MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Eighth Session
February 6, 2015

The Committee on Judiciary was called to order by Vice Chairman Nelson at 8 a.m. on Friday, February 6, 2015, 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/App/NELIS/REL/78th2015. In addition, copies of the audio or video of the meeting may be purchased, for personal use only, through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Erven T. Nelson, Vice Chairman
Assemblyman Elliot T. Anderson
Assemblyman Nelson Araujo
Assemblywoman Olivia Diaz
Assemblywoman Michele Fiore
Assemblyman David M. Gardner
Assemblyman Brent A. Jones
Assemblyman James Ohrenschall
Assemblyman P. K. O'Neill
Assemblywoman Victoria Seaman
Assemblyman Tyrone Thompson
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

Assemblyman Ira Hansen, Chairman (excused)

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Diane Thornton, Committee Policy Analyst
Bradley Wilkinson, Committee Counsel
Janet Jones, Committee Secretary
Jamie Tierney, Committee Assistant

OTHERS PRESENT:

Adam Laxalt, Attorney General
Brett Kandt, Special Deputy Attorney General, Office of the Attorney General
Garrit Pruyt, Deputy Attorney General, Bureau of Litigation, Public Safety Division, Office of the Attorney General
Dr. Robert Schofield, Psychologist, Department of Corrections
Sheryl Foster, Deputy Director, Programs, Department of Corrections
Connie S. Bisbee, Chairman, State Board of Parole Commissioners, Department of Public Safety
Matthew Jensen, Senior Deputy Attorney General, Office of the Attorney General
James Wadhams, representing Nevada Hospital Association
Sarah Partida, representing Nevada State Medical Association
Adam Plain, representing Nevada Dental Association
Cheryl Wilson, representing Nevada District Attorneys Association
Tyler Turnipseed, Chief Game Warden, Department of Wildlife
Bruce Nelson, Deputy District Attorney, Clark County District Attorney's Office
Adrina Ramos-King, Government Affairs, City of Las Vegas
Tom Conner, Chief Administrative Law Judge, Office of Administrative Hearings, Department of Motor Vehicles
Steve Yeager, Deputy Public Defender, Clark County Public Defender's Office
Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office
Eric Spratley, Lieutenant, Legislative Services, Washoe County Sheriff’s Office
Dennis S. Osborn, Chief, Nevada Highway Patrol, Department of Public Safety
Kristin Erickson, representing Nevada District Attorneys Association
Kiera Sears, General Counsel, Black Rock Nutraceuticals
Lisa Rasmussen, Member, Nevada Attorneys for Criminal Justice
Lance Hendron, Member, Nevada Attorneys for Criminal Justice

Vice Chairman Nelson:
[Roll was called. Committee protocol and rules were explained.] We have two bill draft requests to introduce.

BDR 13-418—Creates a power of attorney for health care decisions for adults with intellectual disabilities. (Later introduced as Assembly Bill 128.)

ASSEMBLYMAN OHRENSCHALL MOVED TO INTRODUCE BDR 13-418.

ASSEMBLYWOMAN DIAZ SECONDED THE MOTION.

THE MOTION PASSED. (CHAIRMAN HANSEN WAS ABSENT FOR THE VOTE.)

BDR 2-541—Makes various changes relating to judgments. (Later introduced as Assembly Bill 129.)

ASSEMBLYMAN WHEELER MOVED TO INTRODUCE BDR 2-541.

ASSEMBLYWOMAN DIAZ SECONDED THE MOTION.

THE MOTION PASSED. (CHAIRMAN HANSEN WAS ABSENT FOR THE VOTE.)

Vice Chairman Nelson:
We will start with a presentation from the Attorney General's Office. In addition, I would like to note for the record that Attorney General Laxalt is here. I am glad to have him here with us, also Brett Kandt, the Executive Director of the Advisory Council for Prosecuting Attorneys and the Office of the Attorney General. Please proceed with the presentation.

Adam Laxalt, Attorney General:
Good morning and thank you very much for having me here. You are all welcome in the coming weeks to come to my office and discuss any matters you are concerned about or are pressing. Yesterday we had the first attorney general-led law enforcement summit and the reception was incredible. We had over a hundred law enforcement chiefs, sheriffs, and district attorneys from around the state. It was a unique opportunity to get all of the state's law enforcement representatives in one room. We started hashing out the issues that we care about and the issues that we want to make sure we are looking at this year. We stand ready to answer any questions from this Committee.

I am here to provide an overview of our office. The office consists of approximately 370 people statewide. Our main priority is protecting our community and citizens. [Continued to read from written text (Exhibit C).]

From the overview, you can see we have a lot of work to do. The office does a great job, and I am honored to be the Attorney General and leading this office. I look forward to working with all of you in the coming months. I have received some feedback from law enforcement regarding ways to make our community safer. I will be getting that information to your committee in the future. I thank you for your time and again encourage you to come visit our office.

Vice Chairman Nelson:
Thank you, Mr. Laxalt. Do you have time for a few questions?

Adam Laxalt:
I do.

Assemblyman Araujo:
Mr. Laxalt, thank you for being here today. In the last session, Mrs. Cortez Masto helped pass sweeping human trafficking legislation, so I was just curious if you had an update on the progress that has been made.

Adam Laxalt:
Brett Kandt has the most recent update. I know we have some results of our work.

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General:
Assembly Bill No. 67 of the 77th Session was a comprehensive human trafficking piece of legislation that took some important steps in addressing this problem in our state, especially sex trafficking. It made sex trafficking a crime, which we did not have before. It mirrors the federal definition of sex trafficking and that involves either the trafficking of minors or adults if force, violence, or coercion are used to force them to engage in prostitution. Also, it enacted appropriate penalties in addition to the crime of sex trafficking. As we move forward, we are focusing on a four-pronged approach to the problem of trafficking in our state.

First, the best way for us to detect when there is trafficking activity occurring is not through the law enforcement community, it is actually through our regular citizens. With our tourism-based economy especially, we are working with the Nevada Resort Association to ensure that the employees in Nevada's casinos are aware what trafficking is and how we identify it, because those folks clean the rooms, park the cars, and work the floors and may be in the best position

to identify when there is trafficking taking place. We are working with the educators and people in the trucking industry again on that prevention awareness piece.

Second, we are working with our law enforcement agencies and our prosecutors so that they know the best way to investigate and to prove a trafficking case. We have had convictions of sex trafficking under that new law.

Third, this is a piece of legislation we have to go the furthest on; that is treatment and services for the victims. When you have victims that have been trafficked, especially from a young age, it is disturbing that the average person engaged in the sex trade got into it at the age of 13 to 14 years old. Someone who has been trafficked for most of their life cannot just walk away from that and start a new life with a regular occupation. They need treatment, they need services, and they need support. We are most lacking in that area. That is going to take contributions from the private sector in terms of funding and resources. However, we are working with people in the private sector who are committed to addressing that problem.

Fourth is getting reliable data because as much as we know sex trafficking is a problem in our state, so much goes on under the radar. We really do not have good numbers on the number of true victims we have. Therefore, building up that reliable data so that we really understand the extent of the problem will be another piece as we move forward.

Assemblyman Elliot T. Anderson:
My question concerns the foreclosure settlement funds. I was wondering if you could give us an update on how much of those funds are left and what your office is planning on doing with them.

Adam Laxalt:
As you can imagine, I am getting up to speed on a million things and trying to get a strong grip on how this money has been spent and how it will be spent in the coming biennium. If you do not mind giving us a few weeks, that will be part of our budget proposal as some of it has been earmarked for a number of different programs. Some of it has been earmarked for legal aid and other services that are related to mortgage issues. We will be happy to give you a brief on that when we have a little more information.

Assemblyman Ohrenschall:
My question is a little bit of a follow up of Assemblyman Araujo's. Do you have any data on how many children and young adults being trafficked are Nevada children versus out-of-state children that are brought into the state? You mentioned that there had been convictions, and I wondered if you knew how many convictions and how much time the traffickers or pimps have been looking at. You also talked about treatment and services, and could you tell us where we are with that. Do we have safe homes where these young adults and kids can go to be away from the pimp and away from that culture they were caught up in? Could you give me a little more input on that?

Brett Kandt:
Getting hard numbers is a challenge. When we were putting together the research bringing Assembly Bill No. 67 of the 77th Session to you, we knew that the Las Vegas Metropolitan Police Department alone had recovered about 2,400 children that had been trafficked in the Las Vegas metropolitan area. Once again, I feel that figure is severely understated because so much of it goes on under the radar.

You asked how many of those are Nevada children. An alarming number are Nevada children. There have been instances where 18-year-olds get into the trade, they are still in high school, and they recruit other classmates. It is because the pimps have groomed them for it.

The second question you asked was the number of convictions. I cannot give you an exact number today, as I would have to do some research. Our federal colleagues in the U.S. Attorney's Office prosecute sex trafficking cases and, in fact, until we enacted our own sex trafficking law, we needed them to take the lead on that. We have our local district attorneys seeking and obtaining confessions. Our office has also stepped up in those instances when we can provide assistance and have our prosecutors handle cases as well. I can try to get some estimates for you of convictions to date.

Your third question was about the treatment services component. I can only reiterate that this is the area we have the furthest to go. There was a bill passed in the last session to create a fund to accept grants, gifts, and donations to hopefully build some resources for treatment centers and programs. We still have a long way to go but there are some organizations in the private sector, one is Awaken here in the northern Nevada area, that are focusing on providing services and support to victims. I think there are also some organizations down in Las Vegas but I cannot say it enough, treatment and services for victims is the furthest we have to go.

Vice Chairman Nelson:
I would like to comment before we turn to Assemblywoman Diaz that we have a bill on sex trafficking and we could ask a lot more questions during the discussion of that bill. It is obviously a very important topic.

Assemblywoman Diaz:
Welcome, Mr. Laxalt. A lot of work we do on this Committee directly affects how you do your business in your office. There is a lot of information you shared this morning and I was wondering if we could get that data compiled?

Adam Laxalt:
Of course, we would be happy to do that for you. Again, thank you for having me, and I think this Committee above all is an important partner for the Attorney General's Office. Any questions you may have or anything you need please let me know so we make sure we have a strong open dialogue.

