situation where an attorney may have trouble obtaining information from an out-of-state doctor. Are these examples of common problems and if so, what are the existing remedies? Can a verdict be appealed?

Rudy R. Manthei:
Since I am not an attorney, it is hard for me to answer those questions. I would agree that it is the judge's interpretation of the statute. If there is an injustice, how would the judge address it? As for the expert witness, that is the reason we ask for affidavits. We have had problems with expert witnesses in the past. They are readily available and I am not aware of any problem in getting an expert witness. We would like to be sure the expert witness is actively practicing. With technology, it is not a problem finding an expert witness in a case that has merit, but if a case does not have merit, the attorney may have a problem finding an expert witness. I think the issue is that the case needs to have merit and that it is not frivolous. There should be no problem in complying with the statute in the way it is written. For example, I have a surgery center. We are involved in a case right now where the individual is on his third attorney. Therefore, we are going through depositions for the third time on the same case. This process can go on and on. It goes both ways. We all want a system that is fair and that would allow for an individual that has been harmed to be remedied. As discussed earlier, four to six cases out of thousands are in appeal.

If the process is going to be changed, there should be a clear direction indicating why the change is needed. The responsibility of KODIN, and healthcare in general, is to provide access to healthcare for all. If the Legislature changes things to pacify a small group that is having problems within the system, it is not fair to the rest of us who want and need this access. Right now healthcare has a huge access problem. That access problem is definitely driven by the cost of healthcare. Nevada is one of the states that has addressed the issue regarding the liability costs associated with healthcare. Even after decreasing the cost of healthcare, decreasing the cost of medicine, and providing greater amounts of healthcare, we are not doing very well. It cannot be ignored.

Assemblyman Sherwood:
It seems to me that one issue is whether a doctor is going to move his practice to Texas because there are more favorable laws. Or could it be about aging demographics? Are the aging doctors just retiring? Are there other doctors out there just waiting to replace another doctor that may leave?

Rudy R. Manthei:
For example, in my ophthalmology practice, our pediatric ophthalmologist retired after practicing in Nevada for 30 years. She retired because it did not make sense for her to practice any more. She did not just go part time; she stopped practicing. There have been four other ophthalmologists that have left my practice to go to other states. For them, it did not make sense to practice here

anymore because of the environment elsewhere. We see very little influx of physicians coming to Nevada to compensate for the loss. There is no doubt that Nevada is on the bottom of the spectrum in healthcare and education. We need to deal with that problem. I am in support of anything that moves us in the direction of improving access and the quality of healthcare and education. My feeling is that we are spending more on healthcare than anywhere else in the world without receiving the quality.

Chairman Horne:
Did you just say that despite KODIN, doctors are still leaving Nevada?

Rudy R. Manthei:
I said "in my practice." You would have to poll the medical society to obtain the numbers, but there is no influx of physicians that want to practice here. There is a shortage. Once KODIN passed, we stabilized, but I believe we are number 47 or 48 in a ratio of physicians to patients nationwide. It is the quality parameters that we have a problem with as well. We have a lot of issues with healthcare. I believe the bigger problem is the economics of what is occurring in Nevada where healthcare is concerned.

Chairman Horne:
I think economics is a big part of it. Although KODIN was a big change, could physicians be thinking that KODIN was not enough? I do not know what more can be done.

Assemblyman Hansen:
Out of all of the thousands of cases you have been referring to, has there been a single case that was actually dismissed after the defense challenged the case on the technicality that it was filed outside of the one-year window?

Rudy R. Manthei:
Not that I am aware of.

Assemblyman Hansen:
What about the cases that are in appeal at the moment?

Rudy R. Manthei:
It appears so.

Assemblywoman Diaz:
I would like to echo Chairman Horne's comments about the bill being narrow in scope. I do not think the bill is seeking to dramatically change what the citizens voted for nor do I believe the bill is affecting the statute of limitations. This bill

is just seeking justice for all. It is sad that Ms. Payan did not get her day of justice in court. It was dismissed because her affidavit was not physically attached. This seems like a cleanup to the bill because originally this type of situation was unforeseen. It is pretty harsh to think that humans do not make mistakes or that the court system is perfect. To put this into a medical perspective, my grandmother underwent surgery. After the surgery, the doctors were looking for all of the instruments and discovered that there were towels left inside of her. They had to open my grandmother up again to remove the towels. I know that every field has a checklist, but we should all be fair and assume that we are not all perfect. People should be entitled to justice. I do not believe that providing an additional 45-day window to file the affidavit, which is beneficial to both parties, is affecting the statute of limitations.

