MINUTES OF THE
SENATE COMMITTEE ON COMMERCE AND LABOR

Eighty-first Session
April 21, 2021

The Senate Committee on Commerce and Labor was called to order by Chair Pat Spearman at 9:02 a.m. on Wednesday, April 21, 2021, Online and in Room 2134 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Pat Spearman, Chair
Senator Dina Neal, Vice Chair
Senator Melanie Scheible
Senator Roberta Lange
Senator Joseph P. Hardy
Senator James A. Settelmeyer
Senator Keith F. Pickard

GUEST LEGISLATORS PRESENT:

Assemblywoman Sandra Jauregui, Assembly District No. 41
Assemblywoman Jill Tolles, Assembly District No. 25

STAFF MEMBERS PRESENT:

Cesar Melgarejo, Policy Analyst
Wil Keane, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Alfredo Alonso, Charles Schwab Corporation
Robert Wolz, Charles Schwab Corporation
Connor Cain, Nevada Bankers Association
Terry J. Reynolds, Director, Department of Business and Industry
Sandy O'Laughlin, Commissioner, Division of Financial Institutions, Department of Business and Industry
Whitney Owens, Psy.D., President, Board of Psychological Examiners

Erica Valdriz, Vegas Chamber

CHAIR SPEARMAN:
I will open the hearing on Assembly Bill (A.B.) 290.

ASSEMBLY BILL 290: Revises provisions relating to financial institutions. (BDR 55-979)

ASSEMBLYWOMAN SANDRA JAUREGUI (Assembly District No. 41):
This bill revises the definition of a fiduciary to provide that a trust company or savings bank that acts as a custodian for an individual retirement account is not a fiduciary for the purposes of certain provisions of law governing the business of a trust company.

ALFREDO ALONSO (Charles Schwab Corporation):
In the last Legislative Session, this body passed a bill that brought some updates to Nevada banking law, refining a savings and loan statute that had not been touched for decades. As a result of that bill, Charles Schwab Corporation now has a branch in Henderson, Nevada. This bill is a second part of that.

Charles Schwab is hoping to expand its business in Nevada to include retirement accounts. This bill essentially codifies federal law because Nevada law did not contemplate these types of accounts clearly. This is good economic development. We are looking at our banking statutes for the first time in a long time with the hope that this will bring other banks and financial institutions to Nevada in the future.

ROBERT WOLZ (Charles Schwab Corporation):
Charles Schwab is looking to expand the role of our trust entities. In order to do that, we need some clarifications to Nevada law. We would like to transfer the custodial role for our individual retirement account (IRA) program, currently maintained with Charles Schwab and Company's broker-dealer, to one of Schwab's banking and trust charters.

Here I must get into the technical weeds. A broker-dealer that serves as sponsor of an IRA program under section 408 of the *Internal Revenue Code* is required to qualify as a nonbank guardian. If we move that responsibility to a banker trust company, it relieves us from certain *Internal Revenue Code* requirements that apply to nonbank IRA custodians, and allows us to structure our

IRA product in a framework consistent with what our competitors are doing. Both Fidelity Investments and the Vanguard Group, two of our largest competitors, have it structured in this way. Their affiliated trust companies are the sponsors of their IRA products, which are largely serviced through the capabilities of the broker-dealer as a sub-custodian.

It is anticipated the Nevada entities that would choose to serve in this role will serve as both the sponsor of the IRA program and the custodian of the assets for the account. These accounts are self-directed. The trust company or the trust bank will not be acting as investment manager of the account; they will not be taking on any discretionary responsibilities that are normally indicative of a fiduciary relationship. They will be acting in a completely directed capacity, taking directions from the account holder or perhaps an investment manager that the account holder separately engages. Charles Schwab is not going to be engaging in any fiduciary activity other than holding these assets of the custodian under the terms of the agreement.

In order to facilitate that, we have asked for two clarifications in Nevada law. First, we were looking to refine the definition of fiduciary capacity to make it clear that a trust company or trust bank acting solely as a custodian is not a fiduciary. Currently, *Nevada Revised Statutes* (NRS) 669 states that an administrator, a party defined as one who possesses or controls an asset of an IRA account, is a fiduciary for the purposes of NRS 669. This means that a custodian holding assets would be considered a fiduciary, even though that would be contrary to the law in most if not all jurisdictions of the U.S., which treat a custodian as not being a fiduciary capacity.

Our proposed amendment of this provision states that holding assets of an IRA account in a nondiscretionary custodial capacity is not a fiduciary capacity. That change relates only to Charles Schwab Trust Company. We are also asking for a comparable change to NRS 673, the savings bank statute that governs Charles Schwab Trust Bank, by adopting verbatim the definition of fiduciary derived from the federal Office of the Comptroller of the Currency (OCC) Regulation Part 9. That carves out custody relationships from the definition of a fiduciary account.

Second, we are requesting clarification, or rather codification, of rules under OCC Regulation Part 9 dealing with how a bank treats proprietary affiliate bank deposits that are used in connection with trust relationships. Currently, Nevada

has adopted this provision of OCC Regulation Part 9 for all types of banking charters other than our savings bank. We are asking that the provisions of NRS 673 to extend the rule that is already in place under Nevada law for other charters engaged in trust business apply also to our trust bank under NRS 673. It is nothing new; it is just an expansion of what Nevada has already approved. The existing rule is under a regulation. We are asking that this be incorporated in the savings bank statute.

SENATOR PICKARD:
I do not practice in this area, but typically in the law when we talk about fiduciaries, we are talking about a heightened responsibility standard for the individual managing the accounts or the interests of the individual. With that comes responsibilities that are over and above what we would normally see. If you take yourselves out of this fiduciary language, what is there in the statutory scheme that protects individual account holders?