Vice Chairman Nelson:
I will now open the hearing on Assembly Bill 45.

Assembly Bill 45: Revises provisions governing the assessment by the Department of Corrections of prisoners convicted of sexual offenses. (BDR 16-152)

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General:
With me today is Garrit Pruyt, Deputy Attorney General, and one of the attorneys that represents the Department of Corrections. We will be presenting this bill, and it is my understanding that Dr. Scofield from the Department of Corrections and Sheryl Foster, Deputy Director of Programs with the Department of Corrections, are also here and may be able to answer specific questions about the whole process of sex offender assessment.

Assembly Bill 45 will allow the Department of Corrections to use the best currently accepted standard of assessment to evaluate sex offenders and to determine a prisoner's risk to reoffend in a sexual manner. This is vital to the safety of our communities when sex offenders are considered for parole. *Nevada Revised Statutes* (NRS) 213.1214 currently specifies exact classifications of risk groups. It requires that the Department use a currently accepted standard of assessment that determines a risk of low, medium, or high. Assembly Bill 45 would amend the statute to mandate that any assessment determine the level of recidivism to offend in a sexual manner, including whether the prisoner is a high risk to reoffend for purposes of NRS 213.1215, subsection 3.

The current statute reduces the ability to modify the risk categories that best reflect the safety needs of the community and the developing science of sex offender assessment and evaluation. For example, there is an assessment called the Static-99, which is an actuarial assessment. It is an instrument designed to calculate the risk of recidivism for persons convicted of sex crimes. Qualified Nevada Department of Corrections personnel in advance of parole hearings conduct the Static-99. However, the Static-99 currently yields four classifications for sex offenders. The completed assessment returns a risk level of low, low-moderately, moderately-high, or high. Those four categories do not correspond to the three categories that are currently recited in the statute. Assembly Bill 45 would allow the Department to adapt and utilize whichever instrument is considered by the profession and the professionals to be the best standard for establishing a recidivism risk level of sex offenders for Nevada's prison population. That would include, but not be limited to, use of the Static-99 assessment to provide the Parole Board with the best measure available to determine parole eligibility for sex offenders. The safety of our communities is paramount. The public policy dictates that the best assessment available be utilized for determining the level of risk that a sex offender poses when he or she is considered for release into the community. [Mr. Kandt also submitted a letter of support for A.B. 45 (Exhibit D).]

Assemblyman Ohrenschall:
How would this change affect someone who has been released, ten years has passed, and they are trying to get off lifetime supervision? In this Committee we have debated that issue quite a bit in terms of if ten years is the right amount of time or not and the qualifications of the persons who make the assessment versus whether they are licensed in Nevada or not.

Garrit Pruyt, Deputy Attorney General, Bureau of Litigation, Public Safety Division, Office of the Attorney General:
This bill is not intended to address the issue of how they would come off lifetime supervision. What this specifically does is a sex offender is evaluated to determine types of recidivism and is used in conjunction with other factors that the State Parole Board considers. It is currently stated in the statute that there are three specific outcomes through this type of assessment. However, the evolving science on this can often yield more factors or may yield fewer factors in the future. The way in which sex offenders are evaluated is continually under study as we learn more about the way these crimes are committed. This simply allows the Department to change with the fluid nature of this type of assessment.

Brett Kandt:
This assessment process takes place when a prisoner is still incarcerated and is being considered for parole. You are asking if the assessment they received will follow them throughout their lifetime supervision. I just wanted to clarify the exact question you asked.

Assemblyman Wheeler:
Mr. Kandt, you said that you wanted the best assessment available for these people. Are we getting rid of three levels of assessment and how do we get the best assessment available if it is strictly high or not at all?

Brett Kandt:
The problem with locking in those three levels is that the best assessment might not tie to those three levels. As we indicated, the Static-99 that is considered a very reliable assessment right now uses four levels. There may be an assessment developed in the future that creates a scale of 1 to 10. Tying it into these three levels really restricts the ability of the professionals in the prison system from using the best assessment available. By removing it and not referring to specific levels but clarifying it still has to assess a level, we feel you are still carrying out the intent which is to ensure we are getting an accurate assessment of what that individual's level of risk to reoffend is. This will ensure that the Parole Board can make a decision that is in the best interest of the community.

Assemblyman Wheeler:
If we are looking to get rid of three levels, how is that the best assessment available? Is there a different level of probation currently based on those four levels that Static-99 uses, or are there just different levels of probation for the high-risk offender?

Dr. Robert Schofield, Psychologist, Department of Corrections:
It appears there might be some confusion. The current law requires the risk level of low, medium, or high. The changes proposed in this bill just open it up for the professional evaluators to use instruments that might come up with different levels. What we use currently, the Static-99, has four levels of risk. Those four levels do not fit with the three levels currently stated in the law. This change simply makes it possible for us to use the four levels or any future better forms of assessment.

Vice Chairman Nelson:
Dr. Schofield, could you explain what the Static-99 is?

Dr. Schofield:
The Static-99 is one of many instruments developed to assess the risk for sex offenders to reoffend. The Static-99 is currently the most widely used instrument for this purpose. It has ten items which cover an offender's criminal record, age, marriage, victim known or not known to offender, whether a male or female victim, and various items such as these. Each of the ten items gets a score and then is added up and that score corresponds to one of the four risk levels.

Assemblyman Elliot T. Anderson:
Could Mr. Pruyt or Dr. Schofield tell us more about the instrument that is used to determine the risk to reoffend?

Dr. Schofield:
The Static-99 was developed by psychologists studying risk factors. They looked at thousands of sex offenders. They used sorted statistical properties and determined which one of these risk factors was most predictive of reoffending. The ten factors that were finalized to be used in the Static-99 were found to be the most predictive of reoffending.

Assemblyman Elliot T. Anderson:
I am looking for specificity with what those factors are.

Dr. Schofield:
As I explained earlier, they specifically look at the offender's age, criminal background, whether their background is related to violent crimes, if the offender is a stranger, male or female, a relative, or acquaintance who knew the victim. That is what it covers.

Assemblywoman Diaz:
I have two questions. My first question is how many evaluation tools exist that could be used to evaluate sex offenders? Who determines which one is used?

Dr. Schofield:
I could not give you the exact number of tools that are out there but an estimate would be 30 to 50. Of the most popular tools, there are approximately ten. The members of the Department of Corrections staff make the determination as to which tool is used.

Assemblywoman Diaz:
You may decide to use the Static-99, but what if someone comes into the department, decides otherwise, and goes back to something quite outdated? My concern is how do we determine the qualifications for the best tool to use?

Dr. Schofield:
The way we determine that currently is psychological staff members in conjunction with our deputy director annually review the various risk assessments that are out there. We try to keep up on the current research in this body of science. We review new changes or better assessments that have come forward and then make a decision whether to continue using the current form of assessment or change to something else.

Assemblyman Gardner:
I was reading up on Static-99 and it appears to be used only on male offenders. Could you tell me what assessment is used for female offenders?

Dr. Schofield:
Deputy Director Foster may recall the name of the assessment. Female offenders, juveniles, and pornography offenders all have different assessments.

Sheryl Foster, Deputy Director, Programs, Department of Corrections:
I did not bring that information with me, but we can provide it. They are doing an assessment at the women's prison that is specifically regarded as the current available assessment for female sex offenders.

Assemblyman Jones:
There is a lot of talk about this being scientific, yet it is nothing like if you have strep throat. With strep throat, you take a test and it comes back saying you have this bacteria so scientifically we know you have strep throat. This is just an educated opinion of what test we want to use this month or this year, which does not seem very scientific. My question is on your risk assessments. In the past, how successful have your assessments been to actually predict future behavior?

Dr. Schofield:
I personally have not tracked the results of the inmates that have been paroled or how that corresponds to the risk assessments. The instruments we are referring to are based on very sound statistical science. Statistical science can be very difficult for some to understand. It is certainly not as exact as physics or chemistry, but it is a sound science built into the design of these tools.

Assemblyman Jones:
If you say that you are basing it on statistics but you do not keep the statistics, how does that work then?

Sheryl Foster:
I believe you are asking for recidivism rates for sex offenders.

Assemblyman Jones:
Currently, your system does low, medium, and high risk levels and you want to get a broader type system that can be changed when everyone else has an opinion that something else should be used to evaluate. Therefore, my question is, if it is not based on physical or chemical science, but based on opinion or statistical opinion, then why are we not following the statistics if that is what we are basing our science on?

Sheryl Foster:
The recidivism rates for sex offenders can be obtained. We do keep recidivism rates on inmates coming back into the system after 36 months. In addition, we can specifically look at the recidivism rate of sex offenders.

Assemblyman Jones:
The whole bill is based on putting in a system that rates sex offenders. In addition, currently they are rated low, medium, or high. However, we want a different system that is the most current science that is based on statistics and not based on the test used if you have strep throat. The question is, if you are basing your most current science on statistics, should you not have the statistics stating we rated these offenders high and 9 out of 10 repeated whereas 9 out of 10 who rated low did not repeat? The whole purpose of this bill is to have this rating system and yet it does not seem that anyone is tracking the effectiveness of the rating system.

Dr. Schofield:
I think I might be able to clarify this. The developers of the Static-99 and almost all of the other sex offender risk assessment instruments get sample populations; they do statistical analyses by following offenders who have been released for 5, 10, 15, and 20 years. They get these recidivism rates and compare them to the risk levels in the instrument. In Nevada, we do not specifically do that for our inmates. This is not opinion-oriented; it is scientifically statistic-derived information.

Assemblyman Thompson:
Do they use this Static-99 to measure when an inmate is about 120 days out from being released to see if there is a behavioral change? Because based on some of the things you mentioned, it is never going to change except the age. I would think behavioral changes would be one of the main things you are looking at on whether someone is going to reoffend. Otherwise, they do not stand a chance. Therefore, if they have served for 15 years and they have

come in looking a certain way, I would hope they would look a different way when they are released.