Assemblyman Hammond:
Although I have a problem with the 45-day increase, the Chairman has addressed the issue well. I would like to address the issue of the affidavit not being stapled or attached. As a teacher, I am always trying to teach the young ones to get their work done. I have a problem with the balance between the statute and justice. It seems to me that if you break down the argument, there are mistakes that are made during the course of a year. The human element gets involved. Even though the affidavit may not be stapled together with the action, it seems that there should be language to remedy this. As Ms. Dondero Loop has mentioned, it would be nice to retrieve the document that was first forgotten. In the end, all we want is for people to have justice. I would like to see the language between "shall" and "may" or a similar solution addressed. Would you be opposed to that?

Rudy R. Manthei:
I will agree with you about addressing the issue and correcting the problem instead of extending time lines. I suggest allowing Dr. Havins to discuss what is occurring now. You have to have the affidavit to file a malpractice claim. If you do not have the affidavit, you do not have the merits to ensure it is not a frivolous lawsuit. I cannot understand how an attorney would file a malpractice claim and not have the affidavit. It is all one and the same.

Assemblyman Hammond:
It could be that they forgot it. There are students that come to me claiming they forgot their paper at home. If they live close to school, I ask them to have their parent bring it over.

Chairman Horne:
It does seem rigid. If you received a malpractice claim today, and tomorrow you received the affidavit, are you harmed that the affidavit came a day later? What you are saying to us is, "that is the law and you should not change it."

Rudy R. Manthei:
That is not what I am saying. What I am saying is I do not know, with regard to the interpretation of the law, whether it is a year and whether it can be remedied or not. That would have to be answered by a lawyer or a judge. I will defer that question to Dr. Havins in Las Vegas. I am not necessarily disagreeing with you. As long as all the information is within the year, it should proceed. That seems like the fair thing to happen. How the system functions now I cannot comment on because I am a physician and not an attorney. I would ask an attorney what the remedy is and how to deal with that sort of situation.

Assemblyman Hammond:
I would like to see the language tighten up a little bit. Again, if my student forgot his paper at home, I would give some allowance. But, if the paper was not completed, that is another problem.

Rudy R. Manthei:
I do not disagree. What you are saying is completely logical, and I personally would agree with it. It makes sense to me that if the affidavit was forgotten, the attorney should go back and get it. It is difficult for me to believe the system is so rigid that it would not accept the affidavit the next day.

Assemblyman Hammond:
I am glad you would be willing to work with that. I still have a problem with 45 days but what we have discussed does seem to be the logical solution.

Chairman Horne:
Let us hear the testimony of Dr. Havins in Las Vegas.

Weldon Havins, M.D., Nevada State Medical Association:
I am a physician and an attorney. I have been licensed to practice medicine in Nevada since 1974. I have also been licensed to practice law in Nevada since 1998. I have a master's degree in health law. I serve as a professor of jurisprudence at Touro University of Nevada, and serve as in-house counsel there. I also practice medicine part-time as an ophthalmologist. I am here representing the Nevada State Medical Association in opposition to A.B. 149. Many of the issues I was going to bring up have been previously discussed. One of the more egregious portions of this bill is regarding the 20 days the defendant has to file an answer even though the defendant may not possess the

expert affidavit. It seems inherently unfair to require a defendant to answer the complaint without receipt of the expert's affidavit.

Chairman Horne:
If the clock does not start ticking for the defendant until the affidavit is received, it should take away that concern. Is that right?

Weldon Havins:
Yes, sir, it would. However, this would essentially be extending the statute of limitations to 1 year and 45 days, rather than having a one-year statute. It is certainly within the purview of the Legislature to make such a change. In doing so, it would take away the unfair impediment of making the defendant answer without being in possession of the expert affidavit.

Chairman Horne:
Okay, please proceed.

Weldon Havins:
As the statute now stands, the case may be dismissed without prejudice before the expiration of the statute. This means it will have to be refiled, which is an inconvenience and incurs some costs. There should be no significant harm to the plaintiff. There are potential cures to that situation that the Committee can derive.

Chairman Horne:
The language does say "shall." The harm is that the statute of limitations may have run out.

