MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-sixth Session
May 17, 2011

The Senate Committee on Judiciary was called to order by Chair Valerie Wiener at 8:07 a.m. on Tuesday, May 17, 2011, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Valerie Wiener, Chair
Senator Allison Copening, Vice Chair
Senator Shirley A. Breeden
Senator Ruben J. Kihuen
Senator Mike McGinness
Senator Don Gustavson
Senator Michael Roberson

GUEST LEGISLATORS PRESENT:

Assemblyman David P. Bobzien, Assembly District No. 24
Assemblyman Tick Segerblom, Assembly District No. 9

STAFF MEMBERS PRESENT:

Linda J. Eissmann, Policy Analyst
Brad A. Wilkinson, Counsel
Judith Anker-Nissen, Committee Secretary

OTHERS PRESENT:

John Wagner, Independent American Party
Janine Hansen, Nevada Eagle Forum
Frank Adams, Executive Director, Nevada Sheriffs' and Chiefs' Association
Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department

Michelle R. Jotz, Las Vegas Police Protective Association Metro, Inc.; Southern Nevada Conference of Police and Sheriffs
Barry Smith, Executive Director, Nevada Press Association, Inc.
Scott Anderson, Deputy for Commercial Recordings, Office of the Secretary of State
Shadi Farahi, TechAmerica
Brett A. Carter
Rudy Manthei, D.O., Keep Our Doctors In Nevada
John Cotton, Keep Our Doctors In Nevada
Lawrence P. Matheis, Executive Director, Nevada State Medical Association
Kathleen Conaboy, Nevada Orthopaedic Society
Robin Keith, Liability Cooperative of Nevada

CHAIR WIENER:
I will open the hearing on Assembly Bill (A.B.) 143.

ASSEMBLY BILL 143: Revises certain provisions concerning permits to carry concealed firearms. (BDR 15-118)

ASSEMBLYMAN DAVID P. BOBZIEN (Assembly District No. 24):
This is a straightforward bill; it has two main parts, which I will walk you through. I bring the first part forward because it is a commonsense way to do things. The second item is more a constituent issue. I had a constituent who brought this to me and said, "Can you do something about this?"

Sections 1 and 2 of A.B. 143 have language changes relating to a concealed carry weapon (CCW) permit. Specifically, this allows if you are qualified for one semiautomatic firearm on your permit, you can be qualified for any one that you happen to possess. It is an issue of parity between how the law addresses revolvers and semiautomatic handguns. The law states a revolver is a revolver is a revolver. There are different makes, models and types, but there are general similarities between them. Nevada has a quirk that requires you to qualify on each and every semiautomatic handgun that you possess. But the reality is that the differences relative to the similarities across the makes and models are few. A semiautomatic is a semiautomatic is a semiautomatic is what this bill puts out. The reality is one of convenience and one of common sense that you should not have to go back and qualify for each and every semiautomatic that you possess. Many gun owners I know have more than one make and model, and it makes sense to have it clearer between revolvers and semiautomatics.

Section 3 is one of confidentiality and privacy. This is the item that a constituent brought to me who said, "I am a gun owner. I am a CCW permit holder. I choose not to broadcast that to the world for obvious reasons. That is my personal approach to safety, and I would not want it known that I have such a permit, or to be vulnerable to a public records request."

The Legislative Counsel's Digest refers to a recent court case regarding those records being vulnerable to a public records request. The theory behind this is one of safety. I do not want to broadcast to the world that I may be a gun owner and that I have a CCW permit, and I certainly do not want to have my home address attached to that CCW permit available to the world. This is because if people want to find a stash of firearms, they could probably find them at my address. I argue that this section is the right and responsible thing to protect someone's privacy and safety.

JOHN WAGNER (Independent American Party):
There is not much I can add to Assemblyman Bobzien's bill except to say thank you for bringing this forward. It is similar to other bills that have been heard by the Committee. Eventually, I guess we will get what we want.

JANINE HANSEN (Nevada Eagle Forum):
We support this measure. I have a CCW permit. We have worked on these issues for 20 years, which shows that things happen in an incremental fashion. We are pleased with the progress on CCW permits this time, so we are pleased to support this bill; we are pleased to support the section on semiautomatic handguns and also pleased to support the confidentiality section. Years ago, when we were first beginning to develop these laws in the Legislature, we were promised that these records would be held in confidentiality, and we are appreciative that you are recognizing that and supporting our confidentiality and our privacy.

