MINUTES

ASSEMBLY
GOVERNMENT AFFAIRS COMMITTEE
February 10, 1977
8:00am

MEMBERS PRESENT: Chairman Murphy
Mr. May
Mr. Craddock
Mr. Jeffrey
Mr. Mann
Mr. Moody
Mr. Robinson
Mrs. Westall
Mr. Rhoads

GUESTS PRESENT: Tom Moore, Clark County
Bruce Spaulding, City of Las Vegas
Larry Struve, Washoe County District Attorney's office
Bob Broadbent, Clark County Commissioner
Thalia Dondero, Clark County Commissioner
Sam Bowler, Clark County Commissioner
Ron Lurie, Las Vegas City Commissioner
Paul Christensen, Las Vegas City Commissioner
Assemblyman Jim Banner, District 11
Richard Bunker, City of Las Vegas
Stephanie Barrett, American Civil Liberties Union

The meeting was called to order by Chairman Murphy at 8:07am for the purpose of discussing Assembly Concurrent Resolution 9 and Assembly Bill 17.

ASSEMBLY CONCURRENT RESOLUTION 9

Mr. Larry Struve, Chief Civil Deputy District Attorney for Washoe County, told the committee that he was only partially in support of the ACR because he felt the matter was too serious to simply make a suggestion to the local governments. He submitted written testimony in the form of a letter to Chairman Murphy, attached as Exhibit 1, he submitted a letter from David M. Ebner to Mr. Larry R. Hicks regarding insurance coverage for Washoe County, attached as Exhibit 2 and he also submitted a list of specific questions to be addressed by Legislative Commission, attached as Exhibit 3.

Mr. Robinson asked Mr. Struve what the State could do about problems on the local levels. He was told there were a few possibilities, one of which is a pooling of risks under one policy to lower the premiums and give uniform coverage.

Mr. May then asked Mr. Struve what the role of sovereign immunity in the State of Nevada. He was told that under NRS41.031 the State of Nevada has waived the sovereign immunity for itself and for the local units of government for the state and in a succeeding statute there is a limit of $25,000 placed on judgements that can be entered against the political subdivision. It is the concensus of virtually all local government attorneys he had talked to that that limitation would not apply in judgements against public officers and employees who are found to be personally libel to a person who files a lawsuit. And that is one of the reasons that you have large insurance packages being purchased at the local government level. In 1975 the Legislature passed a statute that says that if any local officer or employee is named personally the political subdivision must be named as a party defendent and that subdivision must come to the defense of the officer or employee and unless the officer has engaged in malicious misconduct or does not cooperate in the defense of his case that that officer or employee when he is adjudged libel for damages has the right of reimbursement against the political subdivision. That has also been a strong inducement for local governments to get liability insurance.

Mr. May suggested that the committee consider asking for a study to be done by the Research Division of the Legislative Counsel Bureau instead of waiting two years for the Legislative Commission to act.

Chairman Murphy appointed Mr. Robinson and Mr. Jeffrey to contact the Research Division to ask them to prepare a study to be presented back to the committee during the session.

Mr. Robert Broadbent and Mr. Tom Moore, both of Las Vegas, commented their support of the concept.

Mr. Bob Warren, Nevada League of Cities, referred to the articles presented to the committee by Mr. Struve, and noted that this is a problem that is going from a 100-300% increases in insurance in California and in some instances 600% increases and in other instances that insurance is no longer available therefore communities are forced to go without insurance. This has lead to a setting up a quasi public insurance agency with a trust fund for municipalities.

Assemblyman Craddock commented that during the interim committee hearings some people testified that one of the reasons they refused to take a public office is that they did not want to jeapardize their holdings in a liability suit.

ASSEMBLY BILL 17

Assemblyman Demers spoke to the committee in support of the bill, his testimony and amendments that he proposed are attached herewith as Exhibit 4.

Assemblyman Banner told the committee that he supported the concept of the bill to have members from the city on the commission. He also commented that he supported the concept of a metropolitan police department.

Mr. Ron Lurie, City Commissioner of Las Vegas, explained his support of the measure and said that crime has no boundaries and that the City of Las Vegas should have representation on the commission.

Mr. Paul Christensen, City Commissioner from Las Vegas, told of his support of the bill with the amendments proposed by Mr. Demers.

Assemblyman May asked if the funding formula for the police force was still the one set by the Department of Taxation. He was told that it was still in effect.

Thalia Dondero, Las Vegas County Commissioner, then spoke in opposition to A. B. 17. Her comments are attached as Exhibit 5.

Mr. Robert Broadbent, Las Vegas County Commissioner, also spoke in opposition to the bill. He said that even though the funding apportionment was set by the Nevada Tax Commission at 52½ - 47½ the county has exceeded its apportionment in the case of revenue sharing or something else. This year for example the 52½ - 47½ amount was increased by the city and the county by the amount of $662,000 of which half was city and half was county. In addition the county is in the process and has agreed to budget an additional 330,000 dollars needed to take care of the payroll increases that were given to the sheriff's department. The county requested participation from the city for this funding, but did not receive any. In addition to that there are additional revenue sharing grants that are requested for a police substation out in the Strip area. The Comptroller, Treasurer and Clerk who act ex officio on the commission are not paid for through the metro fund but the county pays for their salary out of the county budget. Besides that last year the grand jury told Clark County to build an additional detention center for 7 million bond obligation. He asked who should pay for that.

Mr. Broadbent continued to tell the committee that the County had a recent request from the Sheriff's Department for $570,000 of county money for a training facility for use for metro. Additionally the Sheriff, by Constitution and Statute, has certain county mandated responsibilities which need county input on the commission. Mr. Broadbent then strongly expressed his desire that the Sheriff not be on the police commission.

He then suggested that the committee add to the bill in section 2 on page 2 d) need benefit e) historical crime statistics f) additional requirements for police protection.

The County Commissioners suggest holding the bill in abeyance until the annexation question is answered.

Commissioners Broadbent and Dondero agreed that they would like to see the police commission abolished.

Assistant Sheriff Barton Jacup of the Metropolitan Police Dept. of Clark County told the committee that the Dept. feels that due to the current geographical boundaries, the population redistribution, and plain praticality the City deserves representation on the commission. He added that the Sheriff's membership on the Commission will resolve problems of the past. But one thing is clear to him, that the Sheriff's presence on the commission in the form of a vote will definitely be in the best interest of good, effective law enforcement. He suggested an additional amendment to amend NRS 280.220 by adding an additional sentance to subsection 2. "Revenues generated by the Department from all sources other than criminal or civil fines, shall be deposited in the Department Fund for use by the Department". For example, the sale of bicycle licenses, xerox copy cost and the sale of police reports, housing federal prisoners, work card fees, should be directed to the Department. He said that he realized that this bill is not an ideal solution to the problem, that what was really needed is an independent funding source, similar to the tax base created for the school districts.

Mr. Myron Levit, City Commissioner of Las Vegas, spoke in opposition to the bill and added his support to the creation of an independent funding source as mentioned by Mr. Jacup.

There being no further testimony, the meeting was adjourned at 9:43 by Chairman Murphy.

Respectfully submitted,

Kim Morgan

Kim Morgan, Committee Secretary

Murphy

Washoe County District Attorney

Washoe County Courthouse
South Virginia and Court Streets
P.O. Box 11130 • Reno, Nevada 89510

LARRY R. HICKS
District Attorney

Exhibit 1

February 9, 1977

Assemblyman Patrick Murphy
Chairman, Government Affairs Committee
Nevada State Assembly
Nevada Legislative Building
Carson City, Nevada

Re: Tort Liability Insurance of Nevada Governmental Entities

Dear Chairman Murphy:

The following is a summation of remarks prepared for your above mentioned Committee, when it considers proposed Assembly Concurrent Resolution 9 on February 10, 1977. It is the recommendation of the Washoe County District Attorney's Office, which has been authorized to make this recommendation on behalf of the Nevada District Attorney's Association, the Washoe County Commissioners, and the Clark County District Attorney's Office, that proposed Assembly Concurrent Resolution No. 9 be tabled and that the Assembly Government Affairs Committee request the Legislative Counsel to draft a new concurrent resolution, which would direct the Legislative Commission of the Nevada Legislature to conduct a study of the existing practices of the various governmental entities of the State of Nevada concerning tort liability insurance and liability risk management and to submit a report of its findings and recommendations to the 1979 Session of the Nevada Legislature. A form of such a proposed resolution is attached as Exhibit "A".

The need for an interim legislative study of the problem of local government tort liability insurance protection can be summarized as follows:

A. The number of claims and lawsuits filed against local governments and local public officers and employees continues to increase.

At the present time, there is no statewide data summarizing the number of claims and lawsuits that have been filed against the various governmental entities in this State. However, figures from Washoe County may be indicative of the increasing number of claims and lawsuits being filed against local governments. On February 29, 1976, there were eighty-five (85) suits and/or claims pending against Washoe County, seeking damages or some sort of monetary relief against the County. Most of these eighty-five (85) cases had been filed prior to January 1, 1975. Between March 1, 1976 and February 2, 1977 (an eleven month period) a total of seventy (70) new lawsuits and/or claims were filed against Washoe County. Thus, the number of cases filed against Washoe County seeking some sort of monetary relief during the eleven month period almost doubled. Moreover, of the eighty-five (85) cases outstanding on February 29, 1976, fifty (50) were being handled by the County's insurance carriers. Of the seventy (70) new cases filed between March 1, 1976 and February 2, 1977, only twenty-five (25) have been handled by Washoe County's insurance carriers. Accordingly, during the past two years, Washoe County has experienced a dramatic increase in the number of suits and claims being filed against the County and its officers and employees, coupled with an increasing number of claims and suits being handled by the District Attorney's Office. It is anticipated that this trend will continue, in view of developments nationally in which local governments and officials are being named more and more often in lawsuits. Such a trend would have special significance in Nevada because of NRS 41.0337, which obligates local governments (political subdivisions) in the State of Nevada to defend any tort action against one of its officers or employees.