MR. WOLZ:
In connection with these IRA accounts, section 408 of the *Internal Revenue Code* incorporates minimal fiduciary obligations, related to record-keeping, safety and soundness of the organization promoting or maintaining the program. It relates to statement requirements and everything that ensures transparency.

In connection with these relationships, I would also add that while neither the trust bank nor the trust company would be acting in a fiduciary capacity, account holders would likely be hiring other entities, including some Schwab entities, that would in fact act as fiduciaries. If they hired, for example, one of the Schwab investment products, we would be investment advisors and would have the fiduciary duties of an investment advisor. The engagement would be between the client and the investment advisor, not between us and the account holder.

SENATOR PICKARD:
If I understand correctly, we are making a distinction between the advisor and the banker. The fiduciary capacity is maintained by the advisor. Are they separate and apart from the entities that are carved out in this bill?

MR. WOLZ:
Yes. The role we are trying to clarify here is acting as a custodian of assets directed by the account holder. We will commit, as we must, to meeting the

requirements of the *Internal Revenue Code* as they relate to IRA products, including the fiduciary rules under section 408.

SENATOR PICKARD:
I want to make sure that, whatever we do, we are not putting the unsophisticated consumer in a position of having to more fully understand the banking side of this.

SENATOR NEAL:
In section 2, subsection 8, paragraph (a), the bill refers to, "Direct obligations of the United States, or other obligations fully guaranteed ... " Can you give me a real-life example of the other obligations? Also, paragraph (c) mentions "Readily marketable securities of the classes, in which state banks, trust companies or other corporations exercising fiduciary powers." What are those?

MR. WOLZ:
Let me provide a little context on those collateral rules. These are the rules we currently comply with under informal advice from the Division of Financial Institutions (FID). These rules and the types of collateral are fairly uniform; this has been the federal law for acceptable types of collateral. In general, they have to be investments that are not subject to principal risk. The rules also require that the amount of the collateral be market to market on a daily basis. There is always collateral at 102 percent of the value of the cash balances. That is the way we are doing it now.

I do not know what I can add about the specific types of securities except to say that they are highly liquid types of securities that are not subject to great principal risk. That is the common theme amongst all of those classes. Whether it is acceptable or not is generally at the discretion of the bank regulators, and they have not raised any issues with us to date.

SENATOR NEAL:
You have said that the point of the bill is that Charles Schwab does not want to be the fiduciary; you would like to be removed from the fiduciary relationship. But in the section I asked about, you still want to be able to basically do a spread where you have some fiduciary powers within these other investments. I am trying to understand how that works.

MR. WOLZ:
As far as the trust bank is concerned, and I said we are already operating under these rules, we do have some preexisting fiduciary relationships. They are directed trust relationships for employee benefits plans, and the cash balances related to those accounts are governed by this rule as fiduciary funds. As I mentioned, we are currently operating under this rule, which is being applied to other Nevada bank charters that engage in trust business. We are just asking to have it formally codified before we expand the IRA program because we want to make sure we are clear. This applies to our existing business and is essentially just a codification of the rules that we are currently operating under at the direction of the FID.

SENATOR NEAL:
As I read this, section 2, subsections 6 and 7 refer to your ability to spread someone's money across several different entities. It is up to the amount that is being insured by the Federal Deposit Insurance Corporation (FDIC), is that right? I believe it could be up to $100,000 that is spread.

This section took me back to the Great Recession in 2008, when some businesses had the ability to transfer other individuals' money to several different entities. People who went looking for their accounts had to figure out, "Who has my money now?" This was a part of the financial crisis because we flexed the rules to allow the money to be placed in different areas, and when banks failed, their former customers had to run around trying to find out where their money was.

MR. WOLZ:
Schwab has a program we use in connection with these accounts referred to as a sweep tower. It spreads deposit amounts across existing Schwab bank charters to give our clients the maximum allowable FDIC insurance. For example, if someone has $750,000 of cash in a brokerage or IRA account, it theoretically could be spread across Charles Schwab Bank, Charles Schwab Premier Bank and Charles Schwab Trust Bank. It is managed as an integrated program under the supervision of the Federal Reserve Bank of the United States. It has been working well and is a selling point. It is similar to what Merrill Lynch and places like that have. It does not go beyond the three Schwab banks, and the amount in each institution is disclosed to account holders on their statements.

SENATOR NEAL:
I understand what you are trying to do, but I do not understand how, if you are removed from being the custodian and the fiduciary relationship, you can continue to protect your clients. The whole purpose of the fiduciary relationship and being a custodian is the protection and safekeeping of the accounts entrusted to you. Subsections 6 and 7 of section 2 give you the ability to spread the money, although integrated within Charles Schwab. What happens to protection and safekeeping if something happens?

I can just imagine one of my constituents, perhaps an 80-year-old woman, who has an account with Schwab. What are her rights in this context, if we were to pass this bill? I imagine her being told, "Well, we're no longer the custodian of your money, and we don't have a fiduciary relationship with you anymore. I know we used to, but the State law changed." What is she facing? What are her rights if something wrong happens? Who then does she go after or talk to?

MR. WOLZ:
With these types of accounts, your constituent has a number of avenues. First, these accounts are subject to strict IRS requirements. If there is a violation, she can go to the IRS. She can go to the FID, or in the case of the trust bank, the FDIC. She can also complain to the Federal Reserve, who is our credential regulator and is responsible for the safety and soundness of all the component parts of Schwab.

