MINUTES OF THE SUBCOMMITTEE OF THE SENATE COMMITTEE ON JUDICIARY

Seventy-Eighth Session
May 8, 2015

The subcommittee of the Senate Committee on Judiciary was called to order by Chair Greg Brower at 1:03 p.m. on Friday, May 8, 2015, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

SUBCOMMITTEE MEMBERS PRESENT:

Senator Greg Brower, Chair
Senator Becky Harris, Vice Chair
Senator Michael Roberson
Senator Ruben J. Kihuen
Senator Tick Segerblom
Senator Aaron D. Ford

SUBCOMMITTEE MEMBERS ABSENT:

Senator Scott Hammond (Excused)

GUEST LEGISLATORS PRESENT:

Assemblywoman Irene Bustamante Adams, Assembly District No. 42
Assemblyman John Ellison, Assembly District No. 33

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Lynette Jones, Committee Secretary

OTHERS PRESENT:

Steve Hill, Office of Economic Development, Office of the Governor
Eric J. Ellman, Consumer Data Industry Association

Richard Brengman
Wes Duncan, Assistant Attorney General, Office of the Attorney General
Brett Kandt, Special Assistant Attorney General, Office of the Attorney General
Jacqueline Bluth, Chief Deputy District Attorney, Special Victims Unit, Office of the District Attorney, Clark County
Lisa Luzaich, Chief Deputy District Attorney, Special Victims Unit, Office of the District Attorney, Clark County
James Sweetin, Chief Deputy District Attorney, Office of the District Attorney, Clark County
Terri L. Miller, Stop Educators Sexual Abuse, Misconduct and Exploitation, Inc.
Sean B. Sullivan, Office of the Public Defender, Washoe County
Steve Yeager, Office of the Public Defender, Clark County
Vanessa Spinazola, American Civil Liberties Union of Nevada
Amy Coffee, Nevada Attorneys for Criminal Justice
Scott Coffee, Nevada Attorneys for Criminal Justice; Office of the Public Defender, Clark County
Tom Clark, Naturist Action Committee
Kristy Oriol, Nevada Network Against Domestic Violence

Chair Brower:
I will open the subcommittee hearing with Assembly Bill (A.B.) 444.

ASSEMBLY BILL 444: Makes various changes relating to the Advisory Commission on the Administration of Justice. (BDR 14-544)

Assemblywoman Irene Bustamante Adams (Assembly District No. 42):
I will present A.B. 444 on behalf of the Sunset Subcommittee of the Legislative Commission. Our duty is to review boards and commissions created by the Nevada Legislature. We reviewed the Advisory Commission on the Administration of Justice (ACAJ) and voted to continue with this entity. The Sunset Subcommittee has three recommendations for consideration.

The Sunset Subcommittee recommends the Commission have up to five bill draft requests (BDR) in each regular session of the Nevada Legislature. When the ACAJ started as an advisory commission, it did not have authority to request BDRs. Legislators used their own BDRs to sponsor new legislation proposed by the ACAJ.

Senator Segerblom recommended the ACAJ Subcommittee on Juvenile Justice be repealed. In 2009, the Legislature created the Legislative Committee on Child Welfare and Juvenile Justice as a statutory interim committee. The duties of the ACAJ Subcommittee on Juvenile Justice and the statutory interim committee overlap. Senator Segerblom testified the ACAJ Subcommittee on Juvenile Justice has not been active since the formation of the statutory interim committee.

Finally, A.B. 444 includes a recommendation to create a new subcommittee of the ACAJ. The Subcommittee on Civil Procedure of the Commission shall consider issues relating to civil procedure and make recommendations to the ACAJ. During the review of the ACAJ, the Sunset Subcommittee members determined there is no comparable standing interim committee that consistently considers civil proceedings.

Chair Brower:
I will close the hearing on A.B. 444 and open the hearing on A.B. 47.

ASSEMBLY BILL 47 (1st Reprint): Provides for the establishment within the Central Repository for Nevada Records of Criminal History of a service to conduct a name-based search of records of criminal history. (BDR 14-294)

Steve Hill (Office of Economic Development, Office of the Governor):
I will present A.B. 47. *Nevada Revised Statutes* (NRS) 179A requires the Central Repository for Nevada Records of Criminal History within the Nevada Department of Public Safety to provide a current or prospective employer criminal history information of a current or prospective employee or volunteer.

Third-party companies specialize in providing background check services for their clients who are prospective or current employers. The Department of Public Safety interprets NRS 179A to preclude third-party companies from sharing the background information they receive from the Central Repository with their clients who may or may not employ potential employees or volunteers. Assembly Bill 47 allows third-party companies to share background information with their clients if written consent is provided by prospective or current employees or volunteers.

The Department of Public Safety amended the bill to clarify its authority to provide this service. It also details requirements for a contract with the company receiving the background check information, fees for participation in the service and the consent of prospective employees or volunteers before information is shared by the third-party company or prospective employer. The bill allows for auditing of the process.

Eric J. Ellman (Consumer Data Industry Association):
We support A.B. 47 (Exhibit C). Our trade association is over 100 years old and has 150 members. Our members include criminal background check companies that perform criminal background checks for employers across the State. It takes significantly longer for an employer to complete a criminal background check in Nevada when compared to other states. Assembly Bill 47 streamlines this process and allows criminal background check companies to share criminal history name searches from the Central Repository with an employer, which is prohibited by law. It will speed up the background check process and get Nevadans working faster. The bill allows employers to hire more quickly, which works for everyone involved.

Richard Brengman:
I do not support A.B. 47. This is another attempt to streamline things. Every time we do this, citizens suffer. On the Internet, I see pop-ups all the time that say, "We can check anyone's background check." We should not pass more legislation that makes it easier to violate our right to privacy.

Chair Brower:
I will close the hearing on A.B. 47 and open the hearing on A.B. 49.