B. The cost of available tort liability insurance for local governments is increasing very rapidly.

According to the 1975-76 Audit Report for Washoe County, the County Auditor has noted that the County's insurance premiums increased $147,000.00 over the prior year, representing a 100% increase in premium payments. In FY1975-76, Washoe County paid in excess of $235,000.00 for insurance protection. Attached to this letter is a statement from Washoe County's Auditor, strongly recommending that the problem of providing adequate liability protection at the local level should be examined in depth and at a statewide level immediately. Our Office has been informed that the cost of liability insurance for other local political subdivisions have increased as much or more as Washoe County's insurance rates over the

past year. In some instances, governmental entities in the State of Nevada have been forced to drop liability insurance policies because of the astronomical costs now being charged for liability protection. More significant is the fact that continued availability of liability insurance for local governmental entities is in doubt due to developments at the national level in the casualty insurance industry. Trends in other states indicate that liability insurance carriers are becoming more and more reluctant to offer liability policies to governmental entities. In order to prepare for such an eventuality in this State, a comprehensive study is needed now to consider the alternatives that will be available to Nevada's local governments in the coming years.

C. The problem of liability protection of local governments is a matter of statewide concern and not just local concern.

As indicated above, there appear to be great disparities among governmental entities in Nevada respecting the amount of liability insurance carried by each particular entity. It is not known at this time what adverse effects may result if one local government in a particular county is uninsured and another local government is fully insured against liability risks. Furthermore, public officials and employees working for an uninsured local government would not know the extent to which a complete and proper defense would be provided to them if they were named in a lawsuit filed pursuant to NRS 41.031. Usually, the insurance carrier arranges for the defense of such an official or employee, which is one of the biggest inducements to maintain adequate liability insurance coverage.

The Nevada District Attorney's Association recognized the need for some sort of uniformity in the availability of liability insurance protection at the local level and unanimously adopted a motion at its December, 1976 meeting, supporting some kind of legislation to assure that adequate insurance coverage existed at the County and local level, so there would be uniformity of liability protection among all seventeen counties and all local units of government in the State of Nevada. Our Office has also been informed by the legal counsel to the Clark County Commissioners, Mr. Jim Bartley, Esq. that the Clark County District Attorney's Office strongly supports a statewide study of this problem for the reasons noted above.

D. Questions to be reviewed by the Legislative Commission.

Basically, the Legislative Commission or a subcommittee thereof should obtain as much data as is possible prior to the 1979 Nevada Legislature, pertaining to liability protection of Nevada governmental entities. Included in the data that should be obtained is the following:

1. The total annual cost of insurance at all levels of government within the State of Nevada.

2. The total amount of claims that have been paid by insurance carriers of all levels of government within the State of Nevada in relation to the premiums that have been collected.

3. A synopsis of the actions that have been taken by various local governmental entities to minimize the costs of obtaining adequate liability insurance or to cover their liability risks in some other manner.

4. Suggestions for minimizing the costs to local governments in providing adequate liability protection, including concepts of self-insurance, pooling of risks, statewide insurance policies, or other feasible solutions to the problem.

Thank you for your Committee's consideration.

Very truly yours,

LARRY R. HICKS
District Attorney

By _____
LARRY D. STRUVE
Chief Civil Deputy

LDS:ph

Encl.

ASSEMBLY CONCURRENT RESOLUTION NO. ___ - COMMITTEE ON GOVERNMENT AFFAIRS

DATE: _____

SUMMARY--Directs Legislative Commission to study current practices of local governments and governmental entities of the State of Nevada in providing adequate tort liability insurance or alternative means of providing adequate liability protection.

ASSEMBLY CONCURRENT RESOLUTION - Directing the Legislative Commission to study current practices of local governments and governmental entities of the State of Nevada in providing adequate tort liability insurance or alternative means of providing adequate liability protection.

WHEREAS, the fifty-eighth session of the Legislature adopted Assembly Concurrent Resolution No. 32 directing the Legislative Commission to conduct a study of the methods of creating, governing and financing general improvement districts in Nevada; and

WHEREAS, the Legislative Commission appointed a subcommittee to conduct the study, and the subcommittee learned that some general improvement districts and other local governments had made no arrangements for tort liability insurance; and

WHEREAS, the services provided by local governments are wide ranging and as a result the potential liability to these governments and their officers is extensive; and

WHEREAS, the subcommittee has concluded that local governments should have adequate liability insurance; and

WHEREAS, there is inadequate information currently available to evaluate the extent to which local governments in the State of Nevada and other governmental entities in the State of Nevada have obtained adequate tort liability insurance or made other arrangements to provide adequate protection against liability in connection with activities, services, and functions performed on behalf of said governmental entities; now, therefore, be it

RESOLVED BY THE ASSEMBLY OF THE STATE OF NEVADA, THE SENATE CONCURRING, that the Legislature supports the subcommittee's conclusion that every local government or governmental entity should have adequate tort liability insurance or other adequate protection against liability; and be it further

EXHIBIT "A"

RESOLVED, that the Legislative Commission conduct a study of the current practices of local governments in the State of Nevada and other governmental entities in the State of Nevada in obtaining adequate liability insurance or other adequate protection against liability for the purpose of determining whether or not any disparities exist among local governments and governmental entities of the State of Nevada respecting the availability of liability insurance for the protection of each such governmental entity and the officers and employees of each such entity and determining what other alternatives have been utilized by such governmental entities to provide protection against liability if liability insurance has not been obtained and whether such alternatives are providing adequate protection; and be it further

RESOLVED, that the review by the Legislative Commission determine what is the total annual cost of insurance for local governments in the State of Nevada, what claims have been paid by the insuring agents or carriers in relation to the aforesaid costs, what actions have been taken by various local governments and governmental entities to minimize their costs for adequate liability protection, and what action can be taken by either the State of Nevada or local governments and other governmental entities in the State of Nevada to minimize costs for protection against liability in the future; and be it further

RESOLVED, that a report of findings and recommendations be submitted to the Sixtieth session of the Nevada Legislature.

Murphy

KAFOURY, ARMSTRONG, TURNER & CO.
A PROFESSIONAL CORPORATION
CERTIFIED PUBLIC ACCOUNTANTS

February 9, 1977

Exhibit 2

Mr. Larry R. Hicks
Washoe County District Attorney
P.O. Box 11130
Reno, Nevada 89510

Attention: Mr. Larry D. Struve
Chief Civil Deputy

Dear Larry:

Responding to our previous telephone conversations regarding insurance coverage for Washoe County, our audit report for the year ended June 30, 1976 made the following comments on the subject:

"Insurance:

Schedule No. 7, on pages 73 and 74, describes the insurance in force in Washoe County at June 30, 1976. It has been included for several reasons, but primary among them is the simple fact that the cost of insurance coverage has increased substantially over prior years.

Insurance costs for the current fiscal year have increased approximately $147,000 over the prior year, which represents a 104% increase.

These expenditures are made upon the advice and recommendation of the insurance advisor to the Board, who represents the insurance industry and assists the county in placing the insurance with various insurance companies.

Since the costs are increasing rapidly, we recommend that this subject be examined closely to determine whether there might be some alternatives already available and/or whether action at a local, regional or state level could be taken to offer some alternatives in the future.

Specifically, we suggest that the Board consider the following:

(1) Expansion of the concept of self insurance, which was introduced into the County by creation of the Self Insurance Fund on July 5, 1972, the current status of which is shown on page 3.

A review by the Manager's office, with assistance by the insurance advisor, could reasonably project the potential savings to the County by increasing deductibles in many lines of insurance.

(2) Consider sponsoring the concept of a review of this particular problem at the State level.

We normally do not encourage the concept of bringing the State into a problem that is, first of all, the County's problem, because we believe that solutions are normally better (and cheaper) if developed at the local level. However, in this particular case, the concept of "spreading the risk" is so important to this problem that we believe it unlikely that one entity can develop satisfactory alternatives by itself, and therefore we must suggest the involvement of the State of Nevada.

Specifically we suggest that an overview of the problem be conducted to determine what the total cost of insurance is at all levels of government within the State, what claims have been paid by the insuring agents, what actions have been taken by various local agencies to minimize these costs, and what, if any, suggestions do those knowledgeable in the area have to offer to minimize these costs in the future."

* * *

Articles recently published in "Nevada Government Today" tell of the very serious problem now being faced by municipalities in the State of California because of the lack of adequate liability insurance, and we are concerned that governmental entities in the State of Nevada will soon face similar problems. (See attachment.)

Without a source of adequate liability insurance at reasonable prices, the financial posture of Nevada's governmental entities will suffer, and, as one result, the ability of these entities to obtain short and long term debt financing at reasonable prices could be severely hampered.

Therefore, we continue to believe that the problem should be examined in-depth, <u>now</u>, at the State level, to insure that all possible actions are taken in the next few years to make sure that adequate liability insurance will continue to be made available at a reasonable cost to all governmental entities throughout the State.