A financial services holding company like Schwab really is sort of an interesting animal. It is not like a standalone bank; it is an interwoven web of financial charters that are looked at together under the Federal Reserve requirement. We have a number of institutions to backstop anything that would happen with these trust companies, and we are required to do that by the federal government.

SENATOR HARDY:
If I were to explain this, I would say that a bank has more stability and this has less stability but more options to invest than a bank would have since the bank has a fiduciary responsibility. Therefore, there may be increased risk with this versus a savings bank. Is that a fair characterization?

MR. WOLZ:
No, not really. We are asking to get in Nevada what we would get if we were doing this through a national bank charter or a charter of any other state. Those venues would not treat a custodian of an IRA program as a fiduciary. The IRS has forms for prototype IRA documents. There are separate forms for trustees and custodians. With an IRA account, these are merely holding assets and dealing with those assets as directed by the account holder.

SENATOR HARDY:
What I hear you saying is a bank holds onto the asset, and an IRA account invests the asset so there is a potential to earn more, and that would be the motivation for somebody to go into this. If there is a potential to earn more, is there a potential to lose more?

MR. WOLZ:
The bank is not directing the investment. We are holding investment assets in a custodial account for the benefit of the clients, and the clients are directing how they want those assets invested. Clients can engage in discretionary investment outside of the trust company or the trust bank, as the case may be, but we are not assuming any investment responsibility with respect to those accounts. Any investment of financial assets has a risk of loss. But we are not talking about the difference between investing in equities or keeping money in a bank deposit. These are investment accounts. People invest in a wide range of broker-eligible securities in their IRA accounts, and as a general matter they assume that risk.

SENATOR NEAL:
Section 2, subsection 10, paragraph (d), subparagraph (10) says the phrase "fiduciary capacity" includes "investment advisor." Are investment advisors excluded or included in the fiduciary role? When I looked at paragraph (c), I was not clear if this was the category of entities that would no longer have a fiduciary role or entities that do have a fiduciary role.

MR. WOLZ:
Everything listed there is a fiduciary, yes.

SENATOR NEAL:
Section 2, subsection 10, paragraph (f) defines "investment discretion." Since you are taking yourself out as a custodian and out of the fiduciary relationship, what notice is required with this new relationship of not being a custodian?

Investment discretion means you could have "shared authority, whether or not that authority is exercised, to determine what securities or other assets to purchase or sell on behalf of the account."

MR. WOLZ:
A custodial non-fiduciary relationship is entirely determined by the terms of the agreement between the customer and the bank. A fiduciary relationship is defined by the exercise of discretion. A custodial relationship is hardwired by contractual language. We are not acting at all other than at the direction of the account holder. That is the distinction we are missing. If we are not required to invest, we are not a fiduciary because we are not assuming that responsibility. We would not be in connection with these accounts.

SENATOR NEAL:
If we pass this bill, you would not be a custodian anymore, is that right?

MR. WOLZ:
No. We are custodians, and we would be still if A.B. 290 is passed. We are not involved in investment of the assets, and we are not engaging in any discretionary activity with respect to those accounts. So we are not a fiduciary under that definition, which is the common law definition in most jurisdictions.

SENATOR NEAL:
I want to be able to explain this. I picture voting for this, then going home and telling my aunt, "You know that IRA you've had since you were a nun in 1956? We just passed a bill so the bank no longer has a fiduciary responsibility for your IRA. And now they have investment discretion to spread your money around." What notice will she receive to understand that her relationship with Charles Schwab Bank has now been adjusted? What rights and obligations does she have?

MR. WOLZ:
There will be no change in the relationship. The only change is the party sponsoring the IRA program is holding the assets. These accounts that would be moving over are self-directed by the clients. The move will be transparent, telling them the sponsor of the program has changed from Charles Schwab and Company, a registered broker-dealer under the jurisdiction of the Securities and Exchange Commission, to Charles Schwab Trust Bank and/or Charles Schwab Trust Company, a Nevada banking or trust organization.

We are not skating on any responsibilities as a result of this change. We are merely taking out one party that is acting as a custodian now and substituting another one, in this case a Nevada banking entity.

MR. ALONSO:
Just to elaborate on that, the key here is that the only change is the ability for Charles Schwab to park those funds in Nevada when they are self-directed. In other words, I have the ability to direct where I want to spend my money without a broker. That is the only difference in this bill. It would allow Schwab to treat that money as if it were an account, almost analogous to a savings account, and then the client directs where the money goes. If it is directed by a broker-dealer, the broker-dealer is a fiduciary.

This bill does nothing different from almost every other jurisdiction in the U.S. Nevada's laws are just unclear. We went over this with the bank regulators to make sure the consumer was protected and we were doing nothing out of the ordinary that was of concern to anyone. The regulators went through the language with us to make sure that what we were doing was essentially codifying either current regulations or federal law, which is in existence to protect the public.

SENATOR NEAL:
I am going to have dig into it because on the surface it gives me cause for concern. I see a change in fiduciary, and I need to go into the legal context of what that means. There are legal connections and relationships to that word. I would think it would be better to keep them. If we are not going to keep them, I want to understand what I lose if I do not have that fiduciary relationship because it gives me either legal rights or an opportunity to challenge in some way. That is why I wanted to dig into it.

MR. ALONSO:
If you did not dig, I would think something was wrong. You will get all the answers you need as we go through this. The regulators were comfortable with this language. Once you do dig, you will understand that we are doing nothing out of the ordinary here. We are simply allowing entities like Schwab to move those accounts into Nevada, which is economic development for the State. From a consumer standpoint, it will change nothing. If you have a broker-dealer helping you, there is a fiduciary responsibility there.

SENATOR PICKARD:
I am going to join my colleague in digging. I think we will probably end up with quite a hole.