FRANK ADAMS (Executive Director, Nevada Sheriffs' and Chiefs' Association):
The elected sheriffs of Nevada have to administer this program. We have been working on these problems—semiautomatics—for a few sessions now, and we are glad to see this come forward. The second part that deals with confidentiality was a result of a challenge to the law out of a case in Washoe County. The sheriffs believe all of that information, including names, needs to be confidential. We are in support of both of these measures.

CHUCK CALLAWAY (Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department):
We would like to go on record in support of A.B. 143.

MICHELLE R. JOTZ (Las Vegas Police Protective Association Metro, Inc.; Southern Nevada Conference of Police and Sheriffs):
We would like to go on record as supporting A.B. 143 as well.

BARRY SMITH (Executive Director, Nevada Press Association, Inc.):
I am testifying in opposition to A.B. 143, as anytime that there is a government permitting process with the ability to revoke or suspend, there needs to be an opportunity to check how that process is working and whether the law is being followed. I would remind you that the initial issue leading to this court case was not confidentiality; that question came up. The issue was whether the law was being followed and documents were being falsified. In fact, they were. That is what led to this ruling. The ruling says that like other open records requests, confidential and personal identifying information may be kept confidential. That is consistently covered through the law.

You are shutting down information on a permit process that government has the authority to suspend or revoke. But the public has no access to find out whether the laws are being followed, documents are being falsified and what is going on with it. That is my objection.

CHAIR WIENER:
I will close the hearing on A.B. 143.

SENATOR ROBERSON MOVED TO DO PASS A.B. 143.

SENATOR GUSTAVSON SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR WIENER:
I will open the hearing on A.B. 564.

ASSEMBLY BILL 564: Makes various changes to allow for the use of the most recent technology by various business associations, corporations and other entities in carrying out their powers and duties. (BDR 7-891)

SCOTT ANDERSON (Deputy for Commercial Recordings, Office of the Secretary of State):
Assembly Bill 564 proposes several changes to *Nevada Revised Statutes* (NRS) Title 7 that will allow Nevada to become a leader in digital corporate governance. As technology rapidly develops, these provisions will give Nevada entities the ability to conduct corporate business using the latest technology and methods of communication rather than being required to meet face to face or telephonically.

Technology such as videoconferencing, Skype, Google Wave, webinars and Web meetings offer methods of communication not available until recently. As these technologies advance, Nevada entities should have the abilities to use them in their formation and governance documents as well as in conducting corporate meetings and other governance business.

The provisions of A.B. 564 also give the Secretary of State the ability to provide certain basic resources to streamline the formation process to those desiring to form entities. This discussion was started a few years ago when Vermont first proposed the idea of digital governance as shown by the *CFO.com* article provided to you (Exhibit C). Vermont has yet to implement the digital formation provisions as its commercial recordings division has been slow to adapt to technology.

Nevada is well poised to take the lead in this area as we continue to develop and offer online processes for document filing. This complements the work we are doing in developing the Nevada Business Portal as well. There was no opposition to A.B. 564 in the Assembly.

Sections 1, 4, 5, 6, 7, 10, 11, 14, 15, 16, 17 and 18 provide regulatory authority to the Secretary of State to define certain terms to allow entities to carry out their powers and duties through the use of the most recent technology.

Sections 2, 3, 8 and 9 allow certain meetings to be conducted through electronic communications, videoconferencing or other available technology through simultaneous or sequential participation.

Sections 12 and 13 allow for a limited-liability company (LLC) operating agreements to be in any tangible or electronic form as opposed to strictly written form. It also allows the Secretary of State to make available a model operating agreement for use by and at the discretion of an LLC.

Section 19 provides the Secretary of State regulatory authority necessary to carry out the provisions of this act.

SHADI FARAHI (TechAmerica):
I am a student intern attending Sage Ridge High School. I am here on behalf of TechAmerica to briefly testify in support of the Digital Formation Act. I will read from my written testimony (Exhibit D).

CHAIR WIENER:
Mr. Anderson, does this apply to NRS chapter 78, private corporations; NRS chapter 78A, close corporations; NRS chapter 80, foreign corporations; NRS chapter 81, miscellaneous organizations; NRS chapter 82, nonprofit corporations; NRS chapter 84, corporations sole; NRS chapter 86, LLCs; NRS chapter 87, partnerships; NRS chapter 88, Uniform Limited Partnership Act; NRS chapter 88A, business trusts; and NRS chapter 89, professional entities and associations?

MR. ANDERSON:
Yes, that is correct. It covers all of the entities that are formed in our office.

CHAIR WIENER:
I just wanted to make sure we got that into the record.

SENATOR MCGINNESS:
Ms. Farahi, your testimony was good and insightful. Was this a project you took on, or something you decided to look at?

