SENATE AND ASSEMBLY JUDICIARY COMMITTEE

MINUTES OF JOINT HEARING

FEBRUARY 14, 1977

The hearing was called to order at 8:31 a.m. Senator Close was in the chair.

PRESENT: Senator Close
Senator Bryan
Senator Ashworth
Senator Dodge
Senator Foote
Senator Gojack
Senator Sheerin
Assemblyman Barengo
Assemblywoman Hayes
Assemblyman Banner
Assemblyman Coulter
Assemblyman Polish
Assemblyman Price
Assemblyman Ross
Assemblyman Sena
Assmeblywoman Wagner

ABSENT: None

Senator Close stated that the Committee would hear first from the proponents of the bills, one at a time. He suggested that perhaps they may wish to give an overview and then go into more detail later.

Senator Norman Hilbrecht, as Chairman of the Interim Committee, was asked to give an introductory statement regarding this package of bills.

Senator Hilbrecht stated that early in the 1975 session it became apparent that there was a medical liability insurance crises in the state of Nevada. This was demonstrated by the fact that at that time there were only two substantial underwriters in the market and one had announced his intent to triple his premiums with the statement that quite likely this line would be withdrawn from the Nevada market altogether. With that, there was a joint committee established to hear testimony and put together a package of some 15 bills and resolutions which he felt were some of the most satisfactory enacted throughout the United States, to provide a market for Nevada physicians, through the Nevada Medical Liability Insurance Association. By the end of the interim, Dr. Dick Rottman was able to advise them that Nevada physicians were enoying a participation and coverage in the medical liability

assured that money would be available through periodic payments, either to the institution, the physicians, or to the parents if they are engaged in the actual care. If the injured party should die during this time, the fund would then revert to its source. The second modification is a limited abrogation of the collateral source rule. When a person spends money to protect his family, by medical insurance for example, and thereby presumably allocates his limited resources, the proceeds of this kind of insurance should not be a windfall to someone who malpractices. Credit should be given to a defendant for public non-discretionary sources. We were also trying to tune up the JUA, which has carried us through a questionable period of time, but which needs some modification particularly of the consumers or the doctors who are buying this insurance. We also felt the provision of the law where a physician could be reassessed in later years, up to 100% of the premium he is already paying, was somewhat erroneous. A doctor could pay his assessment in advance, and pay his premium on the insurance to begin with, this might be more palatable. One thing they found was that the medical liability crises did not end with the medical community, and therefore he would like to see the Committee enlarge the charge of any further interim studies in this area, to include all kinds of professional liability insurance. He would like to see a concurrent resolution to create another interim study committee to cover this matter as he felt their committee accomplished a lot.

Senator Close at this time asked that the people there to speak on the bills from outside the area do so first, as they had to go into session at 11:00 a.m. The remainder would be heard tomorrow.

SB 185 Provides for retention of and access to certain medical records.

Testimony was presented before the joint Committee by the following:

Jim Crockett, Lawyer, Las Vegas, Nevada stated that this bill addresses itself to retention of and access to certain medical records. The part of the bill that bothers him is the proposed change to Chapter 629, sections 2 thru 6: "the provider of health care shall also furnish a copy of the records to each of such persons that requests it and pays the cost of making the copy". He feels a limitation of reasonableness be imposed as to the release of medical records and

field at least equal to any other state, and probably better then many. Fewer Nevada doctors were going bare, and on an average were not above the median in that area. The public hearings held in '75 and '76 were quite enthusiastic, and there was representation from the medical profession and happily from the public, who suggested some of the problems which have resulted in some of the pieces of legislation that is now before you. We heard from other organizations such as the Trail Lawyers Association, insurance industry, the Board of Medical Examiners, those who were reporting on the success as well as minor difficulties they were experiencing in some cases with the screening panel approach that was adopted in the last session. There was also input by hospitals, and other professional organizations that were also experiencing difficulty in the underwriting area. The first area that was worked on was fix-up legislation. For the first time in the State of Nevada, it allows the Attorney General to intervene in cases of gross or repeated malpractice. To examine the licensure of the physician. It requires the medical societies in the two large counties or the State Board of Medical Examiners, in all events, to review the complaints of patients who felt they had medical accidents committed upon them. Some laws apparently needed revision and these facts were brought to light by a study of the proposed regulations, that the Board of Medical Examiners were adopting to comply with last sessions bills. Changes in the substantive tort law, ranging from modifying the period of limitations in certain circumstances to changing the conformed consent in other provisions. One change is structured awards concept, which is embodied in SB 187. The idea is that a perons who is a minor or becomes incompetent as the result of an injury, requiring ongoing medical care, and a substantial portion of a judgement or award made with respect to this injury will be for that ongoing medical care, sometimes spanning many years. Frequently an injured person dies, sometimes they are rehabilitated, in the case of minor children, the guardians or parents are presented with the stewardship of this money and for one reason or another do not manage that fund correctly. In any event the circumstances there result in something of a windfall to the parent or relative, and in some cases there would be an absence of money necessary for care. For this reason it seemed that a mechanism whereby judgment of a certain substantial amount, could at the option of either party be structured, and we picked $50,000. A judge could break this amount out from the settlement or judgment and could provide for a fund secured by some kind of bonding in our bill. To be