We would appreciate any assistance you can provide in bringing this to the attention of the Legislature.

Sincerely yours,

David M. Ebner

DME:jv

Attachment

Public officials face more law suits, higher awards

today's comment

ROBERT WARREN
Executive Director Nevada League of Cities

PUBLIC OFFICIALS TODAY at all levels of government are spending more and more time in the nation's court rooms attempting to extricate themselves from a multiplicity of law suits. As pointed out in an article in this issue (page 16), "the past several years have witnessed a very significant increase in the number of lawsuits initiated against elected and appointed public officials, and a dramatic rise in the dollar amount of damages awarded or settled in such suits . . ."

These awards have ranged from $12 million damages against officials in the District of Columbia for "preventive detention" of anti-war demonstrators to $6,000 damages against three councilmen for violating the civil rights of a property owner by denying his rezoning request. They include such awards as $85,000 against county commissioners for failing to issue regulations for the operation of a prison farm in which a juvenile was injured and $7,188 against a state official who disapproved the hiring of a racially mixed couple.

There are two basic reasons why this is happening:

1. The highly desirable phenomenon of increasing citizen awareness and participation in government — which is the sine qua non of a successful democratic political system — is also resulting in an abundance of challenges to official decisions. The mutually reinforcing thrusts of activism by citizen groups and unionism among public employees are generating court tests whenever citizens believe there has been a violation of their rights, privileges or immunities as guaranteed by federal and state constitutions, statutory laws or local ordinances.

2. Also contributing to this sprouting of law suits is the "emergence of a legal concept of 'administrative malpractice' with profound implications for both elected and appointed public officials." (Cit. supra.)

When courts consider malpractice suits against professionals, such as doctors, lawyers, accountants and engineers, they attempt to determine if the alleged damage has resulted from ignorance, carelessness, want of proper professional skill, disregard of established rules or principles, or neglect, etc. — as well as the traditional elements of malicious or criminal intent. Likewise, elected and appointed public officials are now being judged by the courts as "professionals" inasmuch as there has accumulated a body of management knowledge and skills which is available to guide the operations of government and upon which "appropriate" official decisions can and should be made. The courts are expected to increasingly measure the discretionary actions of public officials against this body of knowledge to determine whether their acts are entitled to the protection of qualified immunity.

Quite simply, all this means that public officials today are not only being sued for violation of a citizen's rights under law but also for failing to observe and practice sound government management principles.

What can public officials do to cope with the increasing numbers and amount of awards for damages — including those suits which arise out of proposed or accomplished administrative actions or council votes. The growing potential for such legal actions can sharply inhibit or menace the decision-making processes vital to effective government.

The most obvious protection is to use public funds to purchase liability insurance for all public officials. Nevada law provides for this; and most officials are covered. But the substantial loss experience insurance underwriters have suffered in the area of medical malpractice insurance is causing a number of carriers to eliminate this — and related categories of coverage. The rising number of claims and suits against public entities has caused liability insurance costs to skyrocket in some states and liability coverage to shrink.

In California, local governments are helplessly witnessing a once booming insurance market diminish steadily. In that state premiums for liability insurance increased 96 per cent statewide between fiscal years 1973-74 and 1975-76. And premiums for many cities soared between 100 and 300 per cent.

If insurance becomes too costly or unavailable at any price, what then? Two suggestions:

1. In Nevada, public officials are provided substantial protection against awards for damages if they follow the advice of legal counsel. Upon a 1972 rehearing by the Nevada Supreme Court of Cannon v. Taylor, the court held in a head note: "Generally, where government officials are entitled to rely on opinions of state's Attorney General, and do rely in good faith, they are not responsible in damages to governmental body if Attorney General is mistaken." This ruling applies, likewise, to the opinions of all duly appointed and elected counsel to public entities. (NOTE: Some Nevada attorneys say it prohibits awards for punitive damages; but plaintiffs may still recover actual damages.)

Now — 'malpractice' concept hits public officials

As the court noted in quoting from a State of Maryland case: "Were the rule otherwise, few persons of responsibility would be found willing to serve the public in that large capacity of offices, which requires a sacrifice of time and perhaps money, but affords neither honor nor profit to the incumbent."

2. Second suggestion: Persons interested in serving their governments should not run for or hold office unless they are willing and able to do their "home work." Inasmuch as courts will increasingly measure the legality of official actions against that accumulated body of government management principles, the public official must expend the energy to become fully informed about the procedures and pitfalls of governmental operations.

This is true because (as the article notes) there is the "possibility of substantial and widespread damages to categories of citizens arising from . . . want of professional management skill, or disregard of established rules or principles of professional administration . . . . . And it would be utterly incongruous for courts and juries to hold physicians liable for damages in malpractice actions involving patients, lawyers liable for damages to individual clients, and accountants liable for damages to shareholders or investors, and yet allow public officials to 'practice' management with immunity (from awards for damages)."

NOTE: See article page 16 for additional suggestions to reduce the risk of liability suits against public officials.

"Indecision can also result in an award for damages."

Officials face increasing law suits over decisions

"There are indicators of an emerging legal concept of 'administrative malpractice' with serious implications for public officials

By KENNETH HENNING

THE PAST SEVERAL years have witnessed a significant increase in the number of lawsuits initiated against elected and appointed public officials, and a dramatic rise in the dollar amount of damages awarded or settled in such suits.

Recently the news media reported an award of $12 million damages against the District of Columbia government and the chiefs of the metropolitan and capital police forces in actions arising out of the 1971 "preventive detention" arrests of anti-war demonstrators in the nation's capital; an out-of-court settlement of $750,000 by a city government and a former police officer in connection with an action charging false arrest and imprisonment; court confirmations of a damage award of $85,000 against several county officials for negligently failing to issue regulations for the operation of a prison farm in a case where a juvenile prisoner was prematurely blinded when a trustee guard shot him with a shotgun; an award of $40,000 against a police officer who had shot a juvenile in the course of a civil disorder; a United States Supreme Court affirmation of a Federal District Court award of $7,200 damages against an official of a state government who had disapproved the hiring of a racially mixed couple; and a Federal District Court award of $6,000 damages against three former city aldermen for violating the civil rights of a property owner by denying his rezoning request.

Since these legal developments have been occurring during a period of great turbulence in the American society, and also since many of the specific cases have been concerned with civil rights violations, there is a tendency among many government officials to view this type of litigation and the accompanying damage awards against elected and appointed public officers as uniquely related to the black civil rights movement, the Viet Nam protests, the campus disturbances, and the "anti-politician" reaction to the Watergate disclosures. There is also a sense among a number of public officials that there will be reduction in the frequency of such suits and a decrease in the size of damage awards in the future.

Another widely held view indicates that public official liability insurance will substantially eliminate the risk to the individual elected or appointed officer. Such views are dangerous in that they ignore the subtle yet fundamental shifts in the definition of public official liability which are being reflected in a broad spectrum of court decisions.

The personal liability risk to the public administrator is increasing and is likely to continue to increase even in less tempestuous times. Accountability for decisions is broadening substantially. More stringent requirements for claiming immunity are being imposed, and there are indicators of an emerging legal concept of "administrative malpractice" with serious implications for elected and appointed public officials.

Public decisions rendered in private by small groups of entrenched elected officials, political appointees, and self-appointed community "leaders," which violate rights, privileges, and immunities guaranteed by the United States Constitution and statutory law, are increasingly being challenged and remedied as a consequence of new federal laws, national mobility, rising educational levels among the population; heightened awareness of civil

ABOUT THE AUTHOR: For the past five years an Urban Affairs and Organization Science Associate at the Institute of Government, University of Georgia, Kenneth K. Henning in this article describes "an emerging legal concept of administrative malpractice with serious implications for elected and appointed public officials." His article first appeared in the monthly publication of the International City Management Association.

Henning has previously served as Associate Director, Deputy Director, and Director of the Center for Advanced Study in Organization Science at the University of Wisconsin. Earlier he served as Associate Director of the Center for Programs in Government Administration at the University of Chicago, and as Chairman of the Department of Management and a member of the graduate facility at De Paul University.

Nationally recognized as a consultant on urban affairs, Mr. Henning is currently consultant to the Georgia Departments of Human Resources and Natural Resources, the International City Management Association, the United Methodist Church, the National League of Cities, the Southern Regional Education Board, the Air University, the U.S. Army, the U.S. Department of Commerce, and Georgia's six largest cities.

Mr. Henning is a graduate of the University of Chicago's Graduate School of Business, and a member of Beta Gamma Sigma and Blue Key. An Air Force reserve officer with a combat experience in World War II and Korea, he is also a 1951 graduate of the Air Command and Staff School and is a recipient of the Distinguished Flying Cross and Air Medal with Oak Leaf Cluster. Married, he is the father of four children. □

ACTION? Public officials are being forced to weigh every vote and administrative action versus the growing possibility of a law suit for 'administrative malpractice.'

rhts, the emergence of power groups ncluding public employee unions, public interest lobbies such as Common Cause, and legal aid agencies; and by established organizations such as the American Civil Liberties Union and the National Association for the Advancement of Colored People.

HISTORY OF PUBLIC OFFICIAL LIABILITY

Certain public officials, such as judges and legislators, have of course long enjoyed absolute immunity from suits for damages arising from the performance of their official duties. In their departure from the English common law rule, the courts increasingly granted a "qualified" immunity also to high-level executive officers of government in order to free them from the fear of suit and the potential of personal liability which might otherwise inhibit them in the discharge of their duties.