MS. FARAHI:
It was something I decided to look at.

CHAIR WIENER:
I will close the hearing on A.B. 564.

SENATOR GUSTAVSON MOVED TO DO PASS A.B. 564.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR WIENER:
I will open the hearing on A.B. 149.

ASSEMBLY BILL 149 (1st Reprint): Makes various changes concerning medical and dental malpractice claims. (BDR 3-762)

ASSEMBLYMAN TICK SEGERBLOM (Assembly District No. 9):
Assembly Bill 149 attempts to correct what is an anomaly in medical malpractice law. In the 2001 Session, there was major medical malpractice debate and discussion that resulted in dropping the panels, which we used to have, and adopting a requirement that attached an affidavit to the lawsuit from a medical expert identifying the malpractice. At that time, the statute of limitations was two years.

In 2004, doctors were unhappy, so they brought an initiative petition to the voters. That initiative petition changed the statute of limitations to one year, among other things. At the end, we had requirements that a complaint must be filed with an affidavit from a medical expert, and it had to be filed within one year. Normally, when you file a complaint, a provision in the rules states if the complaint is not perfect, you can amend the complaint, and it relates to when it was filed. But because of this specific language enacted when voters approved the petition, this provision does not allow that. The courts interpretation says the complaint and the affidavit together have to be ready to go before the one-year statute of limitation runs out.

Assembly Bill 149 is designed to address the anomaly where attorneys may file a lawsuit but not attach the affidavit or the affidavit was dropped by the runner and so on. It turns out the lawsuit was filed in time, but the affidavit was not

attached. We are figuring out a way because they comply with the substance of the law that we can make those lawsuits valid. This is not an attempt to reopen the medical malpractice statutes; there is no malicious intent or deviousness. In the Assembly, we had worked with the doctors on what we thought was a great compromise, which is the bill you have before you today. But I guess since that time they have reflected upon it and feel they are still unhappy. This is a small issue, but it has arisen several times. We are addressing it specifically so the family of the person who died or the person who is the victim of the malpractice gets a day in court because the law was complied with the same as any other lawsuit.

Specifically, the law says you have to file the lawsuit within one year with the affidavit attached to the complaint. This bill says that if for some reason or another the lawsuit is filed within the one-year period but the affidavit is not filed with the lawsuit or the affidavit is missing, you have a right, within a reasonable time, to amend it and go back and correct that mistake as long as the mistake is what they call a clerical error, mistake, inadvertence, surprise or excusable neglect. If none of these factors are available, then it would not allow you to make up this error. But it is designed for the few cases where, through no fault of anybody, there was a mistake and you want the person who has the malpractice claim to go forward.

CHAIR WIENER:
I understand that a rule was the starting place for the bill. Would you share that with the Committee?

ASSEMBLYMAN SEGERBLOM:
Originally, we had a much more complicated process to allow this anomaly to be corrected. But in the Assembly when we were negotiating it, the language that you see was drafted by the doctors, not by us. You are referring to Rule 60, subdivision (b) of the Nevada Rules of Civil Procedure (NRCP), which allows you to correct a mistake, and it relates back. If you timely file the lawsuit on the last day of the year without an attached affidavit, two weeks later you can file an amended lawsuit and be within the one-year statute of limitations. This corrects what is called clerical or other mistakes, such as the runner filing the wrong paperwork. At legal offices, things fall through the cracks, many times through no fault of anybody; things happen. But the rules make sure justice is done and it does not offend anybody. Because the lawsuit was filed in a timely manner, then we allow those mistakes to be corrected. The language

adopted by members of the Assembly adopts NRCP Rule 60(b), which permits mistakes to be corrected.

We are continuing to talk to the doctors, and we are certainly willing to do further tweaking. We were surprised that this has now become a controversy because we thought we had settled it.

SENATOR BREEDEN:
Is NRCP Rule 60(b) current?

ASSEMBLYMAN SEGERBLOM:
No; NRCP Rule 60(b) applies to every lawsuit filed in Nevada except for medical malpractice cases. When the people voted for specific law in 2004, the Nevada Supreme Court law takes precedence and NRCP Rule 60(b) does not apply to medical malpractice cases.

SENATOR BREEDEN:
Only to these cases.

ASSEMBLYMAN SEGERBLOM:
Right. We want to bring NRCP Rule 60(b) into the medical malpractice cases as before 2004.

SENATOR COPENING:
Assemblyman Segerblom, do you have any knowledge as to why NRCP Rule 60(b) does not apply to medical malpractice?