I want to reconcile a couple of statements. When we are talking about investment discretion and spreading this over multiple entities, it does not sound to me like the investment advisor or the person who is self-directing investments is choosing how that money is spread. It sounds like this is an administrative desire to maximize the amount of FDIC insurance it can get. The administrators are the ones moving money from one institution to another, and those banks are then driven by their own investments. They do not just drop the cash in a bucket; they move it out into the marketplace.

It sounds to me like Schwab would then be the one investing that money. They would be spreading it out over their different operations. They are engaging in investment discretion as to where those funds go. If we exclude them from fiduciary responsibilities and allow them to decide where that money is going to be spread, they are indeed engaging in investment discretion. Can you explain where I am missing the boat on this?

MR. WOLZ:
There is some confusion on that. Our sweep tower program is available in connection with accounts. Whoever has investment authority over that account can leave money in cash and have it participate in that sweep tower, or they can invest it in other assets. That decision is made by the account holder, not by Schwab. I do not believe there is any common-law fiduciary obligation that attaches to the bank investment process or how bank assets placed in a bank for deposit purposes are invested.

CHAIR SPEARMAN:
Years ago, in the military, you had an opportunity to save money with every paycheck. It was invested in a couple of places. One of the places was the ING Group, which did a spinoff of Voya Financial Company, a financial retirement company. I still get emails from people who are trying to figure out three things: Do I still have money? How much is in there? Is my account for ING the same for Voya? As far as I can tell, no one ever notified those clients about the change until after it happened. There were a lot of people who said, "I had no idea this was coming. What am I supposed to do now?" It may be that

the accounts are being managed exactly as they were before, but the account holders are pretty confused.

If this bill passes, we need something in place that would inform the account holders of the fact in plain language, as if you were talking to a kindergarten class: "This is what just happened, and this is what it means." I want to make sure everybody can understand it as clearly as you all do and I do not get the kind of questions I get from people who used to be with ING.

Can you do something like that to allay the fears of people who are not sophisticated in the financial ways of the world?

MR. WOLZ:
We absolutely would do that. One of the things we pride ourselves on at Schwab is being transparent to our clients and educating them. With a change of this sort, we would be required under the IRS requirements to modify the exiting agreements to appoint the new custodian and let them know there is a new custodian. Financial transactions are confusing sometimes, so we use a question-and-answer format to keep it as clear and transparent as possible. I would expect we would do the same thing here.

I would also note that if we were to make this move, it would be done in conjunction with and in cooperation with the FID. It would have an opportunity to look at those notices before we made the move, if we chose to go that direction.

CHAIR SPEARMAN:
Mr. Keane, is there a way to put something like that into the bill, or is that just a bridge too far? I am thinking of a provision regarding the procedures that have to take place so ordinary account holders would understand what just happened, what is different, and how they move forward.

WIL KEANE (Counsel):
We certainly could put a transitory provision into the bill that would address any issues that come up when the bill is enacted and any changes that might be occurring to anyone's account.

Mr. Wolz can correct me if I am wrong, but my understanding is that the bill is simply trying to make Nevada law clear that Schwab will be able to operate one

of its affiliates as a custodian of IRAs. That is why they are being split off in section 1 of the bill. Currently, Nevada law is not clear as to whether Schwab can operate purely as a custodian, not as an administrator. Schwab wants to be able to use its own entity as custodian. People who are currently operating with Schwab accounts where Schwab is the administrator will not see any difference because Schwab will continue to be the administrator. It is just that Schwab would move the actual assets from an outside custodian to an in-house custodian, which would be a separate entity. In some senses, it would be part of the Schwab web.

We can certainly insert a transfer provision requiring that any impact on an account must be fully disclosed to clients. I do not think that would cause a problem for anyone, but I do not want to speak for Mr. Wolz.

MR. WOLZ:
That is accurate.

I want to emphasize that we do not see a material impact to these accounts at all. If you look at the *Internal Revenue Code*, the IRS believes that if these accounts are custodied at a bank or trust company, nothing more is needed. If they are custodied at a broker-dealer, a higher level of diligence is needed on those accounts. From an IRS perspective, we are moving to a more acceptable, more safe and sound environment because we are moving accounts away from a broker-dealer.

CHAIR SPEARMAN:
Here is why I ask the question. We have now spent 53 minutes trying to explain this. You say it is self-explanatory, but for those of us who are not attorneys and do not operate in that field, it could be a little confusing. Coming out of a pandemic, a lot of people do not have the same kind of financial resources they used to have. The liquidity is not there. If something happens that they do not understand, it could cause panic.

For that reason, I would like to see something in the bill that basically explains it in clear language. If this bill passes, everyone who has an account at Schwab should be able to understand what is going on and what it means.

SENATOR HARDY:
As I understand it, the effect of A.B. 290 is not limited to Schwab. It would also apply to other similarly situated financial institutions. Is that correct?

MR. ALONSO:
Yes, if they were chartered in Nevada. That is the benefit to the State; the hope is that we will see more of these banks. As Mr. Wolz indicated, we are talking about banks, which are highly regulated. This is probably the safest situation an investor could be in. Yes, we want more of these banks in Nevada. We are hoping this allows for that.

CHAIR SPEARMAN:
Mr. Alonso, please get with Mr. Keane and see if you can work out some language to make it clear that it is not just Schwab, it is anyone.

MR. ALONSO:
I will do that.

CONNOR CAIN (Nevada Bankers Association):
We are in support of A.B. 290. In response to Senator Hardy's question about other state chartered savings banks, I believe Charles Schwab is the only one currently in Nevada. We do not have any other state chartered savings bank and would like to see more. We hope that this bill will help us get more.