To invoke the protection of qualified immunity, the high level public official ad to be acting in a quasi-judicial dgmental or discretionary capacity, l needed to demonstrate also that he she was acting in "good faith," that without intent to do harm.

At the lower levels of the government hierarchy, public officers were held to be acting "ministerially," that is exercising little or no discretion. If their acts were improper, they were held to be at the personal peril of the official, regardless of good faith. Thus, if a police officer arrests an individual without probable cause, the officer is liable for false arrest even if he acted in good faith and even if the arrested individual is ultimately proven guilty.

For a period of time, especially during the years 1949-1969, some Federal courts tended to extend immunity down the organizational chain of command with absolute immunity.

More recently, especially in the last two years, the federal courts have begun to hold against the broadened application of absolute immunity for federal executive branch officials.

These decisions are very important to note because local and state government officials who are sued in federal court will, except where the law provides otherwise, enjoy the same degree of immunity as do federal officials. To the degree that these courts restrict and narrow immunity for federal officers, the protection available to local and state government officials is also limited.

Essentially, the higher federal courts while reaffirming the concept of executive immunity, recently have once again ruled that the degree of immunity is dependent upon ". . . the scope of discretion and responsibilities of the . . ." and on a factual showing regarding the circumstances surrounding the action taken. The trend now appears to be back to qualified rather than absolute immunity.

SHRINKING IMMUNITY OF PUBLIC OFFICIALS

This is especially so where the constitutional rights of individuals allegedly have been violated. For example, in a 1974 decision, the United States Circuit Court of Appeals for the District of Columbia held that high level officials of the U.S. Department of Justice including the Attorney General did not enjoy absolute immunity from civil liability for directing or participating in law enforcement activity which may have deprived innocent persons of their Constitutional rights.

Also, the U.S. Supreme Court in the 1974 case of Scheuer v. Rhodes, held ". . . that when a state officer (in this case the Governor of Ohio, the Adjutant General of Ohio National Guard,

(*Continued on next page*)

Administrative Malpractice . . .

(*Continued from page 17*)

arious National Guard officers and nlisted personnel, and the President of a state university) acts under state law in a manner violative of the Federal Constitution he comes into conflict with the superior authority of that Constitution and is stripped of his official or representative character and subjected in his person to consequences of his individual conduct . . ."

Most recently, in the important 1975 case of Wood v. Strickland, the U.S. Supreme Court appears to have added an additional requirement for the granting by the courts of even qualified immunity, at least insofar as civil rights cases are concerned. In addition to the requirements that the action taken was discretionary in nature rather than ministerial, and in good faith, the Court here held that a school board member could not claim immunity ". . . if he reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected . . ." If the school board member knew he was violating a student's constitutional rights, the "good faith" requirement would not, of course, be met.

What the Court appears to have ruled is that a "good faith" violation by a public official of an individual's constitutional rights arising from ignorance of the law renders the public officer personally liable for damages.

Put another way, the court appears to have added the "affirmative duty to be legally informed" to the historic requirements for invoking the protection of immunity.

While the Court's decision, was made, of course, in the specific context of school discipline, it is difficult to suppose that a lesser standard will be imposed on other responsible public officers in other situations. The Court's decision in this case is not a radical departure from customary jurisprudence to the concept of qualified immunity. Courts have uniformly held that ignorance of the law is no defense. In effect, a majority of the Supreme Court ruled in this case that ignorance of the Constitution is not a defense.

ACCOUNTABILITY IN DECISION-MAKING

Another matter of concern in discussing public official liability is the level of accountability in the organizational structure. Previous legal guidelines operated on the premise that the higher the rank the greater the degree of immunity, assuming "good faith;" and the lower the rank, the greater the degree of liability, regardless of good faith. Again, there is some evidence from recent court decisions that here too the law may be shifting.

In late 1974, a mayor in Georgia was held liable in Federal District Court for $25,000 actual damages and $15,000 punitive damages when in the course of a civil disorder the mayor issued a "shoot-to-kill" order to the police and a police officer subsequently shot a juvenile who was resisting arrest. The Court ruled that although the mayor did not actually pull the trigger or even order it pulled, his orders and related statements at the time created the feeling of authority on the part of the police officer that caused him to do

"Trend now appears to be back to qualified rather than absolute immunity . . ."

what he did to the plaintiff. In August 1975, the 5th U.S. Circuit Court of Appeals ruled that the mayor was not personally liable for damages despite his orders to the city's police, noting that there was no evidence the order influenced police officers and observing that the mayor was not even at the scene of the shooting.

Pending further clarification by the courts regarding the fixing of the level of accountability for decisions which result in damages, perhaps the wisest course of action for public officials to follow in order to reduce the risk of liability is to assume that they do have, in the words of Chief Justice Warren Burger, a "positive duty to seek out and remedy violations [of laws] when they occur and a further affirmative duty to ensure that violations do not occur. Inasmuch as a decision "not to decide" is a decision, inaction as a planned administrative strategy to reduce risk is a very precarious course to follow.

The one area where public officers are routinely held personally liable for damages is in the area of civil rights. Every public official needs to know the personal liability risks expressly contained in section 1983 of Title 42 of the United States Code.

Two observations with reference to section 1983 are particularly important.

First, the literal language of the code makes all persons liable, judges, legislators, and executive officials alike, even when they act reasonably and in good faith. The U.S. Supreme Court has held that legislators and state judges could not be held personally liable under section 1963; the Supreme Court has not, however, granted similar immunity for executive branch officers. Indeed, the Court held that just as a public official could be prosecuted under the criminal statute prohibiting civil rights violations even though he was also violating state law, so a state official could be sued for conduct amounting to a common law tort. Further, the Court held that this statute does not require a showing of a specific intent to deprive a person of a federal right, the mere deprivation is itself a violation.

The second important point to note with reference to section 1983 is the "and laws" provision which makes the statute essentially open-ended. Where a violation of section 1983 has been alleged and a federal court agrees to hear the complaint, other federal laws such as the Federal Age Discrimination in Employment Act, and such state laws as those involving negligence, may also be included in the action when relevant.

Liability under section 1983 is not limited to the direct infliction of physical injuries to person and property. Several types of administrative or policy decisions affecting employees or citizens possibly could render public officials liable under the provisions of section 1983, depending of course upon the specific facts of the situation and determination of intent. For example: (1) discharge or suspension without pay of an employee who publicly criticizes his superiors unless it can be clearly demonstrated, the burden of proof being on the employer, that the criticism materially and substantially interfered with the requirements of appropriate discipline; (2) dismissal or suspension of an employee "without due process"; (3) dismissal or other disciplining of employees for circulating petitions intended for duly constituted governmental officials and having to do with redress of grievances; (4) dismissal or other disciplining of employees for use of vulgarities; (5) denial of licenses by city councils to legally qualified recipients because of public concern; (6) and denial of building permits to those legally qualified to receive them, because of neighborhood desires.

A most significant area of potential personal liability for public officials under section 1983 is for race discrimination and other related violations of

(*Continued on page 28*)

(*Continued from page 18*)

the equal protection clause of the fourteenth amendment, such as sex-based discrimination in matters of hiring, job assignment, promotion, pay and fringe benefits including travel allowances, and retention. Looking ahead, it is not unreasonable to anticipate that the equal protection clause will be increasingly invoked through the mechanism of section 1983 on behalf of homosexuals, those persons whose physical characteristics such as height and/or weight are abnormal, those with physical handicaps and impairments, and those who do not meet certain "desirable" standards of physical appearance.

AVOIDANCE OF PERSONAL LIABILITY

It is perhaps appropriate to include some observations about how personal liability can be avoided. There is, unfortunately, no easy way. As we have seen, absolute immunity from suit is virtually nonexistent due to the qualification placed on that immunity by the requirement of a showing of good faith and reasonable grounds for belief.

In the end, the only sure way to avoid any threat of personal liability is to insure scrupulous respect for the constitutional rights of those with whom one's agency comes in contact. While that task is not always easy, the fundamental principles of our freedom also make sound principles of management. Indeed, the common thread throughout the cases imposing personal liability for civil rights violations is poor administration, whether it be poor training and supervision of employees, or poorly conceived or nonexistent administrative procedures.

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Maintain a scrupulous respect for all rights

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The preventive measures against personal liability are **clearly defined procedures**, drafted with an eye toward protecting the rights of individuals, and well trained and supervised personnel who are themselves accorded fair treatment. The administrator can avoid personal liability as long as he or she acts in good faith and reasonably under the circumstances.

Maintaining a scrupulous respect for the constitutional rights of those with whom one's agency comes in contact in the performance of public duties is not always an easy rule to observe, for here as in the criminal law area the guardians of the constitutional rights we all enjoy are on occasion persons of the most obstreperous sort, whose motives may be no more lofty than to goad the public official into intemperate action. Nevertheless, the Constitution makes no distinction between upright and obnoxious citizens. The preoccupation in the Bill of Rights with the protection of the rights of criminal defendants attest to that.

The same principle governs in the area of civil liability. A famous judicial quote — speaking to the somewhat different question of the scope of a municipality's duty, to repair its streets — observes that, "A drunken man is as much entitled to a safe street as a sober one, and much more in need of it." The same can be said for the obstreperous citizen's right to a security of person, property, privacy, free speech and freedom from arbitrary government action.

STEPS TO REDUCE PERSONAL LIABILITY

1. Arrange for the purchase of public official liability insurance to cover all employees of the government's jurisdiction.