ASSEMBLYMAN SEGERBLOM:
Yes. When the doctors brought their initiative in 2004, they had specific language saying on its face that the lawsuit has to be filed within one year, no exceptions. The affidavit requirement was not there because that was passed in 2001. But when you merge the 2001 law, which was passed by the Legislature, with the 2004 law voted in by the citizens of Nevada, there is no room for error. The Supreme Court has analyzed that issue and said there is no room for error. Many of us thought NRCP Rule 60(b) was always there. But the Supreme Court has said because the language passed by the voters is so clear, they cannot allow NRCP Rule 60(b). We are here because the Supreme Court has interpreted this to say NRCP Rule 60(b), which normally applies, does not apply to these cases.

BRETT A. CARTER:
I am an attorney from Las Vegas and have been practicing law for about 15 years. I am with the law firm of Benson, Bertoldo, Baker and Carter. I practice primarily in personal injury, and a part of my practice is medical malpractice. Medical malpractice cases are expensive and complex, but as Theodore Roosevelt said, "No man is above the law and no man is below it."

Let me first explain what A.B. 149 is and is not. Assembly Bill 149 is not an attempt to undo any of the medical malpractice reforms previously passed. It is clearly not that. It is simply trying to change a procedural anomaly that only applies to medical malpractice. According to NRS 41A.097, a one-year statute of limitations applies from the date the person discovers or should have discovered the injury caused by alleged medical malpractice. This timeline is half that of a lawsuit brought for any other reason in Nevada. These most complex cases require medical support, an affidavit from an expert. The intent of the statute was that frivolous cases should not be filed. Maybe they were clogging up the courts, maybe they were not; maybe they were a problem, maybe they were not. There was propaganda back then. Whatever the arguments for or against, that is not what A.B. 149 is designed to change or prevent. It is simply an opportunity for the case to proceed on its merits and not allow a technicality to reverse someone's right to proceed.

Right now, there is a requirement that plaintiffs must have a medical expert to support their claims. That expert must say that the doctor or medical provider fell below the standard of care, that failure caused injury and there were damages. This change does not affect that. That expert must still be hired, that expert must still be identified, that expert must still have reviewed all of the records and determined the facts support the opinion that this doctor or this medical provider fell below the standard of care and caused injury. Assembly Bill 149 does not change that. The only change this bill seeks is to ensure an expert has been retained, he or she has given an opinion supporting the claim, he or she has been identified in the body of the complaint and his or her facts and opinions have been identified in the body of the complaint. If for some reason the affidavit is not physically attached at the time of filing, there is an opportunity to cure. As drafted by the opponents, that opportunity to cure is within the one-year statute of limitations. The opponents have had concerns after agreeing and submitting this language. What is important is that the intent of the statute is not being changed. There is still the requirement of the expert and still the intent to avoid frivolous lawsuits.

To put this into context, I am here today because this affected me personally through the representation of one of my clients. Velia Marquez underwent hernia repair, and the doctors erroneously cut her intestines twice during the course of the operation. The doctors closed her up without seeing that they had sliced into her intestines. During the ensuing days, excrement filled her abdominal cavity. She eventually got sepsis and died. These physical findings were confirmed by autopsy. Doctors suggested the family pursue and investigate the situation. That is how the family ended up at my office. We hired an expert, a board-certified general surgeon, who reviewed the case and determined, as the pathologist, that errors made during the course of the surgery led to Ms. Marquez's death and those errors were below the standard of care.

We obtained the affidavit, prepared a complaint, identified the expert—his qualifications and the facts supporting his opinions—and filed the lawsuit. The paralegal did not staple the affidavit to the complaint, and we acknowledge that. There is an opportunity to cure and that is what we did. Within 72 hours we filed an errata, a legal document that cures a deficiency in every other case but unbeknownst at the time, not this one. We submitted the errata with the affidavit three days after the complaint before the statute of limitations had run out, and we served them on the defendant. The defendant hired legal representation and answered the complaint, and the case went forward for close to three years. No issues were raised; the defense hired experts; there were settlement conferences; depositions were taken; and the case was prepared for trial.

During that time, another case—apart and distinct from ours—went before a judge. A second case went before a judge; an attorney filed pretrial motions to see whether the case could be dismissed before it was heard. The judges heard the same issue brought up by a defense attorney that this was somehow deficient. The case had been allowed to proceed for three years, an errata was filed a few days after the complaint and the court dismissed the motion to dismiss saying it was ridiculous and there was no harm there. You have the expert affidavit, there was expert support, you proceeded as if there was not a problem, and now you bring this motion before me; motion denied. Unfortunately, it was appealed to the Nevada Supreme Court. I say unfortunately because the Supreme Court did not look at it—they did not look at equity—they were bound by the language of the statute. The Justices said, as it is written, our hands are tied. It says if a complaint is filed without an affidavit,

it shall be dismissed. The language chosen does not give the courts discretion to find justice or equity. Instead, they are forced to dismiss the case, regardless of harm to the defense.