Dr. Schofield:
The Static-99 is a static instrument and does not measure change other than age. This information goes to the Parole Board, and they are the entity that looks at the various changes the inmate has made during their time with the Department of Corrections.

Assemblyman Thompson:
How much is this weighted when the Parole Board looks at the whole layout of what this prisoner has done during their term of incarceration? Is it a small weight or the deciding factor?

Dr. Schofield:
I do not sit on the Parole Board.

Brett Kandt:
The chair of the Parole Board is here, and I believe that question could more appropriately be answered by her.

Connie S. Bisbee, Chairman, State Board of Parole Commissioners, Department of Public Safety:
If the sex offender comes before the Parole Board and they are a high risk to reoffend sexually and we are not statutorily required to parole them, the odds of paroling a high-risk offender are almost nonexistent.

Assemblyman Thompson:
That person came into the system looking like that 15 to 20 years ago. Therefore, when are they ever going to be given a chance based on this instrument and based on what I am hearing? How are they ever going to have a chance? They might have been the most model prisoner possible during their 15 years. It seems they are doomed from the beginning.

Connie Bisbee:
There are two reasons that you keep people in prison. One reason is that it is their punishment and that would be for any crime a person goes to prison for. The other reason you keep people in prison is that they are a threat to the safety of the community. There are people that go to prison who will never get out because they will never be safe to be your neighbor. Sex offenders scare the living daylights out of most of the people in the community. The Static-99 is internationally the most highly accepted method of assessing sex offenders. Some people will age out and that will reduce their risk. When the Parole Board

is looking at someone who is a low or low-moderate risk, there are treatments that can assist in behavior modification to enable releasing them into the community. With the proper support and treatment, they are relatively safe to parole. The high risk is a different type of person all together.

Assemblyman Araujo:
How is the current assessment being used compared to other methods in other states and what is the most common tool used in other states?

Dr. Schofield:
The Static-99 is the most commonly used tool in other states.

Assemblywoman Diaz:
Have we had any lawsuits in this area before, and do you foresee more lawsuits filed against the Division of Parole and Probation because the statute might be a little vague and people might say it does not say exactly what it needs to be?

Garrit Pruyt:
In respect to lawsuits, the Department of Corrections and the Parole Board are sued on a reoccurring basis. Generally, they are pro per petitioners who are without representation. But we are sued for everything and anything you can imagine. As far as envisioning more suits based on the change of the statue, I would not envision more lawsuits. I believe what this will actually allow is for the Department to use the best recognized assessment available. It will not pin them down to something that was perhaps the best ten years ago. Each legislative session, the Parole Board submits a report on the types of assessments that are used and the manner they are used. This report includes how they are used and how successful they are. So this change allows for the fluidity of continuing science in this area and does not simply allow the Department of Corrections to change things how they want. There will continue to be accountability pursuant to statute.

Assemblywoman Fiore:
As I sit and listen to this testimony, I am getting more and more convinced in my thoughts that Corrections and Parole have to come together as one in true reform because I do not believe you work closely together. I do believe that prisoners can change. If a prisoner has been a model prisoner for 15 years and then you change the rules, the person never gets out. Why not go back to the judge? So far, what I have heard of this bill I am not excited about it.

Garrit Pruyt:
The Parole Board cannot change a prisoner's sentence. When the judge prescribes a given sentence, there will be a range of time dictated. If it is 2 to 20 years, the sentence is 2 to 20 years. However, it will not go above those 20 years even if they were a danger to society. The determination here is whether to grant them parole, which is not a right in the state of Nevada. Maybe a better way to describe it is that in school people get grades of A, B, C, and D. What we have here is A, B, and C. You can say we are short a category. In a sense, with only three categories in which to assess a person, it limits the abilities of the Board. Now if we had high, moderate-high, low-moderate, and low, it would not pen people into a category that sometimes others may believe they do not belong in. What this will allow is to assess a person in all aspects of their confinement in conjunction with the crime they committed and, therefore, provide for a more accurate assessment for the Board.

Assemblyman Ohrenschall:
If this does pass into law, will all sex offenders at the Nevada Department of Corrections facilities be reassessed based on these new instruments?

Garrit Pruyt:
Assembly Bill 45 is not to be retroactive. It is required on new parole board hearings. What it states is an assessment will be done a few months prior to their parole hearing.

Assemblyman Araujo:
Will this change in statute make it more fair for the sex offender?

Garrit Pruyt:
I think that making it more fair will be a point of view. There will be those people on both sides that say it does or it does not. However, as it stands, I believe opening the risk categories and allowing newer science to be utilized creates a better picture for the Parole Board and allows a better assessment; something I believe is to society and the prisoner's benefit.

Vice Chairman Nelson:
Is there anyone else who would like to testify in favor of Assembly Bill 45?

Dr. Schofield:
I am here representing Director James Cox and just wanted to go on record that the Department of Corrections is in favor of the wording changes that this bill makes to the current law.

Vice Chairman Nelson:
Is there anyone in opposition to this bill? [There was no one.] Would anyone like to testify in a neutral position? [There was no one.] With no other testimony, I will close the hearing on Assembly Bill 45 and open the hearing on Assembly Bill 48.

Assembly Bill 48: Makes various changes relating to fraudulent acts committed against the State or a political subdivision. (BDR 14-154)

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General:
With me today is Senior Deputy Attorney General Matthew Jensen with our Medicaid Fraud Control Unit and Mark Kemberling, Chief of the Medicaid Fraud Control Unit in Las Vegas.

This bill strengthens the ability of our Medicaid Fraud Control Unit to effectively investigate and prosecute fraud by health care providers in the Nevada Medicaid program. The jurisdiction of the Medicaid Fraud Control Unit is statutorily defined in *Nevada Revised Statutes (*NRS) 228.410.

Specifically, this bill is intended to accomplish three things. One, allow for the instrumentalities of the crime of Medicaid fraud to be subject to several forfeiture proceedings. Two, extend the time needed before certain convictions of Medicaid fraud can be sealed and provide notice of a request to seal those records to the Attorney General, if the matter was prosecuted by our office. And three, to amend the Nevada False Claims Act, (NRS) Chapter 357, to qualify for a 10 percent greater share from federal recoveries when a matter involves both Nevada and the federal government health care funds. Therefore, these improvements will address present inconsistencies in the law and it assists us in recovering additional funds for the state.

Section 1 of the bill addresses the forfeiture provision, (NRS) 179.121, including Medicaid fraud among those specified crimes in which property used as an instrumentality of the crime may be subject to a civil forfeiture proceeding. In a typical Nevada state civil forfeiture case, there is a seizure of a certain property by law enforcement incident to the arrest of the property owners for the commission of a crime or crimes. The owners are then charged criminally and the prosecuting attorney initiates a civil forfeiture hearing pursuant to NRS Chapter 179 by filing a civil suit against the property itself, which is known as an in rem action. So you have two separate proceedings, the criminal prosecution and the civil forfeiture proceeding.

In the civil forfeiture proceeding, the government notifies all known potential claimants to the property who can answer the suit thus asserting their claim

to that property. The case proceeds through discovery and to trial as in any civil proceeding. The government must prove by clear and convincing evidence that the seized properties are either the proceeds of criminal activity or the means for the criminal activity. The claimants must demonstrate that they were not involved or aware that their property is the alleged proceeds of or the instrumentality of a crime. The whole idea of civil forfeiture is to take the profit out of crime.

Oftentimes a civil forfeiture action will commence prior to the conviction but fairness and due process dictate, and I want to emphasize this, that the forfeiture action should conclude before conviction is obtained. Typically, a civil forfeiture action is stayed pending the outcome of the criminal action. Many criminals are motivated by the acquisition of material goods. The ability for law enforcement to forfeit seized property can be a very effective tool in reducing the incentive for illegal conduct.

Currently, Medicaid fraud is not a specified crime for which the personal property instrumentalities of the crime may be subject to these civil forfeiture proceedings. Perpetrators of various schemes of Medicaid fraud routinely use computers, vehicles, money, and other personal property to carry out their schemes. In addition, these items are left in place even after conviction for use by others or new use by the convicted. Forfeiture would help to prevent further illicit use of the property, prohibit renewed Medicaid fraud activity, and help to fund our crime prevention efforts. This proposed amendment allows those forfeiture proceedings against property used in the instrumentality of a Medicaid fraud.

The second component to A.B. 48 is in section 2 and deals with the sealing of records after a conviction. This amends (NRS) 179.245 to preclude a person convicted of Medicaid fraud from filing a petition for the sealing of records relating to his or her conviction for at least seven years after the date of the person's release from actual custody or from the date when the person is no longer under suspended sentence, whichever occurs later. It also requires the court to provide notice of such a petition to our office as the prosecuting attorney.

Medicaid and other agencies require the ability to review criminal histories in the regulation of contractors and licensees, including Medicaid providers and residential care facility operators. In many instances, any Medicaid fraud conviction within seven years disqualifies a person from becoming a contractor or licensee. However, a misdemeanor or gross misdemeanor Medicaid fraud under the current law can be sealed before the expiration of the seven years. Therefore, this proposed amendment prevents such premature sealing.

In addition, the Attorney General currently may not be notified of the sealing of petition even though the Attorney General was the prosecuting agency. The lack of notification works to deny our office the ability or an agency we represent to present evidence relative to that sealing petition. Therefore, this proposed amendment provides the appropriate notification to our office of those petitions to seal the records.

The third component to the bill makes some amendments to NRS Chapter 357, the Nevada False Claims Act. Sections 3 through 10 make some necessary technical amendments. The purpose of these amendments is to achieve compliance under the federal Deficit Reduction Act of 2005 (DRA). For those of you who were here last session, we actually had a bill that made some technical amendments to NRS Chapter 357 and these are some follow-up amendments that we are bringing to you. The Deficit Reduction Act of 2005 (DRA) enacted certain provisions concerning state plans for Medicaid. In addition, Nevada uses the False Claims Act to fight fraud committed against our state government including fraud involving Nevada's Medicaid program. Specifically these sections of the bill amend existing laws so that the Nevada False Claims Act is at least as effective as the federal law. In addition, it will adjust the maximum shares allowed for any recovery to which a private plaintiff may be entitled under certain qui tam actions to comport with federal law. These amendments are necessary for the state's continued eligibility for financial incentives in Medicaid recovery under the DRA. That is a financial incentive called a DRA bump. It equates to about a quarter of a million dollars a year.