City officials may protect themselves and their appointed and career employees by enacting a resolution or ordinance expressing a policy to defend all or certain specific civil, criminal, or quasi-criminal actions brought against them, and authorizing the expenditure of public funds for such defenses including attorney's fees, court costs, deposition costs, witness fees and compensation, and all other similar expenses.

A much simpler and more straightforward protective arrangement is to purchase public official liability insurance covering all elected officials, appointed officers and employees of the governmental jurisdiction. It is strongly recommended that coverage under such liability insurance be extended to all elected, appointed, and career employees in order to avoid the possibility of a suit originating from noncovered employees contending denial of 14th Amendment rights related to equal protection of the laws.

A problem associated with insurance protection is the knowledge that there is insurance coverage with monies available for damages may actually increase the frequency of suits against public officials. While there is little economic incentive to pursue litigation against a relatively low paid public officer or official with only modest personal means, it is quite another matter where insurance coverage provides the possibility of recovery of up to the maximum of the insurance protection, perhaps several hundred thousand dollars.

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Seek and heed advice of your legal counsel

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Cities considering the purchase of public official liability insurance should have legal counsel to carefully review the exceptions and exemptions under terms of the policy. In some cases, a city may be purchasing less protection than it believes it is obtaining.

Finally, and perhaps most importantly, liability insurance is not readily available. Significant loss experience in the area of medical malpractice insurance has caused a number of insurance carriers to eliminate this and related categories of coverage. Any notable increase in the number of personal liability suits required to be defended and awards of damages under existing policies may cause insurance providers to raise their premiums prohibitively, to cancel coverage, or abandon such forms of protection altogether.

While liability insurance protection is a necessary element of a program for reducing risk, it is not a sufficient element by itself. Therefore, it is important to implement the following actions as well in order to minimize the danger of personal liability.

2. Record all governmental administrative policies and procedures in writing; have them reviewed by legal counsel as to constitutionality and accord with other relevant laws; and make copies of these established policies and procedures available to all employees of the governmental jurisdiction.

Poorly conceived or nonexistent policies and procedures increase the risk of liability. Therefore, careful formulation in writing of governing administrative policies and procedures developed with an eye toward protecting the

communicated to all employees, reduces the risk of liability. In establishing and administrating such policies and procedures, higher level officials reduce the risk of being found liable for a subordinate's indiscretion; and subordinates, to the degree they adhere to such policies and procedures, reduce their own risk of liability.

3. Undertake in-house training of all personnel regarding established policies and procedures.

The purpose of such training is to inform employees of established policies and procedures, to develop employee sensitivity to, and awareness of, problem areas in potential liability. Training will also provide guidelines for employee conduct and behavior which will reduce liability risk for all.

4. Establish a system of monitoring employees' compliance and familiarity with the established policies and procedures.

"Vote and be sued . . .?"

5. Seek the legal counsel of the city attorney or other appropriate legal advisor when policies and procedures are adopted or revised and when administrative decisions are made in areas of potential risk.

6. Increase contacts with and use of the advice of "outside" experts, such as specialists in civil rights law, management consultants, labor relations specialists, consulting engineers, and certified public accountants to provide guidance in keeping policies and procedures up-dated.

THE POSSIBLE EMERGENCE OF "ADMINISTRATIVE" MALPRACTICE

Tort liability, such as considered above, turns on three elements: existence of a legal duty from defendant to plaintiff, breach of such legal duty, and damage as to proximate result. Malpractice liability turns critically as well on an additional element. As applied to physicians and surgeons, the term malpractice ". . . means bad, wrong or injudicious treatment of a patient, professionally and in respect to the particular disease or injury, resulting in injury, unnecessary suffering, or death, to the patient and proceeding from ignorance, carelessness, want of proper professional skill, disregard of established rules or principles, neglect, or a malicious or criminal intent."

The legal profession presently is experiencing an increase in the number of malpractice suits initiated against attorneys. The certified public accounting profession is beginning to see the genesis of malpractice actions in that field of professional practice as well.

It would be inconsistent for courts and juries to hold physicians liable for damages in malpractice actions involving individual patients, lawyers liable for damages to individual clients, and accountants liable for damages to shareholders or investors, and yet allow public officials to "practice" management with immunity in large government organizations with the possibility of substantial and widespread damages to categories of citizens arising from ignorance of sound management principles and precepts, want of professional management skill, or disregard of established rules or principles of professional administration. □

IN NEXT ISSUE:

THE PROBLEMS OF OBTAINING MALPRACTICE INSURANCE!

"Yes, we had a city manager once who thought he was getting a bargain when he bought some manholes at half price."

LEAGUE ASSISTANT

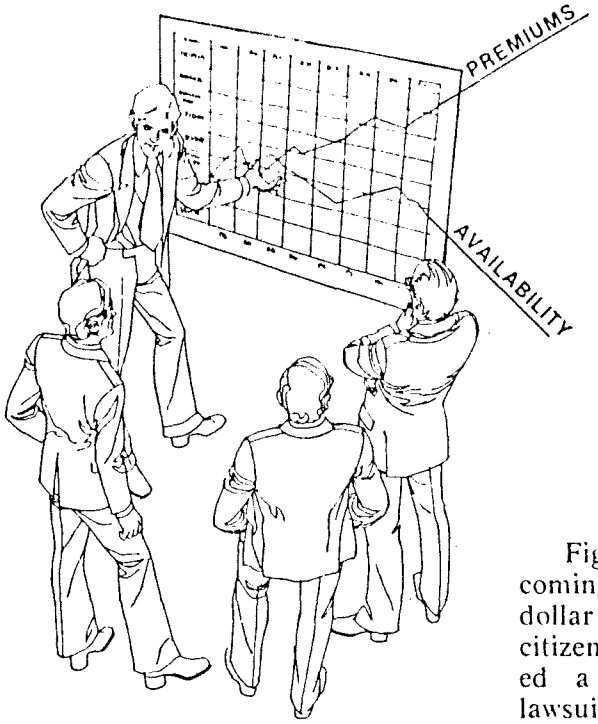
Casey Schrom has assumed the duties of Administrative Assistant to the Nevada League of Cities, following the resignation of Leslie Sherwood, who has recently married and taken up residence in Northern California.

Mrs. Schrom, a Sparks High School graduate, has served as executive secretary to the National Division and the Security Department of the First National Bank in Reno. She also served as administrative assistant to the Community Affairs Department at Harrah's, Lake Tahoe, as an executive secretary for Hill's Brothers Coffee, Inc., in San Francisco, and the Real Estate Research Corp., in Washington, D.C.

While in high school, Mrs. Schrom (Miss Smith) was active in the speech and dramma program and was selected for four years as the Nevada State Oratorical Champion. She also served as a part-time voluntary teacher in speech and dramma at the high school.

Formal education includes attendance at the University of Nevada, San Francisco State College, and the Community College of Northern Virginia where she majored in business related courses.

In addition to her duties as administrative assistant, Mrs. Schrom will serve as business manager for Nevada Government Today magazine, published by the Nevada League of Cities and the Nevada Association of County Commissioners. □



LIABILITY COSTS SOAR FOR PUBLIC OFFICIALS

"Insurance companies say even though they are slapping outrageously high premiums on cities, they too are losing money in the municipal liability field."

EDITOR'S NOTE: The last issue of "Nevada Government Today" magazine carried an article on the increasing numbers of lawsuits being levied against elected and appointed public officials. This article points out the result of this phenomenon — soaring costs of liability insurance, cancellations, and lack of protection for public officials. It centers on the crisis in California; but the message is clear to Nevada governments, some of which are already facing sharp increases in the cost of liability insurance. (See editorial, page 5.)

Fighting City Hall is fast becoming a profitable multimillion dollar enterprise for aggrieved citizens who have recently discovered a powerful weapon — the lawsuit.

And for California's 413 cities, 58 counties and numerous special districts, that discovery is having devastating consequences.

The rising number of claims and suits against municipalities has caused liability insurance costs to skyrocket and liability coverage to shrink. Moreover, local governments are helplessly witnessing a once-booming insurance market diminish steadily.

Premiums for liability insurance increased 96 per cent throughout the state between fiscal years 1973-74 and 1975-76. In 1975 alone, premiums jumped 63 per cent.

The immediate and most obvious cause of the problem has been a litigation explosion that has sent city hall reeling out of the courthouse and onto the brink of financial crisis.

A claims-conscious public has discovered that laws have changed in their favor. They can fight city hall and win big.

"This is what we call social inflation," says David Simmons of the Insurance Information Institute. "For almost anything that happens, the attitude is that someone else ought to pay. Somebody gets mugged, so he sues the police chief for negligence."

"The attorney doesn't want his client holding the bag," commented Ronald Krauss of the American Insurance Institute, "so he start looking for multiple defendants. I plain language, he chases the in surance dollar wherever it is."

But Lleroy Hersh, president o the California Trial Lawyers Assoc iation, sees it differently: "Wha has happened is that people expec that a governmental entity will ac with care and concern for the wel being of the citizens."

Most suits stem from allege negligence by the city — injurie sustained because of dangerou conditions, defective streets, crack ed and broken sidewalks, fals arrest, damage to private propert by public employees or even falling tree limb.

Claims and suits range from th frivolous to the tragic, from th routine fender-bender to the acci dental death.

A Redding resident recentl sued Shasta County for $1.0 million, claiming his constitutiona rights had been violated. His grievance — the county library carries four tapes on sex issues which he contends preach an anti Christian lifestyle and therefore violate his rights to traditional Christian beliefs.