That same thing happened to my case. Once the Supreme Court ruling came down, defense attorneys started filing these motions. Those frivolous motions denied before by our judges were forced to follow the Supreme Court's ruling. The law does not allow judicial discretion, does not allow the application of a Rule of Civil Procedures implied in every other instance, which is the opportunity to provide relief from a judgment or order proceeding when there has been an inadvertence.

There are only two situations where an affidavit is required for cases to proceed. That is medical malpractice and construction defect. We do not dispute the necessity. That is not why we are here today; it is the principle behind it. In construction defect, attorneys are given an additional 45 days in which to file an affidavit. We are looking for statutory consistency. But more important, we are looking to reverse a procedural anomaly by simply changing the language to allow some discretion to the courts. We are only looking at doing it if the intent of the statute has compliance. There was an expert; that expert was retained and supports the case. This is not an issue of frivolity. And if the argument is that a rule is a rule is a rule, that is not true for those of us who practice it. Courts have the discretion to do equity and justice; cases should be allowed to move forward on their merits. I cannot tell you how many times a defense attorney comes to me and asks for understanding, for complicity, for the court to extend deadlines and excuse inadvertent mistakes; it works both ways so that the plaintiffs and defendants can be heard on the merits. We ask—nothing more, nothing less—that these cases be cases to proceed on their merits by allowing the same discretion.

There was an anonymous letter by a judge; it does not read like a judge's letter, but I am not going to impugn anyone. The letter makes mention of concerns over some length of time that could be allowed if you have the opportunity to cure before the statute of limitations. We can work on that issue; we can tweak that part of the bill. The other issue is the substance of the affidavit and the complaint. You have to identify the expert opinions because that was the intent of the statute. These are small things. The substance of the amendment was agreed to during the Assembly proceedings. Nothing has changed.

CHAIR WIENER:
The language is "caused by a clerical error, mistake, inadvertence, surprise or excusable neglect."

MR. CARTER:
Let me explain. The NRCP 60(b) says specifically "Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence; Fraud, Etc." These are all ways in which the court has the ability to do justice by excusing some type of minor mistake. We seek the opportunity to allow for cases to proceed on their merits. If you comply with the intent of the statute and no one is harmed by the defense receiving this within three days or a few days thereafter, the proponents of this bill cannot see the reason why not to allow that.

SENATOR ROBERSON:
What is wrong with simply refiling the claim within the statute of limitation, if the affidavit is not attached?

MR. CARTER:
The question is when was the error initially detected? If the statute has run, it is too late to file. If it is caught before, why should you refile instead of simply attaching the affidavit? We know now to refile. In our case, both sides did not know that at the time because both sides moved forward for the next two to three years. There is a filing fee and additional time and effort. What if the statute of limitations has run and it is too late? This keeps that from being a necessity, and it gives that opportunity to cure.

SENATOR ROBERSON:
As an attorney, it is your job and duty to get it right and to file it in a timely manner. And if you do not do it, then you either suffer the consequences or you go through the small burden of refiling. It is not a huge burden to refile a complaint. The people of the State have spoken clearly about this matter.

MR. CARTER:
The initial law created in 2001 was part of the bill and not subject to the people's vote. It is my understanding that the affidavit requirement was not part of the 2004 Keep Our Doctors In Nevada (KODIN) initiative. There was clearly a movement to have an expert support the claims. But whether or not the claims should be dismissed without any opportunity to cure the "shall" language forcing you to refile under these circumstances, that language was chosen

during the initial drafting of the bill. It is clear that you have to have expert support so frivolous cases do not clog the court system and bring defendants into lawsuits. Having to refile and incur additional costs or potentially dismiss claims on their merits simply because of this issue was never the intent.

When this was argued in front of the Assembly, there were acknowledgements made by the opponents, and specifically, Dr. Manthei, stating that if you can get all of the information within the year, the fair thing to do is allow these cases to proceed. Filing it a few days later makes sense to me. The intent of the law was not to dismiss meritorious cases. I think that it was the intent under these circumstances.