ASSEMBLY BILL 49 (1st Reprint): Revises provisions governing crimes. (BDR 15-158)

Wes Duncan (Assistant Attorney General, Office of the Attorney General):
On behalf of Attorney General Adam Paul Laxalt, we are here to present A.B. 49.

Chair Brower:
I watched the Assembly hearing of this bill.

Brett Kandt (Special Assistant Attorney General, Office of the Attorney General):
We support A.B. 49. I will present sections 1 through 6.5 that create a new crime of unlawful dissemination of an intimate image of an adult person (Exhibit D). This is commonly known as revenge pornography.

There are approximately 17 criminal statutes for revenge pornography nationwide and 28 states are considering similar laws. Nevada has no law to protect victims of revenge pornography, which occurs when a sexually explicit photo or video is shared online without the consent of the individual in the image. We propose this crime be classified as a Category D felony. The crime occurs when a person posts pictures or videos with the intent to harass, harm or terrorize the victim and the victim had a reasonable expectation the images would not be shared.

Certain constitutionally protected activities such as media reports, images taken in a public setting, images disseminated for public interest and photos taken for law enforcement purposes are not subject to the provisions of this section. The act will not constitute a crime if the individual in the image intended it be disseminated to the public. A conviction of this crime will not require the defendant to register or be subject to any sex offender registration or notification laws.

Jacqueline Bluth (Chief Deputy District Attorney, Special Victims Unit, Office of the District Attorney, Clark County):
We support A.B. 49. I work in the Special Victims Unit (SVU) and Major Violators Unit, Criminal Division, Office of the District Attorney, Clark County. We deal with sexual and physical abuse of children as well as the murder of children. I will present sections 10 and 26 of the bill regarding child abuse and child abuse with substantial bodily harm, which are covered in pages 1 through 27 of the presentation (Exhibit E).

Section 10 of the bill addresses child abuse with substantial bodily harm defined as bodily injury that creates a substantial risk of death, serious permanent disfigurement, protracted loss or impairment of function of any bodily member or organ or prolonged physical pain. The penalty for this type of crime is a Category B felony punishable by a minimum of 2 years or a maximum of 20 years in prison with probation possible.

As I prosecuted these cases, I saw a huge gap in statute about penalties. Cases on my desk included children whose parents knocked their teeth out, broke arms or used belts for beatings that left scars. The gap exists in the area of children beaten to a point that they were rendered blind, deaf, paralyzed or needed immediate surgery for brain swelling. People committing these crimes are serving the same types of sentences as those who had committed a lesser offense, such as breaking a child's arm.

I worked with three families who gave me permission to share their stories. The Committee needs to see the real-life cases. I get one to two of these cases a week. It is a serious problem in Clark and Washoe Counties.

The first case is baby Juliana who was abused by her mother's boyfriend. She was beaten and shaken which caused swelling and bleeding in the brain. She required a craniotomy to remove a portion of her skull, which was repaired once the swelling subsided. She is doing better but we are not sure of the long-term effects of her injury.

The next case is baby Joel. He was also beaten and shaken by his mother's boyfriend. He was not as lucky as baby Juliana. Joel is paralyzed with only the use of his left arm. He cannot eat or drink and must be fed through a gastrostomy tube through his stomach. He is blind and deaf and will never walk. Joel communicates by making noises. He was featured in a Hometown Hero's special, and the community was supportive in helping his family.

The last case is baby Illy. She was shaken by her mother's boyfriend and needed an emergency craniotomy. Baby Illy is now 8 months old and she is paralyzed from the waist down. She is learning to crawl by using her arms to scoot. She is a fighter but, unfortunately, she needs a second bone graft surgery this summer to reinforce the bone structure of her skull.

Assembly Bill 49 will make a difference for these kinds of children. When this type of crime is committed against a child, a suitable punishment must be applied. We must send a message that this abuse will not be tolerated and the punishment must fit the crime. These children are the most vulnerable victims in society. Many times, children are too young to speak, they cannot defend themselves and they are completely helpless.

I spoke with Sandra Cetl, M.D., who is a leading expert in this area. She works in a hospital in Las Vegas and speaks all over the Country. We reviewed the type of injuries we repeatedly see with abused children. We delineated these injuries in the bill so defendants and defense attorneys will know the penalty when this crime is committed.

Section 10 of the bill removes the opportunity for an offender to get probation when guilty of this crime against a child. A judge will decide the mandatory sentence of the offender, which could be 5 years to 15 years in prison or 5 years to life in prison.

Section 26 defines negligent treatment or maltreatment of a child. The law is not protecting a class of victims. We had cases in the last 2 years in which children were forced to sit nude on buckets all day, eat feces, drink vomit and urine, sleep naked outside in the winter and sit in a cave until it was dark outside. This type of conduct is not addressed in statute.

Section 26 broadens the language of negligent treatment or maltreatment as: "... harmful behavior that communicates rejection or is threatening, intimidating, disparaging, terrorizing or humiliating, has been subjected to painful or abusive conduct ... ." This section of the bill penalizes individuals for terrorizing children in the manner I described.

Chair Brower:
Most people are not aware these kinds of abuses occur in real life, but we know you see these cases every day.

Lisa Luzaich (Chief Deputy District Attorney, Special Victims Unit, Office of the District Attorney, Clark County):
I have prosecuted many physical and sexual abuse cases against children. We are hampered in our ability to prosecute these cases because we lack necessary laws to do so.

Pages 28 through 55 of the presentation (Exhibit F) discuss other bad act evidence regarding sexual offenses in section 21 of A.B. 49. The SVU deals with crimes that are secret offenses. These crimes are committed behind closed doors with no witnesses. Sex offenders are different from any other kind of offenders. For example, I prosecuted a case last year where an individual got

involved with a woman who had a small child. This individual sexually abused the child, admitted to the crime, pleaded guilty and went to prison.