A Sacramento resident filed a $27,500 claim against the city, charging that a meter maid bit him as he tried to put a penny into the meter before she could write out a parking ticket.

A Whittier man, married and the father of three, who was falsely imprisoned for two and a half years on a bank robbery charge, accepted a $75,000 settlement from the City of Buena Park in 1975.

By MANUEL VALENCIA
Sacramento Bee

"The immediate and most obvious cause of the problem has been a litigation explosion that has sent city hall reeling out of the courthouse and onto the brink of financial crisis."

A Contra Costs County Superior Court jury ordered the State of California to pay $1.9 million in damages to a Girl Scout who lost both hands in a fiery head-on collision on a bridge.

For California cities, the financial impact of litigation, coupled with large jury awards to victims, has been staggering. Premiums for many cities have jumped between 100 per cent and 300 per cent. In at least one case, the cost soared to more than 600 per cent.

Coalinga, a city of 6,350, saw its premiums climb from $11,436 in 1973-74 to $22,441 last fiscal year for general liability insurance alone.

Fremont's premiums increased from $64,453 to $225,000 in that same period.

Ventura County is still recovering from a more than 600 per cent increase in its premiums between 1974 and 1975 from $130,000 to $904,000.

National City was notified in early 1975 that its liability premiums would increase from $32,190 to $60,992. Ten months later, the premiums for the 1976 calendar year had risen to $129,000 for the same coverage.

It's the same pattern everywhere in the state.

Woodland's rates climbed 138 per cent in one year, Campbell's increased 256 per cent, Bakersfield jumped 200 per cent and Chula Vista's 185 per cent.

A survey of 26 Orange County cities showed that premiums rose 85 per cent from 1974 to 1975, and 65 per cent the following year.

The City of Sacramento, whose premiums increased 193 per cent in the last three years, went to a self-insurance program last month. That approach should save the city $370,000 a year at its present level.

But even self-insurance has failed to blunt the crush of litigation against the larger cities.

Payouts in Los Angeles for 1973 totalled $2.1 million, and by 1975 the figure had surpassed the $3 million mark.

San Francisco's payouts in 1970-71 amounted to $1.5 million. By 1974-75, they had increased to more than $3 million.

California isn't the only state faced with insurance problems, city officials said, but the situation here is far more pronounced than anywhere in the nation.

The bottom-line figure sums up the extent of that problem. Liability insurance premiums for all cities in the state now exceed $30 million, according to a study by the League of California Cities.

The cost of insurance is passed on to the taxpayer.

But insurance companies say even though they are slapping outrageously high premiums on cities, they too are losing money in the municipal liability field.

Major carriers, including Pacific Indemnity Insurance Company and Insurance Company of the Pacific, have withdrawn from that line of coverage.

That has left cities and municipalities scrambling for anything they can find.

"It's not a good market," said Clark Goecker, assistant director of the League of California Cities.

"Those carriers that have remained say they have enough city business and don't want to take any more on. They don't want to get too deeply involved in high risk insurance. That could leave a lot of cities out in the cold without insurance."

"Whether or not there will be a crisis will be evident when insurance renewals come up," said David Tavernetti, a King City councilman and chairman of the League's Liability Insurance Task Force.

"And it will be a marketing crisis rather than a rate problem. The question will be whether those cities who will not have their coverage renewed can find another market."

Last December hearings were held in Santa Ana by the Assembly Committee on Finance, Insurance and Commerce and the Assembly Committee on Local Government.

Throughout that day-long session, city after city cited financial horror stories and urged the legislature to act swiftly before the problem takes on the dimensions of a medical malpractice crisis.

No one could offer a solution, but city officials and insurance

(*Continued on next page*)

LIABILITY COSTS SOAR

(Continued from page 21)

representatives offered numerous recommendations.

Those recommendations, however, can only be understood and appreciated in light of the causes and events that led to the current problem.

How did we reach the exploding point? Five factors most frequently cited during that Santa Ana hearing were these:

- Erosion of governmental immunities by liberal courts.
- Double-digit inflation.
- Growing demand by the public for more and better municipal services along with the attendant risks and liabilities.
- The so-called litigation boom, the recent awareness by a consumer-conscious public that litigation is an available and powerful tool.
- A diminishing market for municipal liability insurance.

The year 1961 marks the starting point. Government officials speak about the current problem in terms of before 1961 and after 1961.

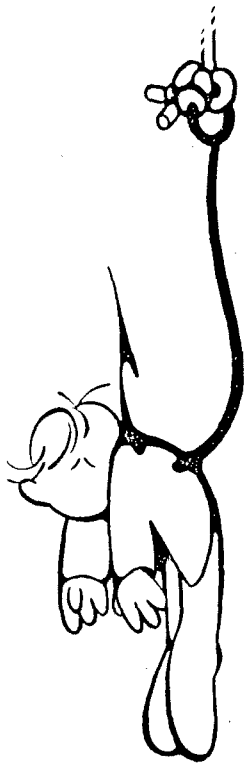
Before 1961, California cities were protected from liability under the rule of sovereign immunity. But after a landmark State Supreme Court ruling in 1961, that immunity was swept away.

Literally, the concept of sovereign immunity means that the king can do no wrong, a concept whose origins date back to medieval England with the personal prerogatives of the king.

But the State Supreme Court in 1961, in its ruling on Muskopf v. Corning Hospital District, tossed out the rule of sovereign immunity as "mistaken and unjust."

"How it became in the United States the basis for a rule that the federal and state governments did not have to answer for their torts (wrongful acts or injuries) has been called 'one of the mysteries of legal evolution'," wrote State Supreme Court Justice Roger Traynor. "The rule of governmental immunity for tort is an anachronism without rational basis, and has existed only by the force of inertia."

Alarmed and surprised by that decision, the State Legislature immediately enacted a law which suspended the effect of the Muskopf decision, pending an exhaustive study and recommendations by the California Law Revision Commission.



Hooked!

Two years later, the legislature enacted into law the substance of the commission's recommendations, six provisions which collectively are called the California Tort Claims Act of 1963.

One of the act's principal objectives was to reduce uncertainty in the law by making all government tort liability dependent on statute. Anyone wishing to know where a public entity was liable had but to read the law.

The act also contained several immunities designed to offset the effects of the Muskopf decision.

Among the more important immunities granted was one called the design immunity. It held that a public entity was immune from liability for conditions of public property which were of safe design at the time they were approved but which became dangerous later due to changed conditions and circumstances.

No sooner had the Tort Claims Act gone into effect than the courts began interpreting governmental immunities narrowly and strictly.

"A review of the State Supreme Court's decisions since 1963," wrote attorney Michael M. Berger in California Western Law Review, "indicates a steady, if slow progress towards a re-establishment of Muskopf through what could be termed in these times 'strict construction' of the Tort Claim Act.

Indeed, judges continue to follow Justice Traynor's dictum: "In formulating rules and exceptions relating to governmental immunity from liability, it should be borne in mind that when there is negligence the rule is liability — immunity is the exception."

City officials point to the so-called erosion of governmental immunities under the Tort Claims Act as a major cause of today's problem.

Yet, even though cities were more vulnerable, times were still good. Insurance was still an available and relatively inexpensive commodity. It was a buyer's market.

The early 1970s was a period of profitability for the insurance industry, and competition was keen. Competitive bidding for insurance kept premiums at bargain prices for cities.

Like the hectic prosperity before the 1929 stock market crash, insurance companies and cities by late 1973 had reached a peak of optimism.

That same period, however, was also marked by double-digit inflation with the lifting of wage and price controls.

The combination of low premiums and spiraling inflation led to substantial losses of revenue for the insurance industry. The floor fell in when the stock market ran into trouble.

The industry's investment losses were heavy, and coupled with soaring underwriting losses of more than $2.5 billion in 1974 and $1 billion in the first quarter of 1975 alone, the insurance industry began

boosting premiums at an alarming rate.

The era of cheap but good insurance was over before anybody knew it.

The problem had swelled quietly and slowly and exploded suddenly.

As late as fiscal year 1973-74, insurance was still relatively inexpensive and easy to obtain.

The danger signal came when Pacific Indemnity Insurance Company withdrew from the municipal liability market in July 1974, leaving roughly half the cities of California without insurance.

Other companies followed. In 1973, another major carrier, Insurance Company of the Pacific, dropped its coverage for about 40 Northern California municipalities.

This year, the company will withdraw completely out of the market, forcing 80 municipalities to look elsewhere for insurance.

"We had a couple of years right before Pacific Indemnity withdrew where premiums actually went down," recalled Tim Casey, assistant to the city manager for Redondo Beach.

"Maybe all that lulled us to sleep and kept us from the problems that were occurring."

After the liability insurance session in Santa Ana ended, Assemblyman Alister McAlister, a committee chairman, was convinced that cities have been rudely awakened from sleep and into a nightmare.

"This is a very broad and diffuse field, more complicated than the medical malpractice problem," he said.

"Malpractice is not as complicated because it's centered on one area of activity, medical care. Municipal liability covers every liability known to man. Therefore cities run afoul of every liability ever thought up."

The recommendations presented at the session are numerous. Those most often cited are these:

- The Tort Claims Act must be re-evaluated and the immunities contained in its statutes must be reaffirmed.
- Cities will have to take on more self-insurance.
- Insurance companies should be required to offer municipal liability insurance as a condition of doing business in California.
- The legislature should explore the feasibility of developing a statewide municipal insurance pool.
- Liability insurance should be established on an arbitration format, such as workmen's compensation insurance, with some sort of state board to resolve disputed claims.
- Cities must increase their expertise in risk management; that is, in identifying those problem areas causing the filing of claims, and in correcting the problems.