the charges therefor. He felt a provision should be made that would limit fees to at least 200% of the actual cost or a set fee for duplication as medical records are often required for insurance purposes, for disability purposes, for future medical care and sometimes for claims or litigation purposes.

Ray Knisley, former member of the Assembly stated he wished to make a brief statement as he has 50 years of medical records existing in the State of Nevada. He said there seems to be a lack of regard for the privacy and interest of the patient. If this bill is passed it could create a situation where there is no privacy to the medical records that have been set up in the past, or will be set up in the future. It would be possible through a trumped up case to obtain copies of any of ones medical records. These records are not strictly the records of the physician, they are the records of the patient. The doctor is merely the custodian. Nowhere in the bill is there any provision or form for notice to the patient that his records are going to be copied, and no provision for secrecy after those records are copied. Also, there is no liability under this bill if the records should be released to the wrong person or persons.

Deputy Attorney General, Bill Isaeff, assigned to the Board of Medical Examiners. He stated this bill was the result of discussions with the Interim Committee and the Legislative Council Bureau over some of the difficulties his office was having with investigation undertaken by his office as mandated by the Legislature in the 1975 session. The bill allows any authorized representative or investigator of the Board of Medical Examiners of the Attorney General in the course of any investigation conducted pursuant to section 6, to obtain the relevant medical records. Under this bill the records would be completely confidential under law, until such time as the Board of Medical Examiners decided to hold a hearing on it. He finds no problem with revealing these documents to the Attorney General so he may conduct a proper investigation of the allegation. He stated that often times these records are the most important part of a hearing, as well as in defending a client. He feels this bill is a vitally important part of the package of legislation to insure both his office and the Board in discharging their responsibilities to insure quality medical practice in Nevada.

Senator Dodge raised the question if this meant that if a patient refused the release, they should be able to go and get the information without the patients consent.

Mr. Isaeff stated that his understanding under this bill it would allow them to get the information directly from the health care provider without necessarily having to go through the patient. He feels that in giving this information to the AG's office and the Board, and these people understand their responsibilities, there would be a very limited dissemination of information. In some cases, in the early stages of investigation, this might be the best way to handle it.

Senator Bryan stated he felt at this point there should be something written into the law to protect the patients rights. Some notice given so that the patient could raise an objection, and stop fishing expeditions.

Mr. Isaeff stated that if the legislature were concerned about this they could live with a notice situation, as long as they were allowed access to the records upon demand, and upon notice being given. He felt that to delay his office immediate access could delay the investigation and in some instances these could be critical matters.

Mr. Barengo asked if there wasn't a way to get the records anyway, if there was probable cause.

Mr. Isaeff stated that this was one way, but in discussions with the Council Bureau they felt it was best to get legislative determination on this whole issue.

Mr. Barengo then asked, if there was a complaint couldn't they get the records by normal interogatory procedures.

Mr. Isaeff stated that these procedures really did not apply, as his office has no pre-hearing subpeona powers. The only subpeona powers they have now are to summon a witness, or records, to a designated hearing before the Board.

Senator Bryan raised the question, if you made the patient testify unwillingly, it could raise a question of embarassment to the patient and perhaps to the family if he were to testify in public. He felt there could be some very serious policy problems under those circumstances.

Mr. Isaeff stated there are policy problems and he feels

it is up to the legislature to resolve those policy problems. He feels that such a strong responsibility has been placed on the Board of Medical Examiners in these area that practicalities dictate that the policy decision be made in favor of the board in discharging its powers to the fullest in order to provide quality medical care. It can only do that it it is able to conduct its investigations properly and records are the most important part.