The minute he got out of prison, this individual met another woman with a small child, sexually abused that child, confessed to the crime and pleaded guilty. In between the time that he pleaded guilty but before he went to prison, he met the mother of my 2-year-old victim. The mother was pregnant with another child and the individual went to prison telling the mother he was innocent of the crime but pleaded guilty because he did not want the 2-year-old girl to testify in court. After serving a 5-year sentence, the individual got out of prison and reunited with the woman who now had a 5-year-old son and a 7-year-old daughter.

For the next 10 years, this individual physically abused both children and sexually abused the daughter. The daughter did not have the courage to tell until she turned 16. I prosecuted the individual for 20 counts of physical abuse and 20 counts of sexual abuse. The jury did not hear any of his prior conduct because it was excluded by the court. He was found guilty of all the physical abuse counts but only one of the sexual abuse counts. This example demonstrates a person who went to prison several times for extended periods, but recommitted the same crime as soon as he got out. Sex offenders are different.

Victims of SVU cases are mostly children who were abused for many years with no physical evidence. Cases depicted on television have DNA evidence, but in real life, disclosure of these crimes comes so late there is almost never DNA evidence. There are no fingerprints, medical findings or witnesses. Many times divorce or other family-related issues are also involved. Our cases have situations in which one person claims abuse occurred and another person says it did not. We must prove beyond a reasonable doubt a crime occurred and the defendant did it.

The SVU cases are different from other cases. In a murder, there is a dead body and we know a crime has been committed. Our jurors are average people who do not see these situations on a daily basis and do not want to believe these crimes are being committed. The jurors come to court with that mindset, and this makes proving our case difficult. The Nevada Supreme Court has said, “We reemphasize that a presumption of inadmissibility attaches to all prior bad act evidence.”

Section 21 changes language to allow prior sex offenses a presumption of admissibility. The defense still has the opportunity to demonstrate why prior evidence should not be admissible. It can be rebutted by demonstrating that the prejudicial effect of the evidence substantially outweighs the probative value. This is not automatic and puts this evidence on the same footing as other evidence. Prior evidence starts out as being admissible as opposed to inadmissible.

Other states including California, Alaska, Arizona, Georgia, Illinois, Louisiana, Utah and Florida have statutes making prior evidence admissible. Some states use the word "propensity" in their statutes, and this concerns the defense. The California legislature determined this evidence is relevant and critical given the serious and secretive nature of sexual crimes. In Utah, statute permits the use of evidence in child molestation cases to prove a propensity to commit the crime. Arizona statute allows evidence of other crimes to be admitted if relevant to show the defendant had a character trait that gives rise to an aberrant sexual propensity. Statutes in Louisiana are similar and allow the admittance of acts that indicate a lustful disposition toward children.

In recent history, we tried a case in which a drunken defendant lured a 3-year-old child into an apartment laundry room and molested her. She told her mother the man touched her private areas. This defendant had another situation in which he had been inappropriately touching his stepdaughters. No disclosure had been made until they heard about this incident. The two cases were tried separately and, in both cases, the jury found the defendant not guilty. This occurred because facts from one case could not be heard in the other respective case.

In a 2011 case, a passerby witnessed a defendant masturbating in a public alley. In 2007, that defendant did the same thing, and it was witnessed. We made a motion to admit the 2007 evidence in the 2011 case. The judge allowed it to prove identity and the absence of mistake or lack of accident. The Nevada Supreme Court reversed the decision, saying the evidence was not relevant and too prejudicial.

In another case, an 8-year-old girl learned the defendant was coming to visit and she disclosed he should not be allowed to come because he touched her inappropriately. When her older sister heard the story, she disclosed she too had been inappropriately touched by the defendant when she was 8. We charged

the defendant for both crimes in the same case and the defendant was convicted. The conviction was later reversed by the Supreme Court.

Defense attorneys will claim we have prior bad acts admitted in our sex cases all the time, but that is not accurate. On the few occasions prior bad acts were admitted, the Supreme Court reversed the decision. Section 21 of A.B. 49 amends statute to give prior sex offenses a presumption of admissibility in court. The defense will have the opportunity to demonstrate why it should not be admissible.

Section 24 of the bill prohibits a court from ordering a victim to take or submit a psychological or psychiatric evaluation in a criminal or juvenile delinquency action relating to sexual offense. We question how much children should endure after they have been physically and sexually abused. Children should be protected.

First, children must disclose the crime to adults. They must then disclose the crime to police, forensic interviewers and district attorneys who will try the case. Children talk about the crime at preliminary and evidentiary hearings where they are cross-examined and again at the trial. In addition, judges will force children to talk to defense psychologists.

The change in section 24 is necessary because we do not know how the court has the authority to order a child-victim to undergo an examination. The victim is not a party to the case. The case is the State of Nevada v. the Defendant. How does the court have jurisdiction over the nonparty victim? No statute allows the court to do this. In addition, NRS 171.1228 prohibits a victim of a sexual offense from taking a polygraph test. If statute prohibits a victim from taking a polygraph test, how can a victim be required to have a psychological evaluation?

Section 24 says the court cannot order the victim to undergo a psychological evaluation. If the bill is passed, defense attorneys say they will have no weighing of evidence with any ability to object, but this is not true. Victims are encouraged to seek therapy after they report the abuse. In the course of therapy, victims may reveal new facts about the incident or act out in a way consistent with abuse. We want the therapist to discuss this information during the trial, and section 24 of the bill gives the defense the ability to object. The court may exclude the State's doctor if the court finds a compelling need for the

defense to obtain a psychological evaluation and the victim refuses. This creates a level playing field for the prosecution and the defense.