I want to point out that when we are talking about Nevada's False Claims Act it uses the term private plaintiff but that really is a synonym for whistle-blower. Currently, the state of Nevada pays whistle-blowers a portion of the Nevada False Claim Act recoveries, NRS Chapter 357.210, based on a percentage range. The state of Nevada currently, as the law is written, has a higher percentage range than any other state or the federal government. Nevada makes it possible for a whistle-blower to obtain a percentage of the recovery between 15 to 33 percent for the initiation of an action and 25 to 50 percent if the state of Nevada declines to intervene. Most states and the federal government cap these percentage awards respectively at 25 percent instead of 33 percent and 30 percent instead of 50 percent. We want to bring our numbers in line with the federal law and the laws of other states. A reduction in the high end of the percentage ranges would bring Nevada in line and it would result in negotiations that are more proficient when we have these multistate settlements.

These revisions really afford Nevada consistency with the other states and in turn allow us to pool our resources since our Medicaid Fraud Unit works with

similar units in other states as Medicaid is a national program. We can rely on common case law and we can act on a united front in matters involving multiple states.

In conclusion, we believe that Assembly Bill 48 will promote a safer living environment for our citizens and addresses the time period when a conviction can be sealed. Also, it takes the profit out of it by allowing us to initiate some forfeiture proceedings and making those technical amendments to Nevada False Claims Act to accrue more funds for our taxpayers. [Mr. Kandt also submitted a letter of support for A.B. 48 (Exhibit E).]

Vice Chairman Nelson:
On the forfeiture portion, is that presented in the bill also to bring it into compliance with federal law or with other states or is that just for Nevada?

Brett Kandt:
The forfeiture provision is not tied to any requirement to compliance or being in line with the federal law.

Vice Chairman Nelson:
I believe you stated that typically the forfeiture would not happen until there is a conviction. Is that by state law or by practice?

Brett Kandt:
It is not by state law but is a practice that the Attorney General's Office follows. I believe it is the best practice that fairness and due process dictate that any forfeiture proceeding should be stayed unless, and until, you obtain a criminal conviction.

Vice Chairman Nelson:
I have a hypothetical situation for you. Let us say you have a medical provider, either a group of physicians or someone else who is governed by the Medicaid laws and there are six doctors working together and they have a common billing system. They also have records on the computers that are subject to the federal Health Insurance Portability and Accountability Act (HIPAA), and one of them is convicted. Will that computer be taken and thus shut down the other five doctors?

Matthew Jensen, Senior Deputy Attorney General, Office of the Attorney General:
Let me clarify. This brings in the ability to transfer title of the property; it does not change the ability to obtain the property as far as closing down the entire practice by forfeiture. Other parties with an interest in the property would also be able to take part in that forfeiture hearing. The court oversees the entire process and so it would be fairly addressed.

Vice Chairman Nelson:
So this would include vehicles and cash. Are there other potential targets as far as assets go?

Matthew Jensen:
It is mainly vehicles and cash. It is conceivable it could be computers. However, those are rarely taken.

Vice Chairman Nelson:
Is that because they do not have a lot of value on the resale market?

Matthew Jensen:
Correct.

Assemblyman Elliot T. Anderson:
Mr. Kandt, could you elaborate more on your practices in regards to the civil forfeitures? I have seen many news stories about civil forfeiture regarding people who have had their assets seized and there was no finding of criminal wrongdoing yet they did not get their property back. Recognizing that jeopardy does not attach in a civil proceeding, is there any protection for those people from having that civil forfeiture action continue? Is there anything we can put in there to make that statute stronger to make sure that does not happen?

Brett Kandt:
I would submit that it is outside the scope of this bill. This bill does not promote any changes to Nevada's civil forfeiture laws specifically. If you have concerns about the current state of those laws and the process, I certainly think that is something you might want to examine and address. Right now we just want to enable our Medicaid Fraud Control Unit to utilize that process as other prosecuting agencies utilize that process. I do not know how many Medicaid Fraud Control Units nationwide have the ability to utilize civil forfeiture, but we will get that information for you. The practice of the Attorney General's Office is to stay a civil forfeiture proceeding until the related criminal proceeding results in a conviction.

Assemblyman Elliot T. Anderson:
I understand that we are not opening the statutes to talk about the procedures, but you are asking us to add more property subject to that statute and it makes me a little uneasy. Therefore, I would appreciate any thoughts you have to assuage our concerns on that because this is not just cash, we are potentially subjecting a business's assets in this statute.

Brett Kandt:
You are talking about the Medicaid Fraud Control Unit, which is a unit within the Attorney General's Office, which has exclusive jurisdiction to prosecute Medicaid fraud in our state. We are asking you to make a policy decision to allow our unit to have the ability to utilize civil forfeiture proceedings when they think it is appropriate. I will leave it to the folks that run that unit to explain to you how they would utilize civil forfeiture. I believe Mr. Jensen indicated it would not be their intent to remove all the computers and the data pertinent to a medical practice in which one doctor may have been guilty of Medicaid fraud. But it would assist them to transfer title away from that one party who was guilty of Medicaid fraud to the other doctors who were not guilty of any wrongdoing.

Assemblyman O'Neill:
To clarify the procedure, when you go to seize the property, you would seize it at the time of the arrest, correct?

Brett Kant:
That is correct.

Assemblyman O'Neill:
In addition, if there were other partners' billing information and patient information in the seized property, they could file a civil suit asking for the return of that property. They would, therefore, not be at your mercy waiting for the conviction as criminal proceedings can last for some time, correct?

Brett Kandt:
In any civil forfeiture proceeding, anyone who has an interest in the property has the right to assert their claim for that property in that proceeding. The court tries to assure that due process is accorded to everyone and their rights in regard to a claim on that specific property.

Assemblyman O'Neill:
And that could be done well before the criminal proceedings?

Brett Kandt:
With the agreement of the parties, I think you could address some of those issues before the criminal proceeding. If fairness and due process dictate that, it would be the appropriate way to handle it.

Assemblyman O'Neill:
Will the seized property eventually be sold? Will the seized funds go to the support of Medicaid and nothing else?

Brett Kandt:
I will let Mr. Jensen jump in here. I think in part they can fund the ongoing activities of the agency that was involved. I also want to remind the Committee that under our laws forfeited funds also go to fund our schools.

Vice Chairman Nelson:
So you can go in and seize the assets then the forfeiture proceedings occur after that?

Brett Kandt:
Correct.

Vice Chairman Nelson:
So you could go in and seize the computer we are talking about and then the other doctors would have the burden to file a lawsuit to get it back?

Brett Kandt:
I am going to let Mr. Jensen explain how the Unit would utilize the civil forfeiture statutes in their arena.

Matthew Jensen:
We are speaking about a theoretical seizure of a computer. In practice, what occurs is if a computer is seized it is imaged or mirrored as soon as possible and my Unit seeks to return those computers as soon as possible recognizing that the seizure causes a bit of disruption to the business. We actually seek the data in those instances. The computers can continue to be used for lawful purposes by the other members of that practice if they are wishing to do so.

Vice Chairman Nelson:
If they are wishing to keep their business going without their computer records? I am not trying to be sarcastic; I am just trying to understand what could happen here.

Matthew Jensen:
If they need that particular computer to continue their practice, we seek to return it as soon as possible.

Vice Chairman Nelson:
Is it by practice or by statute?

Matthew Jensen:
That is by our practice.

Vice Chairman Nelson:
Let me ask you this. In past practices in situations like this, would a judge typically grant an expedited hearing to get this resolved very quickly?

Matthew Jensen:
In my experience, yes. Judges will very quickly recognize that businesses need to continue and will grant these expedited hearings.

Assemblyman Thompson:
I want to discuss the section that addresses fraudulent Medicaid claims. There are numerous providers who do Medicaid billing. About how many potentially fraudulent cases are you investigating in a year?

Matthew Jensen:
I believe there were about 51 cases opened and 59 resolved from last year.

Assemblyman Thompson:
So how does your agency determine if it was truly an egregious versus an honest billing mistake? Also, could it maybe have been a training issue or it needs to be a corrective action?

Matthew Jensen:
Medicaid fraud is what we call a specific intent crime in Nevada. We have to prove that a party specifically intended to commit fraud and that it was not simply just an error. Even beyond a party thinking that something might be an inaccurate claim, we have to prove that fraud was specifically intended in a bad billing act.

Assemblyman Thompson:
How is that determined? Does your office have policy and procedures to determine that it was fraud? I know every case will be different, but do you have an outline of what would be the way you would attest to say, yes, this

service provider was really trying to commit fraud but actually, they just need to sharpen up their skills on how to properly bill?

Matthew Jensen:
Those cases are quite fact circumstance specific. Oftentimes you are relying on testimony of subordinate workers in an organization relating that they were told to create false records, witnessing the bad billing going on, and hearing communications.

Assemblywoman Seaman:
Do any of these civil forfeitures include misdemeanor cases?

Matthew Jensen:
The way this is written it does include misdemeanor cases. There are other misdemeanors already included in that statute.

Assemblywoman Diaz:
How pervasive is this issue? How many types of these crimes do you have to go after? How many people have wanted to seal their records? I would like to understand the frame of reference and background as to why we are making these changes.

Matthew Jensen:
Are you addressing the forfeiture portion or the sealing portion of this bill?

Assemblywoman Diaz:
The first part of my question is how pervasive is Medicaid fraud and the second part is how many individuals seek to have their records sealed?

Matthew Jensen:
Outside agency statistics report an estimate to be about a 10 percent fraud loss in what is over a $2 billion program in the state of Nevada. So we can look at about $200 million annually. Regarding sealing records, I do not have the figures on how many people seek to have their records sealed. However, we do get word of it regularly after records have been sealed. It occurs perhaps once or twice a year.