Senator Dodge raised the question, what if this was a type of record that is protected under the federal legislation and confidentiality of records.

Mr. Isaeff stated that under the Federal Privacy Act this does not reach down and touch any state governmental agency, except those that use social security numbers. There is nothing in our own state law which would affect this except the doctor/client privilege.

Dr. William K. Stephan, Immediate Past President of the State Medical Association. He stated he was representing 500 doctors and wished to make a brief statement in appreciation of the interim sub-committee. He stated they were pleased with their efforts and they were indeed greatful. He stated that in this particular matter, they have no difficulty in allowing patients access to their records. They do sympathize with the Attorney General in trying to establish a case in the area of physicians giving substandard practice. However, they feel that the patient must remain paramount and his rights must be protected in the writing of this bill. He thinks the whole point is that the patients rights supersede the occasional situation in which this involuntary investigation might be justified.

Senator Ashworth stated that perhaps they could put something into the bill with the wording "upon notification".

Dr. Stephan stated he felt that the notification was important but feels that if the patient objected to that invasion, the patients rights must be honored.

Bryce Rhodes, legal council for the Board of Examiners stated he would like only to concur with the remarks of Mr. Isaeff, and that they would be in favor of the bill. He said a responsibility has been imposed on the Board through the mandate of the Legislature. It is a question of patients rights versus the public purpose and the overall mandate. There are two sides but they are the group mandated to maintain quality

practice and at this point in time are hampered in their efforts.

Senator Sheerin stated he felt some thought should be given to where only the records would be used but the patients name could be anonymous.

Senator Ashworth felt that perhaps after the notice was given, and if there was no response, then the investigator could go into the records.

Robert Petrili, Attorney for Southern Nevada County Hospital in Las Vegas, stated he had been doing this work for 13 years. He said there are problems in the medical community within the hospital, as far as malpractice. There are problems with physicians not wanting to talk about each other, with physicians not wanting to take patients records belonging to other doctors. He believes there is more of a problem with due process within the county hospitals, as far as disciplining a physician. He feels this bill should be expanded so a hospital investigative committee could look at records within that hospital to discipline physicians. He had found that in some cases, if a physician finds out he is being investigated he gets ahold of the patient and talks him into not releasing his records. He is also concerned over the federal law that says you can not release the records on a drug abuse or alcoholic patient under any circumstances without either the patients consent or a court order. The joint commission of accreditation is pushing harder to get an annual review of every physician in the hospital before renewing his next years staff membership, and they must have access to records to see that each procedure was acceptable. He is also concerned over the law that now places hospitals responsible for malpractice, if they knowingly allow a physician to practice in the hospital if there is evidence he may not be competent. This requires extensive investigation by administration to make sure this type of situation does not exist.

Richard Garrod, Farmers Insurance feels this is a good piece of legislation as far as the indurance industry is concerned, but feels there is not quite proper language. Their concern is that there is a possiblity that in cretain cases records may be removed from a file in a office. This bill only states at the convenience of an inspector at a place that could be of his designation. He believes that it must state that the records not be removed from the building, which under present language could be interpreted that way. He also believes there must be language so that a

person who merely sends in money and says I want a copy of someone's record may not get at it. He feels the statement "person who shall request and be willing to pay" must be taken out of this bill.

AB 267 Amends various provisions of law relating to medical-legal screening panels.

Testimony was presented before the Committee by the following :

Tom Cochran, Chairman of Southern Nevada Screening Panel, stated they have between now thru July 20 some 24 hearings. They have already had 4 hearings this year. With reference to the panel he feels they need no less then 16 members, preferably 20. The reason is that a number of the doctors are specialists and have had contact with the patient from time to time, also many times the attorneys are challenged or they will remove themselves for cause, therefore there are never the total that remain probable panel members. If there are challenges from each side, there could be as many as 10 or 12 knocked out. Also, he would like 30 days prior to the hearing that administration provide a list of the panel to the respective parties, and within ten days after notice is given to the parties, that they then respond with reference to the challenges. That would leave 20 days in which to select a panel. Some cases have had over 300 pages of medical records which have to be read and researched and they feel they must have the 20 day period. Also, he has talked with both the southern and northern panels and they agree that subpeona power is needed. He stated that they have had problems getting witnesses and sometimes it has even been impossible, as many times the patient does not wish to get involved or they may feel people will feel they are ratting on them.

Assemblywoman Hayes stated that this subpeona power was supposed to be in AB 267 and was inadvertently left out.