Section 12 of the bill relates to the pimp and prostitute subculture, which is unique and unknown to most people, including jurors. The State needs an expert in these cases to discuss two main areas: the language and the subculture itself. No juror has ever heard the language used by pimps and prostitutes. Most people have heard the word "bitch" but are unfamiliar with the terms "ho, the game, racks, trick, date, choosing up, choosy Suzy, out of pocket and walking a track." These terms are uncommon, and a juror will not understand without the use of an expert. The expert can explain the terminology and the subculture to the jury. Who is going to believe a girl would voluntarily enter into this lifestyle and return to it after being beaten by her pimp? Experienced detectives assigned to these cases acquire knowledge through interviews with prostitutes and pimps. We need these experts in court to assist the trier of fact by explaining the subculture to the jury. Defense attorneys will file a notice to exclude our expert witnesses. We had a judge who said he would never allow a pimp expert to testify. Statute defines an expert as someone who can assist the trier of fact with scientific evidence.

The Nevada Supreme Court case, *Hallmark v. Eldridge,* 124 Nev. 189 P.3d 646 (2008), is frequently cited in court cases. This case was based on scientific evidence and factors that deal with methodology. In pimp cases, there is no methodology because there is no scientific evidence. The average juror does not understand the pimp and prostitute subculture or the language, and we need an expert to testify in these cases. This information is needed in order to objectively hear and decide these cases.

James Sweetin (Chief Deputy District Attorney, Office of the District Attorney, Clark County):
I work in the SVU and have experience in dealing with these cases. I will discuss other changes made in A.B. 49 that are outlined on pages 56 through 90 in the presentation (Exhibit G). We support the proposed amendments to sections 8 and 15 from the Office of the Attorney General (Exhibit H).

Section 8 addresses sexual assault. In statute, sexual assault occurs when a person subjects another to sexual penetration of a body part or opening against his or her will or under conditions in which the perpetrator knows or should

know the victim is mentally or physically incapable of resisting or understanding the nature of the conduct.

There is a question about how this statute applies to elementary or junior high school-aged children. A person in authority can to force a child of this age to engage in a sexual act. Many times, children are taught to perform sexual acts and they understand what is happening. This is a hole in the law because the Legislature enacted a lewdness statute which states that a sexual touching violation does not require a victim to consent or not consent in order to make the elements of the charge. To prove a sexual assault occurred, the State must show the child could not have consented to the act based on lack of age, life experiences and immaturity. It has been determined that a child under the age of 14 cannot provide consent to sexual touching or penetration.

Section 8 no longer requires the State to show a child under the age of 14 consented or did not understand the conduct in order to prove a sexual assault. The sexual penetration of a child under the age 14 is enough.

Section 7, subsection 5 clarifies that penetration does not include such conduct for medical purposes.

Section 7, subsection 6 revises the definition of statutory sexual seduction and amends statute to include sexual penetration. This change captures digital penetration not previously covered under sexual seduction statutes. Section 7, subsection 6 includes protection for children aged 14 and 15. It continues to apply to perpetrators who are 18 years of age or older, but there is an additional requirement the perpetrator be at least 4 years older than the victim.

Section 8.5 maintains the penalty of gross misdemeanor if the perpetrator is under the age of 21, but it will be a Category D felony if the perpetrator has been convicted of a prior sexual offense. The penalty for a perpetrator over the age of 21 has changed from a Category C felony to a Category B felony. This provides for a phased approach from the more substantial penalties of sexual assault.

Section 15 makes lewdness with a child a crime, and the penalty is 10 years to life in prison. When a child turns 14, the lewdness statute no longer applies. The only law that applies to them for sexual touching is open and gross lewdness, which is a gross misdemeanor punishable by 1 year in jail. If you

have an individual who touches a child the day before his or her fourteenth birthday, that touching is punishable by 10 years to life in prison. If the child is touched on his or her fourteenth birthday, it is now a gross misdemeanor punishable by 1 year in jail. This is not a reasonable situation.

Section 15 has been amended to create a phased approach to the penalty for lewdness with a child. The penalty for a child under the age of 14 will stay the same. A person who commits lewdness with a child who is 14 or 15 years of age is guilty of a Category B felony and the penalty is 1 to 10 years in prison.

Section 13 addresses open or gross lewdness with a child and uses the phased approach to penalties previously discussed. Open and gross lewdness is punishable as a gross misdemeanor with a minimum penalty of 1 year in jail. The penalty is enhanced to a Category D felony if the perpetrator has been previously convicted of open and gross lewdness. Section 13 increases the penalty from a gross misdemeanor to a Category D felony. This is true not only when the perpetrator has a prior open or gross lewdness conviction but also when the perpetrator has a prior sexual offense conviction and the crime was committed in the presence of a child under the age of 18 or a vulnerable person.

Section 14 addresses indecent or obscene exposure. This statute has the same penalties as the open and gross lewdness statutes in section 13. The amendments to section 14 are the same as those made to section 13.

Sections 17, 18 and 19 address sexual conduct with pupils. The statute does not apply to teachers who sexually touch or fondle students over their clothing or kiss students in a romantic way. Section 17, subsection 8 amends the definition to state, “Any lewd or lascivious act upon or with the body, or any part or member thereof, of another person.” This change captures the conduct I described.

Section 18 has been changed to remove the application of law to pupils aged 14 to 15. Changes to lewdness statutes protect pupils in this age category. The penalty for lewdness with pupils ages 16 and 17 have changed. The penalty in statute is a Category C felony, punishable from 1 to 5 years in prison. The amendment changes the penalty to a Category B felony, punishable from 2 to 20 years in prison.

Section 23 provides that expert testimony is admissible in any criminal or juvenile delinquency action concerning the grooming efforts of children under the age of 18 by the defendant in preparation for sexual abuse. For children 14 years or older, the state must show the perpetrator knew or should have known the child was not capable of providing consent. The defendant's grooming process must be proven to the jury as well as the effect it had on the child.