Undoubtedly, central to any study of the liability insurance problem will be the question of immunity.

Should cities and other public entities have immunities? If so, why and what should they be?

"We are in the business of responding to increasing public demand as best we can," Casey told the Assembly committee.

"But there are certainly risks involved. Where paramedics and police officers are called up to protect lives, there will be loss of life, personal injury and false arrests.

"If the public is going to demand and expect the provision of these services, then the public must share the burden of risk that accompanies the employment of these services."

Hersch, the president of the California Trial Lawyers Association, disagrees.

"I don't believe governmental entities should have immunities. That all stems from the theory that the king can do no wrong. Why should there be these immunities? Why shouldn't they have the same responsibilities as private citizens do?

"Instead of talking about revising the Tort Claims Act, they should educate employees to act in a more prudent manner."

But David Tavernetti points out that "A mistake commonly made is comparing government to private business. Cities must provide many services that no private business wants to provide. Cities don't have the option of discontinuing these services."

(Continued on next page)

"Malpractice is not as complicated because it's centered on one area of activity, medical care. Municipal liability covers every liability known to man. Therefore, cities run afoul of every liability ever thought up."

LIABILITY

(Continued from page 23)

A recommendation already being studied and implemented by cities is self-insurance.

The City of Sacramento, for example, adopted a self-insurance program recently in which the city covers the first $250,000 of claims. In addition, it purchased insurance to cover losses above that level with a $20 million limit.

In the last three years, the city's premiums had increased 193 per cent. The cost of coverage last year was $596,077 and that would have jumped to $938,865 next year had the city continued with a fully insured program.

City officials estimated the self-insurance program could save the city taxpayers $370,000 a year at present levels.

The self-insurance approach is not new or unique. San Diego, San Francisco and Los Angeles have used that approach for several years.

Smaller cities, however, say that option may not be available to them because of the insurance management expertise, staff and reserve funds necessary to make it work.

Moreover, paying out $50,000 claims is simply unrealistic for cities the size of San Mateo where $50,000 is 25 per cent of its total budget.

In Southern California the Contract Cities Association is looking at a variation on the self-insurance program.

The association is studying a plan whereby cities would insure themselves up to a certain limit. They would then join with other cities in a kind of pool to obtain coverage beyond their self-insurance limits.

These are only short-term solutions at best, California city officials say. The underlying problems still must be tackled, and the cities are looking to the legislature for the solution.

That is the difficult task the legislature faces — balancing the public's right to fight city hall with city hall's obligation to provide needed and often risky services. □

Murphy
Exhibit 3

SPECIFIC QUESTIONS TO BE ADDRESSED BY LEGISLATIVE COMMISSION AND/OR SUBCOMMITTEE REVIEWING LIABILITY PROTECTION AT LOCAL GOVERNMENT LEVEL

1. What are the total costs per year of the various types of insurance, including liability insurance, now being purchased by all governmental entities in the State of Nevada?

2. What is the frequency and dollar value of claims paid on behalf of governmental entities by their insurance carriers in relation to the amount of premiums paid during a fiscal year?

3. How many governmental entities are no longer able to insure themselves and their officers or employees to a level deemed appropriate for their sphere of activity?

4. In the event an inadequate level of insurance protection exists, is there any adverse impact on the defense offered by the insurance carrier for that governmental entity and/or will an adverse judgment against such governmental entity cause any harm to other governmental entities through additional premiums and/or reductions of coverage?

5. If a governmental entity does not carry an appropriate level of insurance or carries no insurance at all and if an elected or appointed official is held liable to answer in damages or to pay civil and/or criminal penalties, how is the governmental entity adequately protecting itself against such a contingent liability?

6. How much of a governmental entity's insurance premium payment goes to pay for the defense of suits and claims brought against the insured governmental entity?

7. Can a self-insurance fund created by a local government significantly reduce the overall cost of an adequate liability insurance program?

8. If a local government creates a self-insurance fund, how is an adequate defense provided through the governmental entity and its officers and employees in the case of lawsuits?

9. In addition to purchasing liability insurance and establishing self-insurance funds, have local governments taken any other actions to reduce the cost of liability protection?

9A. Could action be taken by all governmental entities within the State of Nevada consistent with a statewide

policy, which would significantly reduce their costs of providing for liability protection?

10. Are there any other alternatives available to provide adequate liability coverage at a significantly reduced cost? (Such alternatives could include --(a) wider dissemination of information concerning insurance costs, coverages and alternatives; (b) employment of persons knowledgeable in "risk and management" at a regional or state level to advise local governments concerning insurance; (c) establishment of a statewide governmental insurance pool; and (d) statewide liability insurance.

Demers

Exhibit 4

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

THE MOTIVATION IN INTRODUCING AB 17 WAS TO RESOLVE AN INEQUITY BROUGHT ABOUT BY THE FAIOURE OF SB 601 OF THE LAST SESSION. WITH S.B.601 WRITTEN THAT CITY COMMISSIONERS WOULD ALSO SERVE AS COUNTY COMMISSIONERS, IT WAS LOGICAL TO PASS LEGISLATION MANDATING THE COUNTY COMMISSION TO BECOME THE METROPOLITAN POLICE COMMISSION. THE INABILITY OF SB 601 TO RESOLVE THE ALIGNMENT OF SERVICES IN CLARK COUNTY AND BRING ABOUT A BADLY NEEDED REORGANIZATION TO LOCAL GOVERNMENT NECESSITATED THE CONSIDERATION OF THIS BILL THIS MORNING.

PRESENTLY THE CITY OF LAS VEGAS IS PAYING 52-1/2% OF THE METROPOLITAN POLICE BUDGET AND NO CITY REPRESENTATION ON THE POLICE COMMISSION. THIS 52-1/2% REPRESENTS APPROXIMATELY 37% OF THE TOTAL GENERAL FUND EXPENDITURE OF THE CITY OF LAS VEGAS. I BELIEVE THAT EQUITY AND A SENSE OF FAIR PLAY DICTATES THAT THIS SITUATION BE RESOLVED BY THE PASSAGE OF AB 17. THE SUBSTANCE OF THE BILL PROVIDES FOR 2 COMMISSION MEMBERS FROM THE CITY OF LAS VEGAS, 2 FROM CLARK COUNTY AND THE SHERIFF OF CLARK COUNTY SERVING AS A NON-VOTING CHAIRMAN EXCEPT IN THE CASE OF A TIE VOTE. NOT INCLUDED IN THE FIRST PRINT OF AB 17, BUT IN THE AMENDMENTS YOU HAVE BEEN PROVIDED, I FURTHER SUGGESTED MEMBERSHIP BE BASED ON 60,000 POPULATION WHICH PROVIDES THAT AS EITHER ENTITY WOULD GROW, REPRESENTATION WOULD BE BASED ON POPULATION WHICH WOULD APPEAR TO BE THE EQUITABLE WAY.

I ALSO RECOMMEND THAT FUNDING OF THE METROPOLITAN POLICE BE ON A 50-50 BASIS SUBJECT TO REVIEW AT THE APPROPRIATE TIME BY THE LEGISLATURE.

ONE ADDITIONAL AMENDMENT IS OF A HOUSEKEEPING NATURE RECOMMENDED BY THE METROPOLITAN POLICE DEPARTMENT HAVING THEIR PERSONNEL OFFICER UNDER ADMINISTRATIVE DIRECTION OF THE DEPARTMENT RATHER THAN THE CIVIL SERVICE COMMISSION OF METROPOLITAN POLICE.

THIS MORNING ONE MIGHT SUGGEST THAT MEMBERSHIP BY BOTH ENTITIES ON THE COMMISSION WILL NOT WORK. I WOULD SUGGEST IT IS THE RESPONSIBILITY OF LOCAL ELECTED OFFICIALS TO PROVIDE ADEQUATE REPRESENTATION TO ALL PARTICIPATING ENTITIES AND MAKE THE SYSTEM WORK RATHER THAN ENGAGING IN PERSONALITY CONFLICTS THAT FAIL TO SAVE THE INTERESTS OF THE CITIZENS OF THE CITY OR THE COUNTY. I WOULD APPRECIATE YOUR THOUGHTFUL CONSIDERATION AND ENCOURAGE A DO PASS ON AB 17.

Adopted ☐ Lost ☐ Date: Initial: Concurred in ☐ Not concurred in ☐ Date: Initial:	Adopted ☐ Lost ☐ Date: Initial: Concurred in ☐ Not concurred in ☐ Date: Initial:	Amendments to Assembly / ~~Senate~~ Bill / ~~Resolution~~ No. 17 (BDR 22-485) Proposed by Committee on Government Affair

1977 Amendment No. 9

Replaces Amendments 15A and 45A.

Amend section 2, page 1, line 5, delete "two" and insert "the remaining".

Amend section 3, page 1, delete line 18 and insert:

"Sec. 3. 1. In those counties which have:

(a) Only one participating city, the county and the city shall pay equal shares of the capital and operating costs of the department.

(b) More than one participating city, the governing bodies of the various participating political".

Amend section 6, page 2, delete lines 34-41 and insert:

"1. The metropolitan police commission consists of the sheriff of the county and representatives from the county and from each participating city.