TERRY J. REYNOLDS (Director, Department of Business and Industry):
We support the changes to NRS 673 in this bill. The Nevada savings bank charter would be strengthened by the proposed change, which is consistent with national banking laws. In addition, the change will make Nevada savings bank charters more competitive, as Mr. Cain said. That is an important issue for Nevada, since we lost about 50 percent of our banks during the recession and are looking at trying to be more competitive to get more financial institutions into the State.

I also want to point out that Charles Schwab Bank is a good community partner. It has invested a tremendous amount of funds into the Community Reinvestment Act (CRA) nationally, over $2 billion, and it has also invested in Nevada in its tenure here. We are very pleased to have it as a financial institution in our State and think these changes make good sense for Nevada.

SANDY O'LAUGHLIN (Commissioner, Division of Financial Institutions, Department of Business and Industry):
I am here today to testify in support of A.B. 290. This bill makes changes to NRS 673, Savings Banks, and NRS 669, Trust Companies, allowing employer-sponsored IRA investments. The bill's requestor worked with FID prior to submitting the bill. At this time, we do not anticipate any amendments.

CHAIR SPEARMAN:
We have a bill making its way through the Legislature, Senate Bill (S.B.) 145, requiring banks to do some things with respect to the CRA. Mr. Reynolds said Schwab has been a good community partner. Are they subject to CRA?

SENATE BILL 145 (1st Reprint): Revises provisions relating to financial institutions. (BDR 55-481)

MR. WOLZ:
No, Charles Schwab Trust Bank is not subject to CRA requirements. It has received a special purpose bank exemption from the FDIC because we do not generally engage in consumer activities. Our accounts are largely institutional, custody and retirement accounts for corporate entities.

That being said, Schwab does have some investments in the Nevada community. Our local employees are involved. Schwab does a lot of volunteering work and a lot of community development work, and our people are involved in that on a regular and ongoing basis.

CHAIR SPEARMAN:
I will close the hearing on A.B. 290 and open the hearing on A.B. 366.

ASSEMBLY BILL 366: Revises provisions governing mental health records. (BDR 54-456)

ASSEMBLYWOMAN JILL TOLLES (Assembly District No. 25):
I am here to present A.B. 366, which exempts recordings of certain training activities from retention, maintenance and disclosure of healthcare records by mental health professionals.

The use of recordings to advise, mentor, supervise and train new mental health practitioners is a widely accepted practice. Trainees may record audio or video

sessions with clients for their clinical supervisors to review, both prior to meeting with supervisors and jointly in supervised sessions. The use of recordings in sessions like these can benefit the clients as well as the trainees. However, for those clients who consent to audio or video recording, it is important that the destruction of the physical artifacts of those recordings take place at the earliest time appropriate.

Destroying these artifacts ensures the audio or video recordings are not included in a patient's medical record and only the written record of the visit remains, in accordance with State law. Specifically, NRS 629.106 requires all practitioners of healing arts, including the professionals covered by this bill, to retain healthcare records, as defined by NRS 629.021. This bill excludes recordings used for training purposes from the definition of medical records in order to allow for their destruction as soon as appropriate. In essence, this helps protect patient privacy.

WHITNEY OWENS, PSY.D. (President, Board of Psychological Examiners):
Audio and videotaping psychotherapy sessions has been a standard practice for training psychologists and other mental health professions for many decades. The purpose of this bill is to clean up discrepancies in NRS that conflict with the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct and established standards of practice.

Our desire to clean up the language in NRS is to ensure our current way of training future generations of mental health professionals will not be impaired. If they knew the audio or video tapes of their therapy sessions would become part of their record, most patients would not be willing to have their sessions taped due to concerns about confidentiality and privacy. In addition, students would not receive the same level of supervision and training that is afforded when supervisors have access to audio or video tapes of psychotherapy sessions. Not making and using these recordings has negative implications for workforce development in Nevada.

Lastly, the potential for harm to patients is considerable. Having their sessions recorded and kept as part of the clinical record is damaging for the patient if accessed and reviewed outside of the context of the whole therapeutic relationship.

The Board of Psychological Examiners has reached out to other mental health boards impacted by this proposal. Two boards support the bill, and the other is neutral.

This discrepancy in our standards of practice and the language of NRS came to the attention of the Board through a psychologist working at the University of Nevada, Reno (UNR), after university attorneys advised the psychologist would need to keep audio and video recordings based on the current language of NRS. As psychologists and other mental health professionals in Nevada do not keep training audio or video tapes, this caused great concern to the Board. We obtained a decision from the Office of the Attorney General, who concurred with the UNR attorney.

This bill is essentially clean-up language that allows us to train and educate to a standard that is acceptable and practiced in most other U.S. jurisdictions.

SENATOR PICKARD:
I view these sorts of bills through the lens of a litigator, where it is customary for me to want to get evidence in a case. I understand destroying these records if they are used purely for purposes of training. However, I am also aware that there are practitioners who record their sessions, often through video means, because it allows them to take better notes and more fully understand the colloquy between the patient and the therapist. I assume those would remain as part of their records, that this bill only affects records made for training purposes. Is that correct?

DR. OWENS:
I do not think recording therapy sessions is standard practice for most mental health professionals unless we are doing some kind of training. There might be licensed professionals who would record their sessions for the context of receiving consultation or some other sort of peer supervision, but the standard of practice is to destroy them and not keep them as part of the record. It is a way of ensuring the best treatment for the patient and ensuring that the patient gets the best treatment they can without having it as a part of their clinical record that could be used against them or could later be accessed by family.