Section 9 addresses battery with the intent to commit sexual assault resulting in substantial bodily harm. Statute provides penalties for this offense that include 10 years to life in prison or life in prison without the possibility of parole. Statute states this decision will be made by a jury, but it does not provide guidance for the process that would allow a jury to render such a decision. Section 9 has been amended to allow the sentencing decision to be made by the court.

Senator Segerblom:
Are there many cases that you did not get the conviction or plea you wanted?

Mr. Sweetin:
Our proposed changes address gaps in law or issues affecting the presentation of evidence in court.

Senator Segerblom:
Are there many cases where you went to trial and lost?

Mr. Sweetin:
Yes. We do lose cases.

Senator Segerblom:
Can you give us an idea of the number?

Mr. Sweetin:
In the Clark County District Attorney's Office, the win percentage for the SVU team is lower than any other team. Our assigned crimes are committed in secret and have no witnesses or evidence.

Senator Segerblom:
Our legal system works that way. The penalties are serious and people convicted of these crimes are placed on sex offender lists. Defendants suffer serious consequences when they are convicted. I question why we should give up rights of defendants in these cases when you admit cases are weak and hard to prove.

Mr. Sweetin:
It is accurate to say these cases are weak and have little evidence. Many times the rules of evidence work against the State when presenting information appropriate in a particular case. Ms. Luzaich provided examples of other acts in her testimony.

Senator Segerblom:
The other acts apply to all cases, such as when a person robs a gas station.

Mr. Sweetin:
No. Statutes we addressed today are specific to sexual offenses.

Senator Segerblom:
We will ask a public defender to address the question because this is common in civil practice. You cannot admit prior evidence to prove something happened.

Mr. Sweetin:
Yes. This is the reason these defendants and their cases are different. This has been recognized by other states and is the reason we want changes to the bad act statutes.

Chair Brower:
Mr. Sweetin, the proposed changes to the prior bad act rule does not allow for automatic admissibility. It only changes the presumption of nonadmissibility. Defense counsel has an opportunity to argue that the prejudicial impact of prior evidence outweighs the probative value, which allows the judge to order the exclusion of evidence.

Ms. Luzaich:
Yes. Our proposed changes allow the presumption of admissibility and arguments can be made either way. Without this change, we start with the presumption of inadmissibility and prior evidence cannot be heard.

Senator Segerblom:
Are most of these evidentiary issues resolved by motions in limine?

Ms. Luzaich:
Yes. They are resolved by motions in limine where both sides get to brief it, argue it and the judge makes the decision.

Senator Segerblom:
At that point, do people know what is going to happen? Many cases are pleaded based upon that knowledge.

Ms. Luzaich:
Yes. That is correct.

Terri Miller (Stop Educators Sexual Abuse, Misconduct and Exploitation, Inc.):
We support A.B. 49. My organization is an advocacy organization for victims of educator sexual misconduct. I am the mother, formerly from Pahrump, who lobbied for legislation to criminalize educator sexual misconduct in 1997. The Committee must know how egregious this crime can be and the lifelong effects educator sexual abuse has on victims. Last month in Las Vegas, three teachers were arrested for sexual abuse of students. The youngest victim is 8 years old.

A lawsuit stemming from a case in 2012 and 2013 involved a freshman boy who attempted suicide in February 2014 because of his immense emotional trauma. Last year, I spoke with a woman who sought our support. She was sexually offended by her female coach 40 years ago. Four of her covictims offended by this coach have committed suicide. This is a life-threatening and a life-changing criminal act committed by people we should trust.

I support A.B. 49 with regard to raising the penalty to a Category B felony with 2 to 20 years in prison and a $10,000 fine. That is the least we can do. In Nevada, the penalty for penetration of a dead human body is a Category A felony that requires lifetime registration as a sex offender. We must make the penalty severe when our living, breathing children are violated by teachers.

Sean B. Sullivan (Office of the Public Defender, Washoe County):
We worked with Mr. Kandt on sections 1 through 6.5 of the bill, and our concerns regarding these sections have been addressed. We oppose other sections of the bill.

Section 8, subsection 5 increases the student age difference from 2 to 4 years. We oppose this because we do not want an older classmate, such as a 17-year-old high school junior or senior, to face a potential life sentence for engaging in what will be classified as voluntary sexual intercourse with a 13-year-old freshman. The older student would be tried as an adult in this case.

Chair Brower:
You oppose section 8, subsection 5 due to the certification up to adult status for that type of defendant?

Mr. Sullivan:
Yes. A 17-year-old student would be tried as an adult.

Chair Brower:
This is a difficult scenario.

Mr. Sullivan:
We oppose section 8.5. This section should be amended to specify that a reasonable mistake of age is a defense to statutory sexual seduction. Raising the statutory sexual seduction penalty to a Category B felony, with 1 to 10 years in prison and a fine up to $10,000, is a significant penalty. We have all heard of cases in which victims show false identification and look older than 13. Raising the age difference from 1 to 5 years and the penalty to 1 to 10 years in prison is a significant leap.

We oppose codifying medical terms in section 10. A child may have congenital or latent defects or the medical condition may be the result of an accident.

We oppose sections 12, 21, 23 and 24 because they are unnecessary. District court judges are in the best position to determine if prior bad act evidence is relevant or if an expert should be qualified, vetted and allowed to testify before a jury. All parties concerned must file the appropriate motions first, and it must be relevant. When motions in limine are filed, both parties have a chance to respond. Experts can submit their qualifications and the defense can review

works experts have authored. The information is fully vetted and judges can entertain oral arguments on the matter. The process is arduous and time-consuming. The district court judge will decide if prior bad act evidence is allowed or if the expert would aid the trier of fact at the time of trial.

Chair Brower:
If A.B. 49 passed, the judge would make the final decision on admissibility of expert witness testimony and prior bad acts provisions. This bill does not take the discretion away from the judge.