Assemblyman Elliot T. Anderson:
I have not heard any negative news about what the Attorney General's Office in our state does in relation to civil forfeiture proceedings, so please do not take this that I am questioning your policies and procedures. As I so often find myself saying in every committee, statutes last a lifetime and policy and procedures do not. They can change whenever your office or your successor

wants to change them. Is there any resistance to putting in more protections considering the authority that we are giving you? As you know, a court does not care about intent unless things are very vague. It does not matter what we say here; it matters what is in the statute.

Brett Kandt:
I can only iterate what our office policy is and what policies have been under previous administrations. It is what I believe to be the standard practice in our prosecution offices throughout the state. There may be some exceptions that cannot speak to regarding this. Assembly Bill 48 does not propose to address the process of civil procedure, which may be more appropriate in a bill that would propose to do that. We simply want to be able to allow our Medicaid Fraud Control Unit to avail itself to that process when it sees fit to take the profit out of crime and try to stem the opportunities for abuses and fraud in our Medicaid program.

Assemblyman Ohrenschall:
My question is concerning section 9 and the private plaintiff actions and reduction in the award. Is there any concern that there might be less reporting by the whistle-blowers because of the reduction in the reward? What is the policy rationale concerning that?

Matthew Jensen:
Is there a concern that there will be a reduction in reporting?

Assemblyman Ohrenschall:
That was my concern. I am wondering what the policy rationale is by reducing it by 20 percent.

Matthew Jensen:
We do not foresee a reduction in reporting. This remains in line with the federal False Claims Act and promotes a greater amount of money returned to the taxpayers. It also puts Nevada on par with the other states when there are multistate settlements. It does not allow Nevada to be separated from the herd, if you will, and dealt with separately. Our resources are then saved, and we can get to a more fair global settlement in these cases.

Vice Chairman Nelson:
Section 10, subsection 1 says, "If an employee, contractor or agent is discharged as a result of any lawful act of the employee, contractor, agent or associated others." Is the language "associated others" a catchall provision?

Matthew Jensen:
We added it to bring this in compliance with the federal False Claims Act. It mirrors the language in the federal False Claims Act. It is somewhat of a catchall, but it broadens the protection for the whistle-blowers and their associates. If a whistle-blower is not an employee, contractor, or agent, then there is no fallout on another person for that whistle-blower's action.

Vice Chairman Nelson:
We will now hear testimony in support of the bill. [There was no one.] Is there anyone in opposition to the bill?

James Wadhams, representing Nevada Hospital Association:
I am obligated to appear in opposition, but we certainly support the Attorney General's efforts to contain and control Medicaid fraud. However, we have some concerns, many of which were already addressed by members of the Committee.

I would just follow on the Vice Chairman's comment regarding the seizure of the computer. As you can see in the statute, certainly computers and other machines are identified specifically. In the hospital context, it is an issue just as well as in a medical practice. The problem we have and want to make sure of is that we track to see that we are conforming to the federal law. There is a provision referenced in this bill to another statute but it is not in the bill. In NRS 422.550, subsection 3 indicates that a person who signs on behalf of a provider is presumed to have the authorization of the provider and the provider is presumed to have knowledge of what that person has done. In general that is a reasonable rule; however, we are talking about seizure of assets as an imputation of a felony. We have to be very careful and make sure that due process is carefully protected. We apologize for appearing in opposition and to the Attorney General for not having the opportunity to speak with them ahead of this bill. We will continue to monitor the Committee's progress on this bill and will be willing to work with the Attorney General's Office and speak with them offline. We have concerns, but in general we support the notion of bringing this in conformity to the federal law.

Vice Chairman Nelson:
Is there anyone in the neutral position?

Sarah Partida, representing Nevada State Medical Association:
I first want to make it clear that we are in no way here to oppose or question some of the issues regarding Medicaid fraud. We do, however, have concerns with section 1 and the forfeiture. Many of our concerns were addressed today,

but the concerns involve the process in whether or not you could get forfeiture before a conviction. How is this going to apply in misdemeanor cases? There also were statements that this is to prevent profiting from crime. But I will point out that five statutes in regards to Medicaid require restitution upon a conviction. We would like to work with the Attorney General's Office on the forfeiture statutes along with this Committee to find another solution in handling this issue.

Adam Plain, representing Nevada Dental Association:
We would just echo the comments made by Ms. Partida. We would be happy to work with the Attorney General's Office on any language that may be necessary.

Vice Chairman Nelson:
I would encourage the opponents to work with the Attorney General's Office to bring an amendment to the Committee. There seems to be some concern regarding the forfeiture portion of the bill.

I will close the hearing on Assembly Bill 48 and open the hearing on Assembly Bill 67.

Assembly Bill 67: Makes various changes relating to driving, operating or being in actual physical control of a vehicle or vessel while under the influence of alcohol or a controlled substance or engaging in other prohibited conduct. (BDR 4-151)

Brett Kandt, Special Deputy Attorney General, Office of the Attorney General:
Assembly Bill 67 amends various laws regarding driving under the influence or operating a vessel under the influence on our waterways. It specifically amends *Nevada Revised Statutes* (NRS) 50.315, NRS Chapter 484C, and NRS Chapter 488 to comply with recent court rulings. In 2013 in the case of *Missouri v. McNeely*, *133 S. Ct. 1552 (2013)*, the United States Supreme Court held that the dissipation of alcohol in the bloodstream does not in itself constitute an exigency sufficient to justify obtaining a blood test without a warrant of a driver suspected of a driving under the influence (DUI). In light of that U.S. Supreme Court decision, the Nevada Supreme Court subsequently held that the consent implied by a person's decision to drive in this state is not voluntary consent to an evidentiary blood test. Thus, existing laws that allow a police officer to obtain a blood sample from a person without a warrant and without voluntary consent are unconstitutional. That was the Nevada Supreme Court case of *Byars v. State,* 130 Nev. Adv. Op. No. 85, 336 P.3d 939 (2014).

Our laws are implied consent laws as set forth in NRS Chapters 484C and 488. They do not comport with these rulings, and our Nevada law enforcement agencies are now deviating from the current language of the statutes to avoid constitutional violations. For instance, Nevada law enforcement officers must now obtain a warrant in the event a driver suspected of a DUI will not consent to a preliminary or evidentiary test. This bill makes the necessary amendments to those chapters to cure the constitutional deficiencies and makes various conforming amendments.

Nevada Revised Statutes 50.315, permits certain affidavits or declarations regarding the testing of the blood, breath, or urine of a DUI defendant to be admitted into evidence at trial. Subsection 6 of the statute provides that defendants facing a misdemeanor charge of DUI may not cross-examine the witness who signed the affidavit or declaration at trial unless there is a "substantial and bona fide" dispute regarding the facts asserted. In the recent case of *City of Reno v. Howard*, 130 Nev. Adv. Op. No. 12, 318 P.3d 1063 (2014), the Nevada Supreme Court held that the substantial and bona fide dispute requirement of NRS 50.315(6) impermissibly burdens the right of a misdemeanor defendant to confront the witness in violation of the Sixth Amendment. Section 1 of A.B. 67 amends that provision in NRS 50.315(6) to cure the constitutional deficiency by allowing the defendant no later than 10 days before the trial to object in writing to the admission of the affidavit or declaration into evidence and to request an opportunity to cross-examine the witness.

Nevada Revised Statutes 50.315 and certain provisions in NRS Chapter 484C and NRS Chapter 488 as they currently stand do not pass constitutional muster. This bill is crucial to protecting the due process rights of defendants while promoting public safety.

I am going to turn it over to some of our local prosecutors who are in the trenches prosecuting impaired drivers every day to keep our community safe. They are going to take you systematically through the particulars of A.B. 67. I know that we have been in constant communication with our colleagues in the defense bar to address some questions and concerns they had. It is very likely that we will have some small minor amendments that we will submit subsequent to the hearing today. [Mr. Kandt also submitted a letter of support for A.B. 67 (Exhibit F).]

Cheryl Wilson, representing Nevada District Attorneys Association:
I have been prosecuting criminal cases for Washoe County since 1993. I have been processing driving under the influence (DUI) cases throughout my entire career. I currently oversee the misdemeanor prosecution team. About

75 percent of our caseload in Washoe County is misdemeanor DUI cases. I prosecuted under an old rubric of statutes here in Nevada related to implied consent that were changed in 1995 and then adversely impacted by the Nevada Supreme Court and United States Supreme Court decisions that were rendered in 2013 and 2014.

I think it is important to know at the outset what is the Nevada implied consent law. All 50 states have them. The law states that a person who operates a vehicle in any state has given implied consent to submit to evidentiary testing to determine if they are under the influence of drugs or alcohol should an officer have reasonable grounds to believe that they are. According to our U.S. and Nevada Supreme Court cases more recently, Nevada's law of 1995 went too far because it stated that if you implied consent that you cannot revoke that consent. If you do not submit to that test as you implied consent to, we can use force without a warrant to take up to three blood samples from that DUI suspect. While that portion of implied consent law was enacted in 1995, prior to 1995 we had a sanction on the books where a DUI suspect would face immediate revocation of their driving privileges should they withdraw that implied consent and not cooperate with the investigation.

The United States Supreme Court case *Missouri v. McNeely* that was decided in 2013 was the first case that had an adverse impact on the way Nevada wrote its implied consent law in 1995. *Missouri v. McNeely* made a strong point because obviously the government, law enforcement, and victim advocates for those victims who had been adversely impacted by drunk driving cases all came forward and said you have to allow these blood draws based on the exigency of alcohol dissipating or other drugs dissipating. That is a valid exception to our constitutional rights; our Fourth Amendment rights. *Missouri v. McNeely* was very careful to say that they recognize the strong public interest in removing impaired drivers from our roadways. They recognized that implied consent laws are valid and important tools to further allow officers to obtain the evidentiary testing that they need without doing so without consent. They recognized the validity of the implied consent laws, they recognized the public interest in encouraging people to continue to leave their implied consent on the table and submit to this testing. The Supreme Court said we would not allow it without the consent or a warrant if that consent were withdrawn or some other valid exception to the warrant requirement. Dissipation of drugs and alcohol by itself does not get the government there. The implied consent warning that is set forth in A.B. 67 is designed to balance the individual's interest in the privacy of their body. Whether or not they will submit to a chemical test without any judicial oversight versus exercising their option to leave their implied consent on the table, and also allowing the officer to go forward with their investigation based on that

implied consent. Assembly Bill 67 is a collaboration reached by prosecutors throughout the state in terms of how to respond to the U.S. Supreme Court's concerns in *Missouri v. McNeely* and bring our law into compliance. Prior to 1995, we had the administrative sanction on the books that if you do withdraw your consent you are facing immediate revocation of your driver's license for one year. Therefore, we simply put back into the Nevada implied consent law what the sanction was before 1995. It was a sanction that was tried and true for many years before we took it one step further and did not give a person the option of withdrawing consent.