As I was sharing this with a colleague, one of the things the person mentioned was, "Oh my gosh, I wouldn't want to have access to my father's records after he dies. What if he talked about hating being a parent?" As mental health

professionals, we document the session, we document the methods we are using and the response from the patient, but we do not tend to document exact statements from the patient for that reason. Most people in therapy would not come to therapy if they knew their records could be used against them in such an egregious way.

ASSEMBLYWOMAN TOLLES:
I would like to point out that NRS 629.021, which outlines the practices, defines "health care records" as:

> [A]ny reports, notes, orders, photographs, X-rays or other recorded data or information whether maintained in written, electronic or other form which is received or produced by a provider of health care, or any person employed by a provider of health care, and contains information relating to the medical history, examination, diagnosis or treatment of the patient.

This definition remains in statute and will not be changed by this bill. All of the appropriate regulations and laws regarding keeping and maintaining those records are still protected in statute. The language we are adding is that the term "health care records" does not include recordings used for training.

SENATOR PICKARD:
We seem to be blurring the lines here. If a therapy session was recorded initially for the purpose of maintaining a more robust understanding by the therapist, it could later be used for training. There are also confidentiality requirements. It is a violation of ethical rules for a practitioner to make any records available to anyone without the informed written consent of the patient. Those protections would remain, and I would presume that if the patient were to die in the middle of the therapy, those records would be destroyed and not available to families. I also recognize this is different from a forensic evaluation, where the purpose of the evaluation is to generate evidence. That is a separate beast.

But my concern is this. We need to be clear on the record that this only applies to recordings that are made solely for the purposes of training. Otherwise, recordings should be kept as part of the record even if they are subsequently used in some training capacity. I want to make sure those records are retained, particularly when we get into malpractice and other kinds of issues. We need

those records, and the video record is often much better than the written record.

ASSEMBLYWOMAN TOLLES:
I appreciate your concern. With regard to the blurring of lines, I direct your attention to section 2, subsection 1, paragraph (b) of the bill, which requires the patient to provide informed consent to the use of the recording in the training activity. That is the limitation of this provision and this proposed language.

SENATOR PICKARD:
My concern is the other side of that coin, where a recording was not originally intended to be used for training, even though the informed consent might be changed to allow it to be used in training subsequently. If it is a recording of a therapy session with the purpose of aiding the therapy, that is an important distinction we might want to make.

SENATOR HARDY:
If a person dies, does the family have access to the therapy records?

DR. OWENS:
It is possible to access records posthumously. That is outside the scope of this bill, though it does show the rationale for not keeping these recordings in the clinical record.

SENATOR HARDY:
I have a number of concerns. As a physician, I have a statutory obligation to retain patient records. I am looking through the list of groups you contacted, and I do not see psychiatrists here. Did you leave them out on purpose? Obviously, the psychiatrist is under a different board, but that board will have requirements for retention of records and who has access to those records.

Does this bill require people to go back through their archives and destroy old training recordings?

Is this training done for the benefit of the patient? If so, would you not want to keep the recording to show the patient's progress?

DR. OWENS:
Psychiatrists are covered by the Board of Medical Examiners. We contacted that Board regarding this bill, and there was no response. I can imagine situations in which psychiatrists might want to retain recordings.

With regard to archived records, the standard of practice for training records is that the trainees make the recordings. They might listen to them for their own purposes, to critique their own work, and they would provide them to their supervisors. After that, the recordings are immediately destroyed.

SENATOR HARDY:
This bill, then, does not give you an obligation or permission to destroy records that have been used for training in the past.

DR. OWENS:
No. This is the standard of practice, and until the NRS section was brought to our attention, training records were consistently destroyed as soon as the supervision had taken place. If any previous recordings were kept and not destroyed, this bill would not give permission to destroy them.

SENATOR HARDY:
Does this bill allow you to make recordings to train the patient?

DR. OWENS:
The training recordings referred to in this bill are used solely to train our students—postdoctoral students, interns, psychological trainees and social work interns. The student records his or her work in a therapy session, then reviews it with a supervisor to critique his or her work with the patient. This bill would allow us to destroy those recordings rather than retaining them.

In terms of training our patients, we do not typically keep any recordings of that. In certain therapies, patients may record themselves outside of session engaging in skills training or things like that, but those recordings are owned by the patients and never go into their clinical records. It is documented in the clinical notes that we are assigning the patient homework or something similar, but that has never been part of the clinical record.

SENATOR NEAL:
I have a number of questions, including the length of time the recordings would be used, the number of times they would be used and the number of persons who would have access to the recordings during the training.

I would also like to know what happens if a therapy session includes a disclosure related to criminal activity, anything that may trigger some legal liability. What happens if a patient discloses to a marriage and family therapist something related to a divorce?

DR. OWENS:
In the case of who has access to training tapes, it is all detailed in the informed consent form. When patients come in for therapy, they know exactly who will have access to that record. If the student therapist shares it with an advisor or supervisor, it is detailed in that informed consent. If it is shared with a consultation team, it is detailed in the informed consent. The patient knows exactly who has access, who will be listening to the tape.

Most informed consents say, "Upon conclusion of the supervision, the audio tape is destroyed immediately." Depending on the frequency of supervision, which is typically weekly, the tape might stay around for a week or so, perhaps up to two weeks. Typically, they are destroyed more quickly than that.

In terms of the tape being accessed for a family therapy situation or a court case, the informed consent states that the tape will be destroyed after the supervision session. We have a contract with the patient that the tape is not part of the record. From the outset, patients are informed that they will not be able to access those recordings themselves or for legal proceedings. It is meant for training purposes only. Any other parts of the therapy are documented in the clinical note, and that record is kept per clinical note rules in NRS.