Mr. Sullivan:
Yes, but the provisions set forth in sections 12, 21, 23 and 24 are unnecessary. The process works well now.

We oppose sections 13 and 14, which increase the penalty for a person who has a prior conviction for an open and gross lewdness or indecent exposure. These are gross misdemeanor offenses that carry up to a year in jail and a $2,000 fine. The offender would also be placed on the Nevada Sex Offender Registry, in accordance with NRS 179D.

Many of these offenders have mental health issues, and a conviction for open and gross lewdness puts them on a long, arduous path in the criminal justice system. They could face a Category D felony offense if they do not comply with registry requirements for sex offenders under NRS 179D. It is unfair to enhance the penalty from a gross misdemeanor to another Category D felony.

In section 15, subsection 5, we recommend an age increase from 2 years to 4 years to ensure that older classmates, such as high school juniors and seniors, who engage in voluntary sexual conduct with younger classmates are not punished so severely.

We oppose sections 18 and 19 because it increases the penalty to a Category B felony with 2 to 20 years in prison. We recommend the penalty remain as a Category C felony with a 1- to 5-year prison sentence. This recommendation is based on Senate Bill 192, which retains the penalty of a Category C felony but expands liability to include all 18-year-olds, removes the position of authority in the school system and requires the offender be placed on the Sex Offender Registry under NRS 179D.

SENATE BILL 192 (1st Reprint): Revises provisions relating to sexual conduct between certain persons. (BDR 14-731)

We oppose section 26 of A.B. 49, which states,

> Negligent treatment or maltreatment of a child occurs if a child has been subjected to harmful behavior that communicates rejection or is threatening, intimidating, disparaging, terrorizing or humiliating, has been subjected to painful or abusive conduct ... .

This language is not clearly defined and has constitutional implications. Statements such as, "I am very disappointed in your grades this semester," or "Why can't you be more like your brother or sister?" could be considered as rejection or disparaging comments to a child. Corporal punishments in NRS 432B.150 address painful or abusive conduct. Although NRS 449.768 defines corporal punishment, I am concerned about the term "painful." This would conflict with the corporal punishment statute codified under Nevada law.

Chair Brower:
I had discussions with Committee members and stakeholders about your issues regarding section 21. Discussions will be ongoing so that we get this language right.

Steve Yeager (Office of the Public Defender, Clark County):
Mr. Sullivan and I prepared and submitted several documents to the Committee. We submitted a letter detailing our opposition to various sections (Exhibit I), a memo regarding crimes and penalties (Exhibit J) and a listing of proposed amendments in conceptual form addressing our concerns (Exhibit K).

The Judicial Branch of government is often a check on prosecutors. Based on what we heard from prosecutors today, there are cases where the Nevada Supreme Court determined a district court judge did something wrong and the Court reversed an action. We need that in our system because there must be a balance of rights that allow criminal defendants to have fair trials.

The judge will still have discretion under A.B. 49 regarding expert testimony and allowing prior bad act evidence, but it tilts that analysis in favor of the State by codifying the kinds of expert testimony to be admitted. Codifying it without having a discussion about whether the expert testimony is appropriate—whether

it is scientifically based or reliable—is my concern. Putting this language into statute makes a presumption to the judge that it should be admissible.

Based on today's testimony, there is no indication the Nevada Supreme Court got it wrong in these cases. This is the basis of our opposition. We do not want to be reactive. We want to make good policy based on all cases, not just a handful where attorneys disagree about the action of the judge.

The language in section 10 does not include a requirement that the abuse is intentional. A person will be liable for placing another in a situation where serious injury can occur. We are concerned about putting specific medical conditions in the statute because we could have a scenario in which a person unintentionally puts someone in a situation where abuse happens. For example, one of these injuries could occur if there is a car accident and a child was not in a car seat. In this case, someone would then be looking at a potential life sentence. Adding specified medical factors to statute could lead to an unjust result in certain circumstances.

Vanessa Spinazola (American Civil Liberties Union of Nevada):
I agree with the policy recommendations from the Washoe and Clark County Public Defender's Offices. We worked with Mr. Kandt on sections 1 through 6.5 to narrow down the statute. We oppose changing the penalty for intimate images to a Category D felony. In the age of Facebook, we are concerned about youths posting images they should not because they have no boundaries. We submit comprehensive sex education would be a better way to prevent these situations.

Amy Coffee (Nevada Attorneys for Criminal Justice):
We oppose A.B. 49. I have defended sex cases for over 10 years. My colleagues here today get many convictions, and any statement otherwise is not accurate. The prison is full of sex offenders, and we have some of the highest penalties in the Country. I disagree these tools are necessary for convictions. I submitted written documents (Exhibit L) for the Committee.

I disagree with Mr. Sullivan's testimony. I am concerned about sections of the bill that deal with expert testimony. It does use the words "is admissible." Clark County judges will be deferential to this. If I asked for a hearing, the district attorney will say it should not be granted because of the words "is admissible." This language ties my hands. If district attorneys are serious about

hearings for experts, language should be included in the bill that it is subject to all requisite balancing tests and gatekeeping functions. This language is not in the bill.

Chair Brower:
The language "is admissible" is in the bill for a relevant purpose. This opens the door for defense counsels to make motions in limine to the judge. They will argue that the proposed evidence is not relevant and should be excluded. Is this a viable option?

Ms. Coffee:
When you want to prevent an expert from testifying, relevance is only one of several prongs. Is the expert appropriate for this case? It narrows the focus and district attorneys will tell judges the focus is extremely narrow and their hands are tied. The gatekeeping function is vital to due process. I ask that language be included so members of our judiciary understand what they can do. They might be confused by the language as written. The language in the bill is vague which causes more harm than not having a statute. Typically, the prosecution will notice an expert, file a motion and there is a process in which extensive caselaw applies. Assembly Bill 49 will confuse the matter. There are some judges who will use this as excuses to abdicate their responsibilities. It is not necessary because the State's experts are rarely denied.