Weldon Havins:
That is where the potential harm comes in. Only if the statute of limitations is involved, the case must be dismissed if the statute has run out. With the statute of limitations, in all types of civil actions, there will be a line somewhere. It is a common issue in trial practice. It is called busting the statute. Wherever you draw the line, there may be an issue whether it is a year or a year and 45 days. The same goes for the defense side. If you do not plead certain affirmative defenses in the answer, you cannot bring them up later. There are certain time limits required by law to comply with.

A colleague of mine, John Cotton, who could not be here, is very much opposed to this bill. He believes the one-year limit should remain in effect because it represents an adequate amount of time. This was part of a negotiation at the special session of 2002, which he was intricately involved with. This was a trade-off to eliminate the medical and dental screening panel.

Mr. Cotton feels as though attempting to change the statute is a breach of good faith. I realize that this is not being presented as a change to the statute. But, if you provide for answers 20 days after the 45 days, indeed you are changing the statute of limitations to 1 year and 45 days.

The reason behind the expert affidavit is to differentiate frivolous from nonfrivolous cases. Certainly, we are all in favor of that. I am not saying there are not valid concerns here. There may be good ways to address the concerns, but this bill is not the best mechanism to do that. There are other things to consider. I am not suggesting any particular remedies, but you could require court clerks not to accept a case unless the expert affidavit or declaration is filed. In specific instances, such as the previous testimony where there appears to be an egregious wrong committed, those cases can be filed and appealed up to the Supreme Court. In either published or nonpublished opinions, we have an excellent Supreme Court to address those issues. *Buckwalter v. Eighth Judicial District Court* is a good example. The Supreme Court made a decision that a declaration which contained a specific statement by an expert, under penalty of perjury, would serve as the equivalent to an affidavit. An affidavit is a statement that is notarized. The Supreme Court is another avenue to take when there appears to be an egregious miscarriage of justice under a specific case for exceptional circumstances. As Mr. Segerblom has said, this is an issue for very few cases. Those were his words in his testimony today. I agree with him. Perhaps on those few egregious cases, it may be that the court route should be the solution.

Chairman Horne:
Thank you, Dr. Havins. Are there any questions for Dr. Havins? I see none. Is there anyone else in Las Vegas wishing to testify? I show that Dr. Redfern has signed in to testify.

[Dr. Redfern is no longer available. He had a call to attend to.]

Chairman Horne:
Is there anyone else in Las Vegas or here in Carson City to testify?

George A. Ross, representing HCA, Inc. and Sunrise Hospital and Medical Center:
Good morning. My name is George Ross and I am representing HCA, Inc. and Sunrise Healthcare. First, I would like to thank you on behalf of my client for the statement you made earlier. You said this would be the only issue you would consider on medical malpractice and that you were not going to widen the scope.

Chairman Horne:
I meant it and that is why I said it on record.

George A. Ross:
We heard it and appreciate it. My perspective is a little bit different. I am representing a hospital in southern Nevada that is one of the few relatively high technology hospitals. It is the hospital that can best handle the complex cases, and the more complicated situations. It is imperative that if we are to maintain access to high quality medical care in southern Nevada, that we be able to recruit and maintain specialist doctors. One thing that doctors look at when determining where to practice is the medical malpractice statutes and the risks they run. The doctors also look at the expense of their malpractice insurance, given that many of the doctors already have a large amount of debt. The medical malpractice statutes are not the only reason a person lives or practices in Nevada. There is a whole complex of factors that brings someone here to practice, to stay here to practice, or to leave and practice somewhere else. The statute is a key factor in bringing in topnotch specialists to the state. One of these specialists operated on me personally. We feel that what is really important, in showing the environment where doctors will be working, is for consideration that this is permanent law. The doctors should not have to worry that every single session there may be another little change that may affect him or her in their practice. I know this is a very compelling case.

My plea is to think a little bit differently. A very famous world leader, who may have done some things we did not approve of, once said, "One death is a tragedy. A million deaths is a statistic." It is a way of approaching the idea that many of the bills you will consider have the same general characteristic. There are situations that involve real human beings who have had really compelling issues that hurt them or their families. Nobody will deny that it did not happen here, nor will anyone deny that it did not happen in the other cases discussed. What we are talking about is changing laws that serve a much larger good and purpose for all Nevadans, in order to rectify an exceptional situation where something went wrong. I think that is the decision that needs to be made. There is a compelling reason not to change this law. It does not pertain to the issues of whether a staple was placed in this particular case, or if it pertains to the access and quality of medical care for Nevadans. You must face the same issues on 50 to 100 bills each year. That is why we elect you, and I know it is a tough decision. Although I am not an attorney, I am employed by a law firm. I am very conscious that there is a line between what an attorney and a nonattorney can do. I have worked hand-in-glove with attorneys for over 30 years. I find it inconceivable that there is no remedy for what was suggested by Dr. Havins. There should be a remedy within the legal system for

the situation that was described earlier without having to change a law, which to do so would have other ramifications. Thank you.