SENATOR SCHEIBLE:
You said this came to your attention because psychologists at UNR were creating tapes for training purposes and destroying them per their normal practice. They were told by counsel that they had to retain them, and the Attorney General agreed. I assume they have been retaining them since. What is going to happen to that small group of recordings?

DR. OWENS:
They actually stopped making recordings as soon as they were informed of this. They have not been making or using audio or video tapes for training purposes since that time. That is our concern. If we have to keep audio and video recordings, we will not use them for training purposes. We will have to either sit in with our trainees or observe them through a two-way mirror. Either would drastically reduce the mental health workforce in Nevada. Instead of having two providers able to provide services at the same time, we would only have one because we would have to be in the room or behind a two-way mirror. That is what we did before audio or video recordings were possible. We would not make those recordings, so there would be no recordings to be kept.

SENATOR SCHEIBLE:
Now I understand. Thank you.

I have a follow-up question that may be outside the scope of this bill. Could you speak about how the practice has changed with the growth of new technology? I imagine that if I were a marriage and family therapist, I would record that session on my smart phone. I would probably go home and listen to it on my computer, then delete it from both places. Do we need to address specifically the issue of cloud storage or duplication of these recordings?

DR. OWENS:
All mental health professionals are bound by the Health Insurance Portability and Accountability Act (HIPAA). Any time we make any type of electronic record of anything, we are required to have two-factor authentication, making sure we have two blocks before someone could access the information. A smart phone would not meet that metric. We are not able to use our smart phones to record sessions. Some standards of practice are to use an old-fashioned audio recorder; sometimes we use a VHS recorder. We are working with information technology companies to make sure we can meet HIPAA's standards.

SENATOR SETTELMEYER:
Before I vote on the bill, I need to know about the accessibility of this information and its admissibility in a legal setting. That is where I start to get concerned. Under what circumstances does a family member have the ability to access these records? Is it only if the patient dies and the family is trying to find out why? Is the record released in a situation where the patient is committed or maybe needs to be? I am starting to worry.

DR. OWENS:
I apologize; I should not have used that example.

The reality is that if A.B. 366 does not pass, our mental health professionals will simply not use audio or video recordings for training purposes, because we do not want them to be kept as a part of the clinical record. They were never meant to be part of the clinical record. That is not the way patients understand it. In our informed consent, we specifically state that the recording is for training purposes only to make sure patients get the best care possible; it ensures patients have not only the student's eyes on them, but the licensed professional's eyes too. If this bill does not pass, our whole training community will have to find a new way to provide high quality supervision of the next generation of mental health professionals. The short-term solution will be that we have to do in vivo supervision in person, which will drastically reduce the workforce.

Using and destroying these recordings has been the standard of practice. We have stopped using audio or video recordings to do our training. If this bill does not pass, there will be no access to these records because they will not exist.

SENATOR LANGE:
I understand the informed consent, but once a recording exists it can go anywhere. Do those recordings stay in a particular place, or do they leave the building? Do people take them home? It is so easy to make copies. When we start recording, it opens a whole different can of worms. I am trying to figure out how we can control and maintain the fact that these are only for training purposes, to be used for that time and then disposed of.

DR. OWENS:
We have the same concerns as you. We do not want those records to go anywhere they are not supposed to go.

Regarding storage, we are bound by HIPAA. We have to create an assurance that those records are kept under lock and key and only accessed by people who have the right to access them. Each practice, each company, is mandated to have a policy and procedure as to storage of audio and video recordings. If they do not follow that policy and procedure and the records get out, our Board would hear the complaints about that. The Board is in charge of making sure

psychologists and other mental health professionals follow the rules and regulations.

We do not want those records to get out. That is why we have rules in place to ensure those records are kept in a confidential, secure way until they are destroyed.

CHAIR SPEARMAN:
I had flashbacks of doing my doctoral research. The Institutional Review Board (IRB) looks at your study to make sure the people who participated are protected. I had to send out a consent form to everyone I interviewed to tell them what I was researching and how long the recordings would be kept. The IRB required me to keep those records for five years in case anyone had a question about my research or the validity of my conclusions. They were to be destroyed at the end of those five years. Is there anything like an IRB for the mental health professions?

We had to do the same thing when I was in seminary. We had training sessions where we would talk about some of the things we had encountered. If it did not happen to me but it happened to one of my student colleagues, I would learn about that and also learn how to address the issue if it came up.

Is there anything we can glean from the IRB's process? When you are doing research with human subjects, the rules are quite strict. You have to put down exactly what you are doing; you cannot substitute an "if" for an "and." Is there anything we can learn from that process that might be helpful in understanding this legislation?

DR. OWENS:
The difference is research versus treatment. When we are training our students, we are not engaging in the practice of research. We are not conducting research; we are using previous research to give our patients the best treatment possible.

The recordings are made so those of us who are licensed and experienced in the field can provide feedback to our students so they can improve their skills and gain from our experience as they build their own.

We do not use the recordings after the review of the one session. We would not keep those records because patients would not sign up to be recorded if they knew those records were kept. Many patients already refuse treatment with students because of being recorded. They do not want those recordings in their records. That is the reason recording therapy sessions is not a part of clinical practice. People really want confidentiality and privacy.

People are already scared to come into therapy. We do not want to offer another barrier that makes them even more scared to come into therapy. If you knew every word you said, including vulnerable scary horrible things about yourself, could come back and be used against you later, why would you ever go to therapy? You just would not.

We do not want to create another barrier for our trainees to keep them from getting the best experience and the best supervision they can. We do not want to create a burden on supervisors by forcing them to be in every session with their students at every therapy session. At that point, supervision becomes a burden and not a joy. Our ability to train future generations would decrease tremendously. Supervisors would stop supervising because it would not be very cost-effective for them. They would not be able to support the cost of supervision. We would not be able to have a pipeline of supervisees in our workforce.