In section 21, the bill says nothing that shall be construed to prohibit the admission of prior bad act evidence. Judges and district attorneys will interpret this language to mean that all prior bad acts come in as evidence. I provided the Committee a summary of the bad act rules. Published opinions allow these bad acts. The Nevada Supreme Court has reviewed this matter carefully, and the evidence is admissible most of the time but sometimes not allowed in the interest of justice and due process. There is a real danger in codifying something that is best left on a case-by-case basis. There are good and bad reasons to codify information. This is a dangerous area because it sets us back.

The Nevada Supreme Court ruled on this issue in *Braunstein v. State*, 118 Nev. 68, 40 P.3d 413 (2002). The Court took a serious review of this sex offense case and determined that a weighing of prior bad acts should be conducted to determine admissibility. The Committee should proceed with caution when rolling back the law.

Mr. Sweetin indicated we need grooming experts to show consent. He also said section 8 makes it strict liability to have sex with anyone under the age of 14. If it is strict liability, I do not believe a grooming expert is necessary because the only thing the prosecution would need to show is an act of penetration. Consent would not be a defense in this case. The penalty of 35 years to life in prison is higher than the penalty for first-degree murder. You can get life in prison without first-degree murder, but otherwise the penalty is 20 years in prison. We need to be careful about strict liability-type offenses, especially when the penalties are this high. We already convict many people to 35 years to life in prison.

Scott Coffee (Nevada Attorneys for Criminal Justice; Office of the Public Defender, Clark County):
We oppose A.B. 49. I spent 20 years in the Office of the Public Defender, Clark County, and the last 10 years defending capital homicide cases. Section 10 is a dangerous proposition of codifying for injuries normally associated with shaken baby syndrome. The worst written statute is in NRS 200.508, and judges and attorneys do not understand it. The Nevada Supreme Court admitted this statute is poorly written in a 2013 case.

In Mr. Yeager's seat belt example, if there is an accident and a child not wearing a seatbelt has a subdural hematoma, the punishment would be a minimum sentence of 5 years in prison under the conditions of A.B. 49. This is dangerous.

We heard testimony from Ms. Bluth regarding shaken baby syndrome injuries. I want to give you a short list of sources who have commented on shaken baby syndrome. The *New York Times, Washington Post, Los Angeles Times, Chicago Tribune, Discover Magazine, International Public Health Research Group (IPHRG), Slate Magazine* and the *American Medical Association Journal* have all commented and had articles critical of the science behind shaken baby syndrome. *Time Magazine* describes it as "the shaky science of shaken baby syndrome."

There have been exonerations across this Country because of wrongful diagnosis of shaken baby cases. There is the Wisconsin case of Audrey Edmunds in 2008, Shirley Rae Smith in California, who received clemency from Governor Jerry Brown, LeeVester Brown in Mississippi last year

and Jennifer Del Prete in Illinois who was ruled innocent of the charges against her because of wrongful testimony.

Deborah Tuerkheimer, a former prosecutor from the Manhattan District Attorney's Office who is now a professor at DePaul University, has studied extensively on the matter. She wrote an article for the Washington University Law Review, entitled *The Next Innocent Project: Shaken Baby Syndrome and the Criminal Courts.* She concluded the scientific advances of the past 2 decades have cast doubt on the entire category of shaken baby syndrome. I have in my hand a copy of the book recently published by Ms. Tuerkheimer entitled *Flawed Convictions: "Shaken Baby Syndrome" and the Inertia of Injustice.*

Science has advanced greatly because of MRIs, but those who have done the scientific research on this subject have noted our legal system has failed to absorb this new consensus. Innocent parents and caregivers remain incarcerated for the triad of symptoms prosecutors believe to be shaken baby syndrome. These symptoms include brain swelling, cerebral edema, brain bleeding, subdural hematoma and retinal hemorrhages. There was a time when the experts thought these injuries could only be caused by shaking, but science has moved away from that theory. Ms. Tuerkheimer indicates she thinks the injustice being done here is consummate with any our criminal justice system has ever seen. Thomas L. Bohan, Ph.D., J.D,, a lawyer, physicist, and past President of the American Academy of Forensic Science, says he does not know of a single physicist or biomedical engineer who supports shaken baby syndrome. He states there is no evidence to support it and every attempt to prove it has failed.

Chair Brower:
Submit the scientific records or articles regarding shaken baby syndrome to the Committee.

Mr. Coffee:
Section 10 of A.B. 49 codifies something that is subject to scientific debate. This is bad practice.

Tom Clark (Naturist Action Committee):
I oppose A.B. 49. Everyone wants to see children protected, especially when it comes to sexual crimes; however, the Naturists are concerned with this bill.

Chair Brower:
Can you give the Committee information about the group you represent?

Mr. Clark:
We are a national organization that represent nudist colonies in North America.

Chair Brower:
Nudist colonies?

Mr. Clark:
Yes. We are concerned about sections 13 and 14 of the bill that could deem our recreational activities as felonies with prison time. We do not want the activities of our organization to be construed as misconduct toward children. For this reason, we oppose sections 13 and 14. We support sections 1 through 6.5.

Kristy Oriol (Nevada Network Against Domestic Violence):
I submitted a proposed amendment to the Committee regarding section 26 (Exhibit M). We worked with the bill sponsors to draft the proposed amendment to section 26, and we still have a few remaining issues. We suggest that judicial training be provided should A.B. 49 pass. Ms. Bluth provided testimony regarding serious cases affecting children, and I am concerned those cases were not found to be abusive under statute. I understand prosecutors need additional tools when prosecuting cases regarding children being terrorized. It is important that judges are trained to recognize cases of abuse and neglect in situations that may not be easy to understand.