ASSEMBLYMAN SEGERBLOM:
One year is the shortest statute of limitations on the books. Everything else is two years. When you combine the fact that it has to be done within one year and then you have to have the medical expert's testimony all laid out, that is a short deadline. Allowing this little tweak to the law seems reasonable under the circumstances. We want to help members of the public who are legitimate victims of medical malpractice.

RUDY MANTHEI, D.O. (Keep Our Doctors In Nevada):
I will read from my written testimony (Exhibit E).

JOHN COTTON (Keep Our Doctors In Nevada):
I am a trial attorney in Las Vegas; we also do work throughout the State. My firm handles about one-third of the medical malpractice cases filed in southern Nevada. In that capacity, we occasionally run into the problem Mr. Carter described. I can speak with some experience on the issues of the affidavit and the language of the statute.

I was a special counsel to the Nevada Physicians Task Force at the 2002 Special Session of the Legislature and was one of the drafters of that specific provision. Testimony then by Mr. Bill Bradley and me made clear that this legislation was to be specific and binding upon the parties because we were giving up the screening panel protection that the physicians held at the time.

I was asked by KODIN in the last several days to look at A.B. 149 and the proposed amendment. Quite frankly, my initial reaction was what my father used to say: if it is not broken, why are you trying to fix it? Secondly, why are

we trying to change something here and open up a Pandora's box when we have no need to?

Mr. Carter related a story about a case he had. I am familiar with one other case from my firm and four or five or cases throughout the State where this issue did come up. But we are talking about maybe five or six instances out of 1,000 cases in the last ten years. You are talking about changing a statute that is clear. It was made very specific at the time. If you file a complaint, you must have a signed affidavit from an expert in the field or your complaint will be dismissed, period. It does not say maybe you can file it a little later and if you come in with—I am not certain of the language—mistakes, inadvertence, surprise or excusable neglect, you can file the affidavit later. It was very clear and it has been affirmed by the Supreme Court. Senator Roberson asked, why not just refile—that is the remedy, A.B. 149 does not change that. The affidavit still has to be filed within one year. Why are we trying to change this statute at all? This has nothing to do with the statute of limitations or any concerns. With the Supreme Court's ruling and this statute, not an attorney in this State would be committing legal malpractice by filing a complaint without attaching an affidavit signed by an expert in the same field. Attorneys are clearly on notice today that any past cases are basically done. From this point forward, there should not be any question in anyone's mind as to what he or she needs to do in order to properly file a medical malpractice case in Nevada.

That said, A.B. 149 opens the door to a myriad of potential problems. Mr. Carter is a young attorney whom I respect and who is trying to be ethical. Other attorneys may end up with an opening like this, filing lawsuits without affidavits, trying to extort settlements from doctors, requiring the doctors to report the filing of the lawsuit even if there is no affidavit under the statutes passed back in 2002. They could sue ten doctors in one lawsuit, and all of them would have to report it to their malpractice insurance carrier and to report it to the Board of Medical Examiners. If they did that today, the lawyer filing the lawsuit would be subject to an action for abuse of process and malicious prosecution and subject to Federal Rules of Civil Procedure Rule 11—sanctions by the court for filing a complaint without an affidavit. No sanctions are provided in A.B. 149. There is nothing to stop someone from filing lawsuits now and then shopping around for an expert. You have to ask yourself why this amendment is being proposed; it does not change the statute of limitations. If attorneys did not file the affidavit in the first place, they still have to file it

before the statute runs out. Why not just wait to file your complaint until you have the explicit affidavit attached?

I wonder if there is an ulterior motive beyond clearing up this little clerical error because it is no longer a clerical error. The Supreme Court said, if you filed the thing without an affidavit, you have basically lost your right to proceed with that lawsuit. If someone does it today, he or she can refile, as Senator Roberson said. Attorneys can refile the next morning, they can refile anytime before the statute of limitations, and there is no issue involved. Then you certainly are not opening up the door to all of these other problems that could arise if this statute is passed.

LAWRENCE P. MATHEIS (Executive Director, Nevada State Medical Association):
We oppose A.B. 149 as we did the initial bill. Just as a technical matter for the record, the legislation that created the affidavit in lieu of the medical legal screening panel process was the Eighteenth Special Session in 2002, not 2001. And the purpose of that legislation is extremely important. We look at it as the only way to open the statutes and change a fundamental part of the approach. The reason an affidavit has to accompany a claim is so within the 20-day answer period, the defense team knows the basis of the claim. The panel process used to be exactly that. The rationale of what was done erroneously or neglectfully and how that harmed the patient had to be put into the record. Then the defense could respond from the record as well. That was replaced by the affidavit.