Mr. Cochran, said he would like to state he felt the panel was doing a good job. Last year there were 16 cases filed and only two went to litigation. This year to date there have been 4 filed and only one has gone to litigation.

Jo Powell, President of the Nevada Nurses Association, District 1 and a Trustee of Washoe Medical Center stated she felt this was a good bill. She only had one comment to make and that was an amendment to the

stating, "That no medical or legal members selected to act as a member of the medical-legal panel, including the chairman, has rendered services directly or indirectly to the subject or party before the panel hearing".

SB 189 Requires reduction of damages awarded in medical malpractice actions by amounts from certain collateral sources.

Testimony was presented before the joint Committee by the following:

Richard Meyers, Attorney from Las Vegas and a member of the Southern Nevada Medical-Legal Malpractice Screening Panel feels that this bill is generally undesirable. This bill in the case of malpractice provides that the malpracticing physician is entitled to a credit for 5 specific types of public benefits. He feels that if a trial were prolonged there could be the chance of the malpracticing physician or hospital to benefit in the form of insurance paid out. He feels that section "B" should be excluded as in Nevada only the person who is able to work can receive umemployment benefits. "C" provides for medical payments by reason of former service in any branch of the armed services of the United States. If a person is injured through malpractice and he later gets treatment from military hospitals or doctors, this would provide that the malpracticing physician or hospital is entitled to an offset, this is contrary to the federal lien law. The law provides where the service renders free medical care to its personnel and that person later recovers, that the government has a lien on those proceeds and can get their money back. He feels this should also be deleted. "D" provides for payments under any national health insurance program, and there may be a time in the future where there is a system of national insurance, and because you don't know what that insurance will be, he suggests this also be deleted. He stated that the cost of malpractice should be reduced and this is only one suggested way to do it.

Dr. William K. Stephan stated he felt this bill and 187 were perhaps the two most important to come out of the interim. He stated under section "D" he would like to see an addition in the language to cover state health insurance. Many states have already enacted state programs and the time may come when Nevada may wish to do so. Also, group insurance plans provided by employers, are in fact non-discretionary sources

and therefore should be included in the list of collateral sources. He disagrees with Mr. Meyers as to his contention that public collateral sources listed in the bill are not indeed available collateral sources. They have suggested that the agencies listed have a right of subrogation, so as to preclude duplicate payments. Social Security pays for death and disability, regardless of its cause, and does not exercise the right of subrogation. There are times when there is duplication of payments and therfore he urges passage.

Neal Galitz, Attorney from Las Vegas stated that he knows that the federal law without question requires reimbursement to the United States for bills incurred and paid by the military where a third party is ultimately held responsible, and he could produce statutory references if needed. As to the portion on payments he feels this bill is clearly in conflict with the existing law.

Senator Dodge stated that perhaps the language could be clarified by phrasing "payments not recoverable by the government".

Mr. Galitz stated the "non-reimbursable" should satisfy the conflict problem there is now.

SB 187 Provides for periodic payment of certain damages recovered in malpractice claims against health care providers.

Testimony was presented before the joint Committee by the following:

Dr. William K. Stephan stated this provides for periodic payments of malpractice awards. It is consumer oriented legislation and protects the patient damaged by malpractice against squandering lump sum awards. It assures his future custodial, hopital and medical care and precludes windfall wealth. It specifies for the settlement to be structured, however it should be amended and improved in two areas. One should be "replacement of income.", if the judgment creditor was employed, and if his future income is impaired as a direct result of a malpractice incident. Two we feel that the periodic payment plan should be instituted whenever the total award perhaps exceeds the most recent annual income of the judgment creditor. They feel that the sum at which there is structured payment be lowered considerably. They feel that $50,000 in one lump sum is too much responsibility to place on a person.

Senator Dodge asked how then can they pay attorney's fees?

Dr. Stephan stated that the concept was that pain and suffering was not structured and would be paid in a lump sum and, therefore, the value of future payments was defined by the total award in the court and the contingency fee would be taken out of that.

Senator Close stated that as the Committee was now compelled to go into session, the hearing would be continued at 8:00 a.m. tomorrow morning.

Respectfully submitted,

Linda D. Chandler
Linda D. Chandler, Sec.

APPROVED:

SENATOR MELVIN D. CLOSE, JR., CHAIRMAN

ASSEMBLYMAN ROBERT R. BARENGO, CHAIRMAN