Our proposed amendment to section 26 tightens language in NRS 432B.140. This section defines when negligent treatment or maltreatment of a child occurs. We propose changing the first sentence to read, "Negligent treatment or maltreatment of a child occurs if a child has been subjected to harmful behavior that is threatening, disparaging or terrorizing or has been subjected to physically painful or abusive conduct ... ." The language in section 26 is broad and not clearly defined as Mr. Sullivan noted in his testimony.

We are concerned about increased reports of abuse to Child Protective Services (CPS). For example, an advocate on our hotline may get a call in which a person's behavior may be humiliating to a child. Not having a clear definition in statute could result in a formal report to CPS. Our advocates and volunteers err on the side of caution in these cases, but our concern is that the call may

warrant a visit from CPS. Many times, there is not enough evidence to remove a child, but perhaps it would initiate an investigation of the family. The worst abuse happens after a CPS visit. The child and the parent-victim become fearful of reporting crimes in the future due to retaliation from the abuser. Without clear definitions in the bill, there will be confusion for our mandated reporters and an increase in reports to CPS, which has limited resources.

Our most significant concern with the bill is the expansion of criminal penalties for allowing abuse to occur. In NRS 200.508, there is a section that criminalizes a person who allows abuse to occur without taking action. I am referring to a person who is not abusing a child but is aware of abuse without taking action to stop it. We agree it is dangerous for a child to be in an abusive home, but we are concerned that language in A.B. 49 makes people criminally liable for not reporting abuse and neglect.

Research has shown how failure-to-protect laws disproportionately affect women and victims of domestic violence. Victims find themselves in a situation where the abuser is threatening to hurt the child or the parent-victim. This puts parent-victims in a difficult position. They are afraid to report the crime, but if they do not, they could face criminal sanctions. We are moving in a good direction and we believe language can be amended to our satisfaction.

Chair Brower:
The Committee has your proposed amendment regarding section 26.

Ms. Bluth:
Mr. Coffee and I will continue to agree to disagree about shaken baby syndrome. The specific list of injuries in section 10 is there to provide assistance to both sides of the table. The term traumatic brain injury could have been used instead, which would broaden the injuries I could take before a judge. A definition of traumatic brain injury is fair to both sides, and I must show the defendant's conduct caused the injury. For example, if a mother punches a newborn child in the head and causes the injury, I must show the mother's conduct caused that injury. My job is the same and the law will not change in this area.

Concerning Mr. Yeager's example of not putting a child in a car seat, I have had parents get into a car drunk or high on methamphetamines without securing their child in a car seat. They are in an accident, the child goes through the

windshield and has a traumatic brain injury. As a result, the child is paralyzed and blind. This behavior should be punished. This is why it is the judge's discretion to order a 5- to 15-year prison sentence or a 5 years to life in prison sentence.

Traumatic brain injuries can be caused by congenital defects or accidents. It is my job to prove the injury was not caused by a congenital defect or accident but caused by a person's conduct.

I spoke to Ms. Oriol regarding section 26, and we are working together to modify the language. Ms. Oriol also had a concern regarding the failure-to-protect language. I recognize both women and men can be victims of domestic violence, but their job is to protect their children who are the most vulnerable individuals in society. A child's safety must be placed before the safety of a parent.

I recently had a mother whose child was severely beaten for 11 years. The child finally came forward and both the mother and father are being prosecuted because the mother watched as her child was beaten almost every day of her 11 years of life. The language in sections 10 and 26 provides protection in those types of situations.

Ms. Luzaich:
Ms. Coffee testified that we get many convictions, especially in the SVU. This is true, but many of those convictions are made because the cases were resolved on a lesser charge because of a bad ruling on a bad act motion. In the 26 years I have been prosecuting, with 15 of those years on the SVU, I can only recall three cases in which I was allowed to admit prior bad acts into my trial.

Concerning pimps, prostitutes and their subculture, there is no caselaw regarding the admissibility of an expert in those cases. Assembly Bill 49 tracks the domestic experts' statute, and this is what we are asking you to do. Judges are not making informed decisions; they make decisions based on caselaw. Right now, caselaw deals with scientific evidence. We can all agree that expert testimony regarding the pimp and prostitute subculture is not scientific evidence.

Mr. Duncan:
On behalf of the Attorney General, we believe A.B. 49 is an important bill that protects our most vulnerable members of society.

Chair Brower:
I will close the subcommittee hearing on A.B. 49 and adjourn the meeting at 2:26 p.m.

RESPECTFULLY SUBMITTED:

_____
Lynette Jones,
Committee Secretary

APPROVED BY:

_____
Senator Greg Brower, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	**# of pages**		**Witness / Entity**	**Description**
	A	1		Agenda
	B	4		Attendance Roster
A.B. 47	C	3	Eric J. Ellman / Consumer Data Industry Association	Letter of Support
A.B. 49	D	3	Brett Kandt / Office of the Attorney General	Letter of Support
A.B. 49	E	27	Jacqueline Bluth / Office of the District Attorney, Clark County	Presentation
A.B. 49	F	28	Lisa Luzaich / Office of the District Attorney, Clark County	Presentation
A.B. 49	G	35	James Sweetin / Office of the District Attorney, Clark County	Presentation
A.B. 49	H	4	Office of the Attorney General	Proposed Amendments
A.B. 49	I	3	Steve Yeager / Office of the Public Defender, Clark County	Letter of Opposition
A.B. 49	J	6	Steve Yeager / Office of the Public Defender, Clark County	Crimes and Penalties Memorandum
A.B. 49	K	4	Steve Yeager / Office of the Public Defender, Clark County	Proposed Amendments
A.B. 49	L	61	Amy Coffee / Nevada Attorneys for Criminal Justice	Letter of Opposition
A.B. 49	M	1	Kristy Oriol / Nevada Network Against Domestic Violence	Proposed Amendment