This bill seeks to divorce the filing of the claim from the filing of the affidavit. Depending upon the timing, the 20-day answer period could be invoked without having the rationale of the expert. That begins to crack the basis of the act that has been successful in stabilizing issues. Also, it is clear that most attorneys have been able to follow the law. Several hundred claims have been filed every year since the passage of the ballot question in 2004 and have met the standards of law. That is almost seven years of experience that if there is an error or an act of negligence by a professional that leads to someone who relies on a professional to be harmed, that is alleged to be malpractice. Is it not also the case in the legal field? There is a standard, and by error, inadvertence or by negligence, the client is harmed because the attorney did not meet the standard. I am not an attorney or a doctor, but it seems that not meeting the standard of care raises the question of malpractice. I do not think most cases against doctors turn out to be malpractice; they turn out to be inadvertent errors. And

they turn out to be things where no harm is done, and that is probably the case with attorneys. The standard should be consistently applied.

For the reasons that Mr. Cotton and Dr. Manthei said, we oppose the bill. It is unnecessary. Most attorneys who file malpractice cases against physicians meet the law's requirements. In those cases with some exception, we simply are not convinced by the examples that there is a problem significant enough to justify opening and changing the essence of the act that works.

SENATOR ROBERSON:
The irony is we are talking about standard of care for doctors. To me, this bill lowers the standard of care for lawyers. If I am a doctor—and please help me out, Mr. Matheis—and I get sued in the first month after a standard of care was not met, there is no affidavit. My attorney is supposed to file an answer within 20 days. According to this, you would not necessarily have to file. Having 20 days from the time the affidavit is filed does not make any attorney very comfortable. But if the attorney wants to answer, he does not have specific allegations based on an affidavit to adequately answer the complaint. For up to a year, you have a doctor under a cloud of a pending lawsuit. Even though it makes sense for the attorney to not answer the complaint for a year, it hangs over the doctor's head for a year. It is a public record; someone is out there saying that the doctor committed malpractice. I have a real problem with that. We need to support doctors and encourage doctors to come to Nevada and practice here. It becomes more difficult day after day, year after year, for doctors to make a living. We are helping out lawyers who, from my perspective, are not doing their jobs. And as a lawyer, I have a problem with that; I have a problem with this bill.

MR. MATHEIS:
I do not think that requires a response. I agree with the Senator.

KATHLEEN CONABOY (Nevada Orthopaedic Society):
I want to follow up on several things that Mr. Cotton said. You all heard him say that when physicians are served with complaints, they have to report immediately to their medical malpractice insurance carriers and within 30 days to the Board of Medical Examiners. Mr. Cotton also suggested that perhaps A.B. 149 would allow lawyers whose scruples are under question to push a physician into a settlement to get rid of a nuisance case. If there is a settlement, the physician's record of settlement is recorded in the National

Practitioner Data Bank, which is a public data bank that anyone can search. A physician's settlement remains public information essentially forever.

Going back to what Senator Roberson just said, the threat of a lawsuit hanging over your head has a psychological impact. With some of the doctors I represent, it has an emotional impact. It literally ruins their day. To have to come to a settlement to get rid of a case and have it recorded nationally for public scrutiny is a further insult. In following up with Dr. Manthei and Mr. Cotton's comments, I would ask you to oppose A.B. 149.

ROBIN KEITH (Liability Cooperative of Nevada):
I represent the Liability Cooperative of Nevada (LICON) which is a self-funded, risk retention pool operated by several of Nevada's rural hospitals. The pool insures nine hospitals and about 85 rural physicians.

I want to go on record as opposed to this bill. Mr. Cotton and others have made a good case stating the facts of opposition. However, when physicians apply for coverage through LICON, we go through an underwriting process. The process involves searching the data bank, as Ms. Conaboy mentioned, and evaluating the physician's malpractice history. It is fairly easy to do that when we have a claim that has gone through an entire process and we know the outcome of that claim. It is much harder to evaluate physicians who have claims hanging over their heads, so to speak. Similarly, physicians with a history of settlement are a red flag for us, even though the physicians may have good reasons for having made those decisions.

We are opposed to this bill. It is difficult to recruit and retain physicians in the State as a whole and certainly difficult to do so in rural areas. We are satisfied with the tort reform statutes in our State and do not want them changed.

ASSEMBLYMAN SEGERBLOM:
If there is a medical malpractice law at the end of the day, it is the shortest statute of limitations of any law of the State. This amendment would conform statute to meet with other laws to make up for excusable neglect. It is not an attempt to reopen medical malpractice statutes; but doctors do make mistakes, and that is why we have medical malpractice laws. They should be user-friendly because we are trying to protect the victims, not the lawyers or the doctors.