Assemblyman Elliot T. Anderson:
I want to draw your attention to section 1, subsection 6, paragraph (b), the cross-examination provision. If I recall that is in there because of the *City of Reno v. Howard* case. In reviewing *City of Reno v. Howard*, specifically at 318 P.3d 1066 through 1067, the court's rationale was a simple notice and demand statute with no other requirements. The way I read it, the cross-examination requirement not only seems to go against that rationale and maybe does not fit in the confines of *City of Reno v. Howard*. Also it seems to shift the burden to the defendant.

Cheryl Wilson:
With respect to subsection 6, the simple notice in the main statute is just asking for enough notice to get the requested expert to the court. There are a number of issues in a DUI case, and more often than not it has to do with the legality of the stop—the legality or sufficiency of the evidence obtained that ultimately resulted in the officer's decision to arrest. The government is requesting the opportunity not to bring these experts in on every single case unless flagged by the defense that they want them there. Just because they are there, they do not have to cross-examine them. They are just given the opportunity; they are not obliged to cross-examine them. Upon hearing the expert testify, they may not have any questions, which will not be known until the expert is there to testify. All this does is give the government the opportunity to better allocate limited resources. In the northern half of the state, if we are talking about the evidentiary breath machine, there are three experts that maintain the machines throughout the northern part of the state and they are obligated to appear in many counties upon request. It just helps us allocate those scarce resources to the many courts where they might be needed. It does not obligate the defense to exercise their right to cross-examine.

Assemblyman Elliot T. Anderson:
I just think if that would be inherent why would you need subsection 6, paragraph (b)? If they object, then they are inherently asking for the opportunity to have them in court for potential cross-examination. It just does

not seem that paragraph (b) is necessary. To me it reads that they would have prepared a cross-examination and actually do it.

Brett Kandt:
To that extent, you would like us to work on that language and come up with something you are more comfortable with. We will certainly work on that with you.

Assemblyman Elliot T. Anderson:
Thank you. I just remember from a trial advocacy class that preparing a cross is not easy.

Assemblyman Ohrenschall:
My question has to do with section 12 on page 18, lines 34 through 37. "Except as otherwise provided in NRS 484C.200, not more than three samples of the person's blood or breath may be taken during the 5-hour period immediately following the time of the initial arrest." If this passes, can you explain how this is going to defer from current law in terms of taking breath and blood? I thought there was a shorter time frame.

Cheryl Wilson:
With respect to this potential for three samples during the 5-hour period immediately following the time of the initial arrest, one way somebody could be found accountable for a drug and under the influence charge in the state of Nevada is if their blood alcohol content is above the 0.08 within two hours of driving. The statute does not require proof beyond a reasonable doubt under the theory that they were a 0.08 or higher at the time of driving. It usually takes about 40 minutes and sometimes beyond two hours depending where the driving under the influence occurs and whatever circumstances may come into play. I will give you an example of a case I prosecuted many years ago in Gerlach Township which is over 100 miles outside of Reno in a remote region. There had been a rollover accident with both the driver and passenger ejected from the vehicle. The passenger's injuries were more serious, and he was taken by helicopter ambulance to the hospital for treatment. The driver did not have any serious injuries and was taken by ground ambulance to the regional medical center in Reno for treatment. Based on the distance and the mode of transportation available, the blood draw on that particular suspect occurred at the hospital. I believe that first draw was about three and a half hours past the time of driving. As a result of getting the timed three samples and other information gathered in the investigation, all of that evidence was able to be analyzed by a pathologist. The pathologist was able to talk about the steady rate of dissipation of alcohol and all the other relevant factors regarding the range of blood alcohol content that would have been present back at the

time of driving. That is where the use of three samples within a period of five hours as opposed to just two can become very important in what could be a very serious DUI offense.

Assemblyman Ohrenschall:
Then this does expand the time frame in existing law in terms of taking those blood samples?

Cheryl Wilson:
It does not expand the time frame. This provision has moved a little bit in lieu of the rewriting of this statute, but it has always been on the books. Within two hours was a newer provision.

Assemblyman Ohrenschall:
That is not changing under this bill?

Cheryl Wilson:
No, it is not.

Vice Chairman Nelson:
I have a question in section 25 subsection 8, "If a person who is less than 18 years of age is requested to submit to an evidentiary test pursuant to this section, the officer shall, before testing the person, make a reasonable attempt to notify the parent, guardian or custodian of the person, if known." Do you have any elucidation on that?

Brett Kandt:
This is the keen eyes of your staff attorney who noticed that provision was already in NRS Chapter 484C but a corresponding provision was not in NRS Chapter 488. Chapter 484C of the NRS is driving under the influence and NRS Chapter 488 is operating a vessel under the influence. They noticed that there should be the same provision under each of the chapters. They caught that and put it in so there would be the same provision for minors whether they are operating a vehicle under the influence in violation of NRS Chapter 484C or they are operating a vessel under the influence in violation of NRS Chapter 488.

Vice Chairman Nelson:
While we are talking about operating vessels, is there anything else you want to say about the vessels versus driving a vehicle, or is the statute pretty much the same for both of those with this change?

Brett Kandt:
It was our intent to bring both chapters up to constitutional muster, and I believe all the changes made correspond with one another. Your legal counsel can probably confirm that, but it was my understanding that was the goal.

Assemblywoman Diaz:
My question also comes out of section 12 subsection 5, paragraph (b), on page 18.

> "The person may request a blood test, but if means are reasonably available to perform a breath test when the blood test is requested, and the person is subsequently convicted, the person must pay for the cost of the blood test, including the fees and expenses of witnesses whose testimony in court or an administrative hearing is necessary because of the use of the blood test. The expenses of such a witness must be assessed at an hourly rate of not less than: (1) Fifty dollars for travel to and from the place of the proceeding; and (2) One-hundred dollars for giving or waiting to give testimony."

I wanted to get a feel for what these fees might be—it states $50 for travel and $100 for testimony. Is this a one-time fee or is it paid each time they come to court? I would like to get an idea of what the total amount is they may be paying.

Cheryl Wilson:
With respect to this provision, I can give you my opinion based on my jurisdiction. I can tell you that the rationale behind the statute is if we are talking about a blood test, there are more players involved. There is the phlebotomist draw tech as well as the blood analyst to talk about what presence and quantities may be in that blood sample. That is why there is the incentive if the breath test is available, and we are talking about alcohol, to go the easier more cost-effective route. With respect to the actual cost, I can tell you that half of my DUI offenders are indigent and represented by the public defender's office. I do not believe, since they could not afford counsel, and were provided court-appointed counsel they would be required to pay the statutory fees. With respect to how much these fees might be, the Washoe County Crime Lab where the analysts are located is about 15 minutes from the courthouse. As a courtesy to them, we try to minimize the amount of dead time they spend in court when they could be doing their work at the crime lab. We call them when it is time for them to testify. We do our best to have the analysts in and out of court within 45 minutes to an hour.

Brett Kandt:
This is an attempt at cost recovery for the actual cost incurred when you have a blood test involved.

Assemblywoman Diaz:
I am looking for just a ballpark figure. Based on your experience of having someone come and testify for a blood test result, are we looking for strictly the $150 or can it go above that amount? I am looking for a minimum and a maximum based on your experience with this type of case.

Cheryl Wilson:
Based on my experience in Washoe County, I would not expect it to deviate from the statutory amounts proposed here of $50 and $100.

Assemblywoman Diaz:
What is the research out there in terms of breath exams for intoxication with alcohol versus blood tests? What is the most accurate?

Cheryl Wilson:
This comes from my personal experience of having been a prosecutor. If you look at the way the statutes are currently written, they require a DUI suspect to submit two consecutive breath samples. This is a safeguard to ensure that they are full and complete samples within a certain range of each other so that the test does not disqualify itself. There have been circumstances under the way the law is currently written where a suspect has cooperated and submitted to that first evidentiary breath sample and then they have chosen not to cooperate and provide that subsequent sample. At that point, under the current statutory scheme, law enforcement has been authorized to turn to a phlebotomist and have a blood sample taken in that moment in time. I can tell you I have seen that circumstance close to a dozen times in the last four years. The reassuring fact that I have seen in every single one of those cases was that the one evidentiary breath test that was obtained when compared to the blood test result were right on each other. The experts will testify that taking into consideration all environmental factors that might affect the accuracy of a breath test there could be as much as a 10 percent margin of error. The blood experts will say, taking into consideration all factors that might possibly impact the reliability of the blood test, they place it at a potentially 5 percent margin of error.

Assemblyman Elliot T. Anderson:
I wanted to ask about the language changes that we see throughout the bill and crossing out "power or sail" and putting in "under way." If I am under way on my bike or canoe, I do not know if that is against the law now. I do not

know if you can drive over the limit on a bike or those sorts of things. But the way I read it, taking out power would mean if you were not in a motor-operated vehicle then you could still be subject to the DUI laws.

Brett Kandt:
My understanding is there is a representative from the Department of Wildlife here and they handle many NRS 488 situations. They may be the best to answer those questions.

Cheryl Wilson:
In Washoe County we have jurisdiction over a little piece of Lake Tahoe. In 20 years, although I have prosecuted many surface DUIs, I think I have prosecuted two vessel DUIs on water. So my expertise is very limited in this area.