2. Except as provided in subsection 3, the county and each participating city are entitled to one representative on the commission for each 60,000 persons residing within the boundaries of the county or of the city. In determining the number of representatives:

(a) A participating political subdivision is not entitled to an additional representative for any fraction of the population which is less than 60,000; and

(b) Persons residing within the boundaries of an incorporated city shall not be included in the population of the county.

3. The county and each participating city are entitled to at least one representative regardless of the number of persons residing within the boundaries of the county or of the city."

175

Drafted by LP/cj Date 2/5/77

Amend section 6, page 2, line 42, delete "3." and insert "4."

Amend section 8, page 3, line 3, delete "Sec. 8." and insert:

"Sec. 8. NRS 280.170 is hereby amended to read as follows:

280.170 1. The [police commission shall elect one of their number as chairman on the commission.] sheriff of the county is the chairman of the commission.

2. The police commission shall employ a clerk and may employ other clerical personnel necessary to the discharge of its duties. The clerk [shall be] is secretary for the commission.

Sec. 9."

Amend section 8, page 3, delete line 10 and insert:

"3. [Cause] If there is more than one participating city, cause to be prepared [a] the funding apportionment plan pro-".

Amend section 8, page 3, delete line 21 and insert:

"4. [Cause] If there is more than one participating city, cause a new funding apportionment plan to be prepared:"

Amend the bill as a whole by adding a new section, designated section 10, following section 8, to read as follows:

"Sec. 10. NRS 280.310 is hereby amended to read as follows:

280.310 1. Each department shall have a system of civil service, applicable to and governing all employees of the department except elected officers and such other positions as designated by the police commission.

2. The system of civil service shall be governed by a board composed of five civil service trustees appointed by the police commission. Upon creation of such board, the police commission shall appoint one trustee for a term of 2 years, two trustees for terms of 3 years and two trustees for a term of 4 years. Thereafter all trustees shall serve for terms of 4 years.

3. The board shall prepare rules [and] or regulations governing the system of civil service to be adopted by the police commission, but in the case of a county having a population of 200,000 or more which is required to comply with the provisions of this chapter by July 1, 1973, [pursuant to NRS 280.100,] the initial civil service rules shall be those governing the police department of the largest city in the county, as such rules are modified and approved for such purpose by the law enforcement consolidation committee organized and operating pursuant to resolution of the special committee created by chapter 613, Statutes of Nevada 1971, to study the problems of local government in Clark County. Such rules [and] or regulations shall provide for:

(a) Examination of potential employees;

(b) Recruitment and placement procedures;

(c) Classification of positions;

(d) Procedures for promotion, disciplinary actions and removal of employees; and

(e) Such other matters as the board may consider necessary.

4. Copies of the rules [and] or regulations of the system of civil service shall be distributed to all employees of the department.

5. The [board shall appoint] sheriff shall designate a personnel officer to administer the personnel functions of the department according to the policies, rules [and] or regulations of the board, including but not limited to the items enumerated in subsection 3. [The personnel officer shall be subject to the administrative supervision of the sheriff of the department.]".

February 9, 1977

Exhibit 5

STAFF REPORT

SUBJECT: FUNDING OF THE LAS VEGAS METROPOLITAN POLICE DEPARTMENT

When the funding apportionment formula was established by the Nevada Tax Commission in 1974, it was based upon the understanding that revenues of the County and the City before the merger of the two police departments would continue to be the revenues of the respective entities thereafter. It was further understood that revenues for the combined police department would be derived solely from the contributions of the participating entities and not from any other revenue source. The revenues in question which resulted from the care of federal prisoners, parking citations, interest on fund balances and the payments by county agencies for police services were revenues which accrued to the County before the merger and therefore should still accrue to the County. Although a more equitable disposition of these revenues may have been possible at the time the funding formula was determined, the fact remains that the disposition referred to here was the one considered by the Tax Commission when it established the 52.5/47.5% formula. If it had been decided to allow any of the aforementioned or other revenues to accrue directly to L.V.M.P.D. a different funding apportionment formula would have been reached.

The automotive profits referred to by the City representatives do not accrue to the County general fund but are retained by the automotive fund and are used to reduce the cost of next year's automotive services to all participants including Metro.

I am aware that since the 52.5/47.5% apportionment formula was established, there have been significant changes in the variables upon which the formula was based as well as considerable changes in services and revenues of both entities. Possibly a change in the formula is in order, but I don't believe any changes can be made at this time because of the provisions of N.R.S. 280.190; i.e., a funding plan cannot be prepared at intervals of less than four years.

TESTIMONY ON A.B. 17
(CHANGES COMPOSITION OF METROPOLITAN POLICE COMMISSION)

ITEM: 1 THE PROPOSED CHANGES IN THE COMPOSITION OF THE BOARD MAY HAVE ABSOLUTELY NO EFFECT IN RECTIFYING THE CURRENT DISHARMONY BETWEEN THE CITY OF LAS VEGAS AND THE COUNTY OF CLARK RELATIVE TO REPRESENTATION ON THE COMMISSION.

Recent statements made by City of Las Vegas officials in the local press indicate that emotions have clouded any logical appraisal of the representation and funding questions. Not only does the City apparently feel that it is not represented, it additionally feels that the County is knowingly profiting from the funding arrangement. See item following.

ITEM: 2 THE STATE TAX COMMISSION APPROVED THE CURRENT FUNDING FORMULA GIVEN THE FACT THAT CERTAIN REVENUES FROM THE OPERATION OF THE METROPOLITAN POLICE DEPARTMENT ARE RETURNED TO THE COUNTY.

It is quite conceivable that, were such revenues to be made available directly to the Police Department to defray costs of operation, the formula set by the Nevada State Tax Commission might very well have been a 60%/40% City-County split, or some formula untenable to the City, assuming that any formula aside from a 50%/50% split is unacceptable.

ITEM: 3 THE PLACEMENT OF CITY COMMISSIONERS ON THE POLICE COMMISSION WOULD NOT UNEQUIVOCABLY SOLVE THE APPARENT PROBLEMS IN FUNDING THE DEPARTMENT.

Any funding formula set by the Police Commission would have to be submitted to the City Commission and the County Commission for approval, as well as to the Nevada Tax Commission, which would be charged with making the final funding formula decision in the event the two entities could not agree on a formula (as is currently the case and with which the City Commission takes exception, it should be pointed out).

ITEM: 4 PLACING CITY COMMISSIONERS ON THE POLICE COMMISSION WILL NOT RESULT IN ANY BETTER REPRESENTATION FOR ANY LOCAL CITIZENS.

Clark County Commissioners, who currently comprise the Police Commission, have been elected at large and represent all residents of the county. City Commissioners would represent essentially the same constituent groups that County Commissioners represent, although some segments of the population would be over represented by virtue of being represented by both a City Commissioner and a County Commissioner serving on the Police Commission. Clark County questions whether the concern of the City Commissioners is to promote equitable representation for citizens of the Las Vegas Valley or whether their real concern is personal participation on the Commission.

ITEM: 5 ON WHAT BASIS IS THE COMPOSITION OF THE BOARD DETERMINED?

The City and the County, under the amended bill, would be allowed one seat on the Commissione per 60,000 population. However, is the population that figure set at the last census in 1970 or the most recent population estimates set by the Clark County Regional Planning Council? It should also be pointed out that the annexation measure proposed would result in the County's having one (1) representative on the Police Commission while the City would have three (3).

ITEM: 6 EITHER THE CITY COMMISSION OR THE COUNTY COMMISSION COULD, IN EFFECT, OVERRIDE ACTION TAKEN BY THE METROPOLITAN POLICE COMMISSION.

Should the Police Commission approve, as a hypothetical example, a $40 million annual budget for the department on the assumption that each entity would fund half, either Commission (City or County) could hold that it did not have enough available revenue to fund the budget at $20 million and could override the action taken by the Commission. This is essentially the arrangement that exists currently, and would solve none of the apparent problems currently cited.

ITEM: 7 THE POSITION IN WHICH THE BILL PLACES THE SHERIFF IS MANAGERIALLY UNTENABLE.

It is managerially unsound to have the chief administrative official of a department serve on that department's governing board, and, indeed, be the chairman thereof, as well as have a tie-breaking vote in policy matters that directly affect the operation of his department.

RECOMMENDATION: That this piece of legislation be held in abeyance until the annexation question is answered.

/bw

GOVERNMENT AFFAIRS COMMITTEE

DATE: 2/10/77

	PRESENT	EXCUSED	ABSENT
CHAIRMAN MURPHY	✓		
VICE CHAIRMAN MAY	✓		
ASSEMBLYMAN CRADDOCK	✓		
ASSEMBLYMAN JEFFREY	✓		
ASSEMBLYMAN MANN	✓		
ASSEMBLYMAN MOODY	✓		
ASSEMBLYMAN ROBINSON	✓		
ASSEMBLYMAN WESTALL	✓		
ASSEMBLYMAN RHOADS	✓		

GOVERNMENT AFFAIRS COMMITTEE

GUEST REGISTER

DATE: 2/10/77

NAME, ADDRESS & PHONE NO.	REPRESENTING	TESTIFYING ON BILL NO.
Tom Moore	Clark Co	
Bruce Spaulding	City of LV	
Larry Struve	Washoe Co.	ACR 9
Bob Broadbent	Clark Co	AB-17
Thalia Dondero	" "	"
Sam Bowler	" "	"
Ron Lurie	City of Las Vegas	AB 17
Paul Christensen	" " "	"
Jim Banner	ASA	AB 17
Lew Burken	City of L.V.	AB 17
Stephanie Barrett	American Civil Liberties Union	