Chairman Horne:
What we have heard many times today is that the remedy does not exist because of the simple word "shall," which directed the judge on the action taken. Without the word "may," the judge did not have the discretion. You have heard the story of how that happened. Also as I have stated earlier, the Legislature is here to examine laws to see whether they are working. Your testimony also gives the impression of "hands off." Sometimes with complex legislation, we hook everything up, we turn on the water, and we see where it leaks. We see whether we can repair those leaks without causing further damage. I think that is where we are today. Although the target group that we are proposing to protect might be small, it is up to us to see whether we can remedy that problem without overturning the apple cart. What you are suggesting is that helping the target group will turn over the apple cart or will allow another group to ask for something else. I have already stated that I will not entertain any further issues regarding this matter in this session. I do not believe that KODIN will be harmed, if we can find a remedy that will not change the statutes. In helping this small group, there may be the opportunity for the appropriate access to the justice system. We have heard comments from my colleagues from both caucuses. All agree that there may be a solution. I hope that everyone can get together and see whether something can be worked out. There is belief among members of this panel that there may be some middle ground to find a solution.

George A. Ross:
Thank you, Mr. Chairman. I have noticed that you have been carefully phrasing your words. You could have said it differently but have been very careful, knowing what you say will go into the record. I would be more comfortable if all legal remedies have been explored first in these cases. Going back to my original testimony, I am concerned that possible recruitments from Massachusetts General Hospital or Sloan-Kettering Memorial, for instance, may see the nuances that you are considering. The doctor may see that something has changed as opposed to the carefully nuanced approach.

Chairman Horne:
For the record, I was not choosing my words. I am sincere in what I am saying.

George A. Ross:
I knew you were, however, there is legislative intent. I believe you were being very careful.

Chairman Horne:
Dr. Manthei, do you have another comment?

Rudy R. Manthei:
My intent was not that the Legislature should not continue to examine and improve legislation regarding tort reform. My intent is just the contrary. It is a work in progress and we need to refine and continue to work on and improve the process. There is no absolute. My comment was suggesting that the problem is not in this area. My feeling is that we do not have a problem here and it does not necessarily need to be addressed by extending the statute of limitations. The issue is a little broader and goes back to the liability companies and the direct effect of liability premiums for physicians. The reason for one of the changes from the initiative was to remove the exceptions on the noneconomic damages because it created vague and ambiguous language, which was uninterruptable and created uncertainty. When uncertainty is created in the statutes, it changes the way the liability companies view the predictability, which will directly affect the premiums. The premiums will then affect the cost of healthcare. Creating exceptions will create the unpredictability, which will affect the liability directly. That is the reason why we want to refrain from these exceptions. Effectively, we changed from a two-year statute to a one-year statute for a reason. To go from one year to one year and 45 days creates unpredictability. If there is a problem, let us address the problem and not extend something that is working overall. Let us work to make it better because it is not about you or me. It is about the people of Nevada receiving the highest quality of care. In order to achieve that we must consider what is cost-effective in today's economy. Thank you.

Chairman Horne:
Are there any further questions? Is there anyone else wishing to testify? We will close the hearing on A.B. 149. [An exhibit not discussed is titled "Correcting an Injustice" (Exhibit E).] We will now open the hearing on Senate Bill 55.

Senate Bill 55: Revises provisions governing crimes against older persons. (BDR 18-204)

Keith Munro, Assistant Attorney General, Office of the Attorney General:
Good morning. For the record, my name is Keith Munro. I am Assistant Attorney General for Attorney General Catherine Cortez Masto. I am here today to discuss Senate Bill 55, which expands the authority of the Attorney General's Office to seek civil penalties from criminals who prey upon elderly victims.

With me is Heather Procter, a Deputy Attorney General with our office. Heather will go through the specific sections of the legislation.