Assemblyman Elliot T. Anderson:
I understand that if you have a canoe or a bike obviously there is prosecutorial discretion in all that. Maybe legal counsel could get back to us.

Tyler Turnipseed, Chief Game Warden, Nevada Department of Wildlife:
As far as canoes are concerned, a definition of a vessel is something that can be used for transportation. Changing the definition to "under way" would include canoes. One reason for that is it would mirror the federal definition laid out by the Coast Guard which basically says that anything that is not anchored, beached, or moored is under way and that would include adrift. One example would be if you are in a boat and towing a water skier, the water skier goes down, the boat turns around to pick up the skier, then turns off the boat or idles it by changing it to "under way" rather than "under power" or sail it would still include those. Another example is if we come across a vessel that is adrift in the middle of Lake Mead or Lake Tahoe and the person on board is intoxicated or over 0.08, that would include them.

Assemblyman Elliot T. Anderson:
The bike example might not have been the best example, but I think it got the point across so I apologize for the confusion.

Vice Chairman Nelson:
Let us go to Las Vegas now.

Bruce Nelson, Deputy District Attorney, Clark County District Attorney's Office:
I just wanted to mirror the presentation already made and note a couple of things for the Committee. There are currently 49 states that impose some kind of sanction if a person refuses to take a chemical test when lawfully asked

to do so. Thirty-four of those states do what this bill proposes, which is you losing your license for a period of time. The other 15 states actually make it a crime to refuse. So you can be convicted of both a DUI and refusing. Only Nevada currently has no penalty for refusing to take a chemical test. That is because the statute we are proposing to change provides that you cannot refuse. We need to put some kind of incentive in the bill to get people who are pulled over and lawfully asked to take a test to actually take the test. So that they can either be convicted or acquitted if they pass the test and that would make our roads safer. I would also briefly answer Assemblyman Anderson's question. It is currently not illegal to ride a bike under the influence. However, if they are riding a bike under the influence and run over somebody, they might be charged with unsafe lane change or something like that. We have driving under the influence (DUI) and boating under the influence (BUI), but we do not have riding under the influence (RUI).

Adrina Ramos-King, Government Affairs, City of Las Vegas:
The city would like to go on record in support of A.B. 67, as its passage is important to allow DUI prosecutions to proceed successfully in our municipal court.

Tom Conner, Chief Administrative Law Judge, Office of Administrative Hearings, Department of Motor Vehicles:
We are also in favor of the passage of A.B. 67. We have, however, a proposed amendment to the bill. That change would be to section 16.

As currently stated in the statute on page 22, line 24, it requires the hearing to be conducted within 15 days after it is requested and the hearing has to be held in the county where the party resides. In the 2009 Legislative Session we proposed a change that we thought eliminated that requirement. That change was codified in NRS 481.029, subsection 2, which allowed the hearing to be conducted at any location in the state, provided the hearing officer allowed the party to testify by telephone, videoconferencing or other electronic means.

We recently had a decision from a district court judge that said the statutory language concerning the hearing being conducted in the county where the party resides was controlling. The other statute was permissive. If you could make an agreement between the parties, then you could conduct the hearing telephonically. We disagree with that position and think that it eliminates the flexibility we requested in the 2009 Session. So what we are proposing is to strike out the language concerning the residency requirement and replace it with the language now found in NRS 481.029, subsection 2. This change also eliminates the 15-day requirement under that same sentence, as I stated

in my materials. My agency reports the 15-day requirement as a performance measure for my staff. We have reported that at zero in this session and in the previous session and doubt that we would report it at anything other than zero because 15 days is simply impossible to meet.

When you submit an evidentiary test as a result of a DUI arrest there are two procedures, breath and blood tests. In a breath test situation the officer conducts the test and if it is 0.08 or above he, at that time, becomes an agent for the Department of Motor Vehicles and revokes the person's driver's license. So at that point, the person has the right to request an administrative hearing. [Mr. Connor also included a letter of support for A.B. 67 (Exhibit G).]

Vice Chairman Nelson:
Have you spoken with the bill's sponsor about your amendment?

Tom Conner:
I have sent an email to the Attorney General's Office concerning the amendment and they replied yesterday afternoon. The amendment does not conflict with anything they have proposed.

Vice Chairman Nelson:
The question is, have they agreed to it? If not, I think you really need to speak in opposition.

Tom Conner:
As far as my understanding is, they have not agreed to it.

Brett Kandt:
In speaking with the defense bar, they are indicating they do not oppose the amendment. If they do not have a problem with it, prosecutors do not have a problem, and you do not have a problem with it, we consider it a friendly amendment.

Steve Yeager, Deputy Public Defender, Clark County Public Defender's Office:
Mr. Sean Sullivan, Deputy Public Defender with Washoe County, is here with me in support of this bill with the understanding that some amendments will be added. I am happy to walk you through what I believe to be a preliminary agreement that we have reached with the Nevada District Attorneys Association. We thank them for meeting with us and we talked extensively about some of our concerns.

The first amendment that we agreed to is the notice provision that Assemblyman Anderson referenced which is on page 4 in section 1.

Assemblyman Anderson had asked about subsection 6, paragraph (b). I think we have a preliminary agreement to eliminate that provision. I think it would get around any constitutional issues with that provision. In addition, with that provision, one of the concerns on the defense side was that this bill is effective immediately upon passage and signature. So for this particular provision in section 1 we wanted an effective date a little further out because this is going to be a change of business in the way we do things. I think there is some agreement to move the effective date for section 1 to at least July if not October so we can get our offices up to speed on the new procedure with respect to objecting within ten days.

The next set of amendments would be about the fee provisions that were added. Specifically we are looking at page 18 of the bill in section 12. The basic idea is that they are instituting additional fees for witnesses to travel to and from court or testify about blood draws. What we are agreeing to do there is to make that discretionary for the courts so instead of saying, "must be assessed" it would be a "may be assessed." For a public defender client, for instance, the judge may not assess those given the indigence. That change would apply on page 18 and, for the record, on page 31 there are similar provisions that deal with increased fees.

Lastly, if I could direct you to page 20 of the bill, in section 14, subsection 2, there is specific language that we had a problem with which was adding the language "controlled substance." The new section that will be added says "or a detectable amount of a controlled substance or a prohibitive substance." I think we have a preliminary agreement to indicate that it should be a controlled substance that you do not have a lawful prescription for. If someone fails preliminary testing and a blood test is done and there is any amount of a controlled substance that this section requires, (1) that the Department of Motor Vehicles (DMV) must suspend the license and (2) that DMV must revoke and take the license. Our concern was that people could have prescriptions for controlled substances, so we believe that there should be an added requirement that that provision of the mandatory revocation would only come into play if it were an unprescribed controlled substance. That language does occur throughout the rest of the bill. There are some situations where it is okay and some not, but we are going to work to try to figure out exactly where we need to remove that language to be sure we are protecting individuals who are on lawful prescription medication. That does not mean that they cannot still be prosecuted and convicted of a DUI.

Assemblyman Elliot Anderson:
You can still be prosecuted for a DUI with a lawfully prescribed controlled substance, but how exactly would that be done? You cannot accurately

measure some of the prescription drugs with the technology that we currently have.

Steve Yeager:
It can be measured only by a blood test. I think your question is in regard to prescriptions that are not in the statute. You can still be prosecuted for that through a blood test. At the time of the prosecution, the prosecutor would have to prove beyond a reasonable doubt that you were impaired due to those levels. How does that evidence normally go? For most drugs, there is an agreed therapeutic level that we expect to see in someone's blood system when they are lawfully taking the prescribed amount. That is something the court can consider when they are looking at intoxication. Of course, we look at the facts of the case. If there is an accident, and there is indication that the person was acting very strangely or appeared out of it at the time of driving then that might be something to consider. It is more difficult for a prosecution because the prosecutor does not get the benefit of a per se intoxication. Those are possible but they require a blood draw to know what is in someone's blood.

Brett Kandt:
We are working with our colleagues in the defense bar to address their concerns. What we will do is put together a comprehensive proposed amendment document to you for your consideration.

Assemblyman Ohrenschall:
Section 16, subsection 2, lines 35 through 40, talks about the revocation and about a detectable amount of a controlled substance. Does that mean even the most minute amount would trigger it?

Steve Yeager:
That was exactly our concern; the word "detectable" in front of controlled substance. The issue there would be that if you had even any amount of a lawful prescription, you could be prosecuted. But I think if we removed controlled substance then we are left with "detectable" amount of a prohibited substance.

Assemblyman Gardner:
I was looking through the list of drugs and it includes marijuana that is now legal, at least medically. Is that going to be brought into these amendments saying, "except for"?

Steve Yeager:
Even though you are an authorized medical marijuana user, you do not have a lawful prescription. As the law stands now, marijuana would continue

to be prosecuted under these prohibitive substances unless some time in the future some extra concessions are made for those who have the cards.

Vice Chairman Nelson:
Is there anyone else in support of this bill?

Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office:
We support this bill with the amendments we have been discussing.

Eric Spratley, Lieutenant, Legislative Services, Washoe County Sheriffs' Office:
We are in agreement with A.B. 67 and the proposed amendments.

Dennis S. Osborn, Chief, Nevada Highway Patrol, Department of Public Safety:
We are in support of A.B. 67. As a statewide agency, the *Missouri v. McNeely* ruling has caused many differences in procedures throughout all of the state. The Highway Patrol has had to defer to local prosecutors and mostly it has come down to wording. Assembly Bill 67 would bring everything into alignment for us and we would be consistent on how we applied the implied consent law throughout the state.

Kristin Erickson, representing Nevada District Attorneys Association:
We have all worked very hard on this bill, and we hope we have addressed the public defenders concerns and if we have not, we are very close to doing so.

Tyler Turnipseed:
We have worked with the Attorney General's Office in drafting the bill and are in support of it.

Assemblyman Thompson:
If this bill does pass, how are we going to communicate this to the community? Are there any education components built into this so people do not learn about it by trial and error?