MR. CARTER:
There is a distinction between malpractice, errors and inadvertence as most doctors will readily admit. There are risks; there are issues that affect any particular practice, professional or nonprofessional. There are unscrupulous attorneys; there are unscrupulous politicians; there are unscrupulous physicians. This bill is not designed to assist unethical attorneys. The requirement is the same: you have to have an expert, you have to identify the expert and his or her opinions have to support the claim.

It appears the biggest concerns raised are in regard to this apparently anonymous letter from a judge. If there is a concern that the language proposed by the opponents is too broad, I can suggest a change. Under subsection 2, instead of saying, "may file the affidavit required pursuant to subsection 1 not later than the period of limitation prescribed by NRS 41A.097," which is the one-year statute of limitations, we could shorten that to "within 45 days, whichever is shorter." It does put an earlier cap on it so these issues are not potentially languishing. The 45 days is statutorily consistent with the professional design statute, the only other statute requiring an affidavit.

Second, there was some concern by the author of the letter about "the substance of the affidavit," referring to the language, "if the substance of the affidavit was incorporated into the body of the complaint." A sentence can be added to remove any ambiguity: "that the substance of the affidavit shall include the identity of the medical expert with the supporting facts and opinions."

It is unfortunate that we have to clarify laws and make them broad and malleable for judges to effectuate justice. What we do not want to do is tie their hands. The NRCP relief from judgment or order proceedings under Rule 40 gives them that ability, but they have carved out an exception with this particular law as written. All we want is to allow judges discretion in this situation that they have with every other situation.

CHAIR WIENER:
I will close the hearing on A.B. 149 and open the work session on A.B. 56.

ASSEMBLY BILL 56 (1st Reprint): Grants subpoena power to the Attorney General, acting through the Medicaid Fraud Control Unit, to obtain certain documents, records or materials. (BDR 18-119)

LINDA J. EISSMANN (Policy Analyst):
I will read from the work session document (Exhibit F).

CHAIR WIENER:
Committee, you will remember that I asked Mr. Kandt what kind of timelines might be involved for this compliance. I will read into the record what Ms. Eissmann sent me, as Mr. Kandt responded to her. He said through Ms. Eissmann:

> With regard to the timelines for complying with an administrative subpoena requesting the production of documents, a response date would be specified in the subpoena and would reflect a reasonable time in which to respond based in part upon the volume of documents subject to the subpoena and whether the party subject to the subpoena is already on notice that the documents are being sought. Depending upon the circumstances, the time frame could be as short as 5 business days or as long as 30 days after issuance of the administrative subpoena.

Mr. Kandt's response to my query will be added to the record.

Senator Roberson, were your questions answered?

SENATOR ROBERSON:
Yes.

SENATOR ROBERSON MOVED TO DO PASS A.B. 56.

SENATOR COPENING SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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CHAIR WIENER:
I will open the work session on A.B. 72.

ASSEMBLY BILL 72 (1st Reprint): Revises provisions relating to securities. (BDR 7-405)

MS. EISSMANN:
I will read from the work session document (Exhibit G).

SENATOR COPENING MOVED TO DO PASS A.B. 72.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION PASSED. (SENATORS GUSTAVSON, McGINNESS AND ROBERSON VOTED NO.)

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CHAIR WIENER:
I will open the work session on A.B. 135.

ASSEMBLY BILL 135 (1st Reprint): Revises provisions governing probation. (BDR 14-806)

MS. EISSMANN:
I will read from the work session document (Exhibit H).

SENATOR COPENING MOVED TO DO PASS A.B. 135.

SENATOR BREEDEN SECONDED THE MOTION.

THE MOTION PASSED. (SENATORS GUSTAVSON, McGINNESS AND ROBERSON VOTED NO.)

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CHAIR WIENER:
This meeting is adjourned at 9:30 a.m.

RESPECTFULLY SUBMITTED:

_____
Judith Anker-Nissen,
Committee Secretary

APPROVED BY:

_____
Senator Valerie Wiener, Chair

DATE:_____

EXHIBITS			
Bill	**Exhibit**	**Witness / Agency**	**Description**
	A		Agenda
	B		Attendance Roster
A.B. 564	C	Scott Anderson	*CFO.com* magazine article
A.B. 564	D	Shadi Farahi	Written testimony
A.B. 149	E	Dr. Rudy Manthei	Written testimony
A.B. 56	F	Linda Eissmann	Work session document
A.B. 72	G	Linda Eissmann	Work session document
A.B. 135	H	Linda Eissmann	Work session document