Heather Procter, Deputy Attorney General, Office of the Attorney General:
Good morning, for the record I am Heather Procter, Deputy Attorney General for the State of Nevada. This bill will increase the Attorney General's ability to protect a vulnerable population of our state by permitting the Office to seek civil penalties against offenders convicted of a greater range of criminal conduct targeting older persons. [Continued reading from written testimony (Exhibit F).]

[Vice Chairman Ohrenschall assumed the Chair.]

Vice Chairman Ohrenschall:
Thank you very much, Ms. Procter and Mr. Munro. Under current law, must someone target an older person or a vulnerable person specifically? Or, is it that the victim happened to be in the category of older person?

Keith Munro:
The bill is for the victims who are older. For instance, if I wanted to target someone that was elderly, it does not apply. But, if someone falls within the range, they are subject to this bill.

Vice Chairman Ohrenschall:
Would this bill broaden the category of crimes which could be considered a civil penalty? Would it apply if someone just happened to be older and vulnerable?

Keith Munro:
Yes. This came about because the Legislature created a mortgage fraud task force within our office. We began to notice that much of the mortgage fraud was being committed against the elderly. We noticed that these types of crimes set forth in *Nevada Revised Statutes* (NRS) 193.167 would not receive the protection with respect to the legislation that was passed in 2007. Since the intent in 2007 was for the Legislature to protect the elderly from this type of crime, we thought it should be brought to your attention that there is a larger group of crimes that should fall within this jurisdiction as well.

Assemblyman Frierson:
I would like to follow up on my colleague's question. You have said that one of the goals is to allow the state to seek civil remedies for those who target seniors. I wholeheartedly agree with that goal. It seems to me that this language allows for the seeking of civil penalties for those who may not be targeting seniors. Let us say that John Doe steals two cars and one of them happens to be owned by a senior. If the perpetrator is not specifically targeting

seniors, you end up of having two victims that are treated differently, when the conduct is exactly the same, as opposed to someone actually targeting seniors, as in mortgage fraud cases. I would like to get some clarification on your intent. Also I would like to ask whether you would be amenable to focusing on those who are specifically targeting seniors?

Keith Munro:
Yes, we would be amenable. We are working off the statutes that the Legislature has already passed. That is how our unit is functioning. It came to our attention that people committing mortgage fraud seem to be focusing on older individuals. As reflected in NRS 193.167 (Exhibit G), some of the crimes that people are focusing on with regard to seniors, such as embezzlement, or obtaining money under false pretenses, seem to be where the seniors are most vulnerable.

Assemblyman Frierson:
I would like to work with you to determine the right language that will target those who are actually seeking out seniors as victims.

Keith Munro:
Sure. We would be willing to do that.

[Chairman Horne reassumes the Chair.]

Chairman Horne:
I will concur with that. It seems that the new identifiable crime victim may just happen to be a senior, who may not necessarily have been targeted for that reason. Let us see whether we can get that narrowed down.

Assemblywoman Dondero Loop:
I am wondering how long ago the age of 60 years was chosen to be considered senior.

Keith Munro:
This statute came into effect by one of your former colleagues, Kathy McClain. I do not know whether Ms. McClain, Terry Care, or Bernie Anderson was directly involved. They chose the usage of that age.

Chairman Horne:
Are there any more questions? Is there anyone else wishing to testify? I will close the hearing on S.B. 55. I will appreciate it if Mr. Munro will work with Mr. Frierson on the language issue. Is there any other business to come before

the Committee? My thoughts and prayers go out to Mr. Brooks and his family. With no further business, I will adjourn the meeting [at 10:11 a.m.].

[An exhibit not discussed was a letter of support for S.B. 55 from Attorney General Catherine Cortez Masto (Exhibit H).]

RESPECTFULLY SUBMITTED:

_____
Lenore Carfora-Nye
Committee Secretary

APPROVED BY:

_____
Assemblyman William C. Horne, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 17, 2011 Time of Meeting: 8:10 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 149	C	Sandra Payan	Written Testimony
A.B. 149	D	Rudy R. Manthei, Medical Director, Department of Ophthalmology	Written Testimony
A.B. 149	E	Assemblyman Tick Segerblom	Correcting an Injustice
S.B. 55	F	Office of the Attorney General	Written Testimony
S.B. 55	G	Keith Munro	*Nevada Revised Statutes* 193.167
S.B. 55	H	Attorney General Catherine Cortez Masto	Letter of support