Brett Kandt:
Please remember in the wake of these important landmark rulings from the U.S. Supreme Court and subsequently the Nevada Supreme Court, we are already advising the law enforcement agencies to change the way they are operating to conform to the new rulings. The statute on the books does not reflect the way we are enforcing Nevada law now, and this is what we are trying to do. What we are doing is getting warrants. Either there is consent or we get a warrant. I do not know if curing the constitutional deficiencies will

really have an immediate impact upon the public as much as the way we were enforcing the laws when we began getting more warrants.

Vice Chairman Nelson:
Are there any opponents to the bill?

Kiera Sears, General Counsel, Black Rock Nutraceuticals:
Black Rock Nutraceuticals is a Nevada-based company that has recently received its provisional license to operate a medical marijuana production facility in Reno. Consistent with the Controlled Substances Act, Nevada law includes marijuana as a controlled substance and provides an exemption from prosecution acts by a person holding a valid registry identification card. More specifically it authorizes them to use marijuana as long as it has been properly authorized for medical purposes. *Nevada Revised Statutes* (NRS) 453A.200 lists these exemptions.

In NRS 453A.300 it also details when a cardholder is not exempt from state prosecution. Specifically NRS 453A.300, subsection 1, paragraph (a), states that a person holding a valid identification card will not be exempt from prosecution if driving, operating or being in actual physical control of a vehicle or a vessel under power or sail while under the influence of marijuana. This is both an important and valid clause that as a business in this industry we firmly support, obviously for the health and safety of the public. We have, in fact, begun a user responsibility program to help educate patients, physicians, and the public on the dangers of irresponsible use as well as the state and federal laws that these individuals are subject to. However, certain changes proposed in A.B. 67, specifically the addition of the language controlled or prohibited substances, creates what we feel to be a gray area in the law, whereby an individual who held a valid registry identification card may be prosecuted for driving or operating a vessel under the influence of marijuana when, in fact, they might not be under the influence at that time.

A single use of marijuana can be found in an individual's urine for 1 to 7 plus days and in the blood for 12 to 24 hours, while with an individual who regularly uses marijuana, it can be found for 7 to 100-plus days in the urine and 2 to 7 days in the blood. Currently, detectable amounts of marijuana in an individual's urine is 10 nanograms per milliliter and 2 nanograms per milliliter for blood tests. These amounts are detectable anywhere from 12 to 15 days after a person uses marijuana.

*Nevada Revised Statutes (*NRS) 484C.150 subsection 1, states in part that any person who drives or is in actual physical control of a vehicle shall be deemed to give consent to the preliminary test of his or her breath at the request

of a police officer at the scene when the police officer believes that the person who is driving or in control of the vehicle while under the influence of alcohol or a controlled substance. As of now the breathalyzer only detects traceable amounts of alcohol.

Our concern with the changes made in A.B. 67 is the reconciliation of the actual state of the driver at the time of the traffic stop and the traceable amounts of marijuana that will certainly be detectable in persons with valid medical marijuana registry identification cards should they be given these further blood or urine tests. If the driver in question has a valid prescription to use medical marijuana, regardless of when they dosed their medicine, they will most certainly have detectable levels of marijuana and more specifically tetrahydrocannabinol (THC), which is the psychoactive component of marijuana. While it remains a valid concern to public health and safety that drivers not be under the influence of controlled substances while operating a vessel or vehicle, it also remains a valid concern to protect patients that are legally authorized to use marijuana.

There are currently several companies—one Swedish and one Canadian—that are developing breathalyzer technologies for law enforcement and in the workplace. [Continued to read from Exhibit H.]

While patients may not legally operate a vessel or vehicle after dosing medical marijuana, the law does not provide that they may never operate a vehicle or vessel as long as they are legally authorized to use medical marijuana. Assembly Bill 67, section 14 seeks to amend NRS 484C.210 by adding section 2, which states in part if the result of a test given under NRS 484C.150 or 484C.160 shows that a person has detectable amounts of a controlled substance in his or her blood or urine at the time of the test that their license, permit, or privilege will be revoked. Several portions of the law have the same consequences if these amendments are passed.

We feel the consequences of this language unfairly subject patients legally authorized to use medical marijuana to the loss of certain rights and privileges in the state of Nevada. We respectfully ask this Committee to consider these marijuana breathalyzer technologies as an option, or in addition to this amendment, to aid in decreasing the margin of error in this specific issue.

Therefore, a police officer may determine at the scene at the time of the traffic stop whether the individual in question is under the influence of marijuana rather than relying on the results of a later blood or urine test, which would usually positively show detectable amounts.

Lisa Rasmussen, Member, Nevada Attorneys for Criminal Justice:
I want to speak to a couple of the issues we are opposed to in the bill. We are, of course, pleased that Mr. Yeager was able to speak to the District Attorneys Association and work out the issue in regards to the cross-examination provisions.

I oppose the monetary issue discussed on page 18 with regard to the expenses, reimbursements, and cost recapture. There is no other criminal case where we make a defendant pay for someone to come testify to what is essentially the burden of the prosecution. For an example, in a murder case, we do not make a defendant pay the medical examiner to come testify about the results of an autopsy. We do not make a defendant pay for any witness that the state or the city has a burden of calling to establish their case. We believe that provision would be improper, unlawful, and probably unconstitutional. Not to mention it would burden indigent people. We feel the provision regarding paying for testimony should be removed. I have not spoken with Mr. Kandt or the District Attorneys Association, but I would be happy to work with them.

In regard to the issue addressed regarding revocation, I think one thing that needs to be included is some protection on a revocation for an outright refusal. I have looked at what other states have done and many other states have the mandatory automatic revocation if you refuse to take the test. There has to be some protection to make sure that it is not abused when law enforcement is requiring someone to test. What other states have done to put in some protection is they have clearly indicated that it must be a lawful arrest. In other states, if a judge determines the arrest was unlawful and without any cause whatsoever, if you refused, you would not have the consequence. I think we need to add some small protection when someone is unlawfully arrested. There are few unlawful arrests but there does need to be a protection where someone would have a right to say, "No I refuse." And if later a judge determines that there was in fact no reason to arrest the person, then they should not have the consequence of the refusal to consent to the test.

Vice Chairman Nelson:
On that point, I suggest that you work with the Attorney General.

Lisa Rasmussen:
Yes, I will. One of the issues that was addressed with the Department of Wildlife was the use of being "under way" opposed to "under power." I understand their concerns, but we think it should be phrased as a vessel capable of being under power. It should not be just a canoe or paddleboard.

Finally, this is not an opposition but I wanted to comment on it. One of you asked how we were going to educate people. I think the proposed bill states that a police officer who requests that a person submit to a test pursuant to the section should inform the person that his or her license, permit, or privilege if he or she fails to submit to the test would be revoked. In part, this bill takes care of that, but I would recommend having them sign something that says they have been admonished. I can predict in the future it ending up in an administrative hearing with the accused saying, "I did not know" or "I was not told." This would protect both the officer and the administrative process. Mr. Yeager and the District Attorney's Office are right in contemplating a date such as July 1 for enacting it because there are probably some public messages that need to get out on this as well as having officers ready and trained when they have to give people the admonishment.

Vice Chairman Nelson:
Thank you, and please make sure that you send your proposed changes in writing to staff.

Lisa Rasmussen:
Yes, thank you, I will.

Assemblyman Elliot T. Anderson:
For those lawyers who do convict indigents, how would that fee work? Would there be a shuffle of budgetary funds between the county indigent defense office and the public defender's office to the court?

Lisa Rasmussen:
I actually do not know and I am assuming you are referencing having to pay the expert witness to testify. I think as a general matter there are not many conflict councils or those of us on the conflict board who take the DUI cases because it is rare that there is a conflict with the public defender's office on a DUI case. I know in the municipal courts those courts have track lawyers who handle the indigent people who come before them. It is my position that nobody should have to bear the burden to pay for a witness that the state is required to call to prove his or her case.

Lance Hendron, Member, Nevada Attorneys for Criminal Justice:
I want to direct your attention to page 20 of the bill, section 14, lines 21 to 22. Obviously, there are concerns on our end specifically because of having to show a causal link between impairment and the drug itself. Again, a controlled substance is not illegal when it is prescribed. The reason it is a controlled substance is the abuse and dependency factors. There is the concern that someone who is legally taking a controlled substance would be subject to losing

their license. I am glad to hear that there are already discussions to amend this language.

Secondly, I appreciate Assemblyman Gardner's position with the marijuana concern. As Mr. Yeager indicated, it is not a prescription but an authorization. Therefore, I would ask the members to inquire further into the issues of our legalization of marijuana for medical use and how it will come into play in regard to this proposed bill.

Vice Chairman Nelson:
Is there anyone else in Las Vegas who would like to speak in opposition? [There was no one.] Anyone else in Carson City? [There was no one.] Anyone in the neutral position regarding this bill? [There was no one.] We will now close the hearing on Assembly Bill 67. Is there any public comment?

Assemblywoman Diaz:
I want to compliment you on running this Committee very smoothly.

Assemblyman Elliot T. Anderson:
I would like to ditto that comment. I know from my own experience how hard it is to chair a meeting. We had some difficult bills today, and I am very impressed as well.

Vice Chairman Nelson:
You are all very kind, but I must thank the person sitting on my left, Diane Thornton, Committee Policy Analyst, who has helped me quite a bit, and I am grateful for her help. The Committee on Judiciary is now adjourned [at 10:53 a.m.].

RESPECTFULLY SUBMITTED:

_____
Janet Jones
Committee Secretary

APPROVED BY:

_____
Assemblyman Ira Hansen, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: February 6, 2015 **Time of Meeting: 8 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
	C	Adam Paul Laxalt, Attorney General	Office of Attorney General's Overview
A.B. 45	D	Brett Kandt, Special Assistant Attorney General	Letter of Support A.B. 45
A.B. 48	E	Brett Kandt, Special Assistant Attorney General	Letter of Support A.B. 48
A.B. 67	F	Brett Kandt, Special Assistant Attorney General	Letter of Support A.B. 67
A.B. 67	G	Tom Conner, Department of Motor Vehicles, Las Vegas	Amendment A.B. 67
A.B. 67	H	Kiera Sears, General Counsel, Black Rock Nutraceuticals	Written Testimony