The whole purpose of this bill is to continue to do what we have already been doing to ensure that we give the best training to the people who will be going out there to provide good mental health, and doing it in a way that ensures confidentiality and privacy for people who seek therapy.

CHAIR SPEARMAN:
I am talking about the process. If I am understanding the questions being asked, the concern is about the possibility of the recording somehow getting released. When I was training to be a trauma chaplain, we took notes during sessions with a stubby little pencil and a pad of paper. After, we would review our notes and our supervisors and colleagues would critique us. After our stint at the hospital was up, we had to destroy everything. The records had a start and an identifiable end. Do you do anything like that?

DR. OWENS:
I want to make sure I understand the question. You are asking if there is a detailed outline in the informed consent about how long these recordings are kept. Is that your question?

CHAIR SPEARMAN:
Yes. I may have misunderstood, but the questions I am hearing from my colleagues on the Committee seem to be about these recordings getting into the wrong hands. The patients sign the informed consent. Does that informed consent include a definite date or time when recordings will be destroyed? Everyone needs to be clear on when that will happen.

DR. OWENS:
Our informed consent form specifically states that the patient agrees to be recorded, that the session with the student will recorded and that the recording will be destroyed after the student reviews the recording with the supervisor. There is no specific timeline, like one week or two weeks. One reason for that is to create a bit of latitude in case the supervision does not occur immediately. We do not have a specific timeline, but the recording is destroyed right after the supervision occurs.

The training recording is not part of the clinical record, which has its own retention rules. Many mental health professionals have switched to an electronic health record. For a recording to be kept as part of that record, it would have to be uploaded into the electronic health record, which is not standard practice and does not happen. Typically, it is made using a separate recorder, and the actual recording is kept in a separate place under lock and key per HIPAA rules.

As long as practitioners follow HIPAA confidentiality and privacy rules, there is no risk that it would be released within the clinical record. The recording never becomes part of the clinical record. It is kept separately.

If the patient were to pass away, the same practice would happen. The supervisor might have a final supervision about that patient with the supervisee, and then the recording would be destroyed.

CHAIR SPEARMAN:
Is there language in the bill that captures that?

ASSEMBLYWOMAN TOLLES:
If your question is whether the bill includes a specific length of time before recordings will be destroyed, no, that is not included in here. It is my understanding that it could be addressed through regulation, which might be a more appropriate place for that to be addressed. That way, each individual practice could determine the guidelines for the security of the recordings as well as the timeline, as appropriate for each professional setting.

CHAIR SPEARMAN:
That is what I was getting at. We need to make sure there is a finite time when records will be destroyed, and everyone knows when that is. I have no problem if we put in statute that the Board will set this up via regulations in the *Nevada Administrative Code* (NAC). We just need to tighten the language up a little bit. Are you amenable to that?

ASSEMBLYWOMAN TOLLES:
Absolutely. I appreciate all the questions and the concern for the patients. That is what this bill is about: making sure we are protecting patients. I commend the members of this Committee for having that first and foremost in their minds. That will strengthen the bill and make it better. I am certainly amendable to taking a look at how we could add any clarifying language.

SENATOR PICKARD:
When I first read this bill, I did not realize that the training was taking place between supervisor and supervisee. I was thinking in terms of a classroom situation—recording a therapy session for the purpose of showing it to students in a classroom. This bill does not distinguish between those two uses and should.

I am intrigued by the discussion about the informed consent form. It sounds like a standard form, but Dr. Owens noted that there may be different forms used by different people. Does the current regulatory structure require a specific form with certain content? How much control do we have? Are we sure that every informed consent form actually covers the things we have discussed today, or is that just an assumption that a good practitioner would do so?

DR. OWENS:
It is in our ethics code, but no, there is no one standard informed consent form. It is the same when you go to your physician's office; your physicians have

their own stylized way of doing their own informed consent. However, there are necessary parts that are included in the informed consent. I imagine that is in statute somewhere, and it is also a part of our ethics code. If our informed consent is missing something, our Board hears those complaints and those psychologists are disciplined for that. But they do have to be in our informed consent.

SENATOR PICKARD:
That is comforting. That would be critical to make sure every practitioner is actually getting the same information to the patient, and that it is truly informed consent. I will pursue my remaining questions offline.

ERICA VALDRIZ (Vegas Chamber):
We are in support of A.B. 366. We believe this bill provides support to mental health professionals, especially during training. We believe this bill will help improve the system of behavioral health of our community.

ASSEMBLYWOMAN TOLLES:
We will work with the Board and Committee members to make sure you are comfortable with the language. I believe this could help with patient privacy and security. I share the concerns of the Board that if this bill does not pass, it will have a negative impact on our ability to provide services in mental health settings, at a time when we need it most.

I want to point out one last thing that was brought to my attention. Currently, in NAC 641.224, confidential information including written informed consent, recordings are included in that. Recordings have been done since recordings have been possible, from my understanding. To the Board's knowledge, there have been no privacy breaches thus far. The professionals who make these recordings protect them with their lives, and we want to be able to give them the opportunity to continue in a way that would make this body comfortable and accomplish our goal.

CHAIR SPEARMAN:
I will close the hearing on A.B. 366. Is there any public comment? Hearing none, we are adjourned at 11:04 a.m.

RESPECTFULLY SUBMITTED:

Lynn Hendricks,
Committee Secretary

APPROVED BY:

Senator Pat Spearman, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit Letter**	**Begins on Page**	**Witness / Entity**	**Description**
	A	1		Agenda