MINUTES

ASSEMBLY JUDICIARY COMMITTEE
April 1, 1977

Members Present: Chairman Barengo
Assemblyman Hayes
Assemblyman Banner
Assemblyman Coulter
Assemblyman Polish
Assemblyman Price
Assemblyman Ross
Assemblyman Sena
Assemblyman Wagner

The meeting was called to order at 7:45 a.m. by Chairman Barengo. He stated that before the regular agenda was taken up there would be some committee action work and they would also be hearing from the Attorney General's office regarding the letter received prior referencing AB 268.

Committee Action:
SJR 16: Mr. Ross moved for a Do Pass. Mr. Sena seconded the motion and the motion carried. This bill was from the 58th session. (Mrs. Hayes and Mr. Polish were not present when this vote was taken.)

SB 85: Mr. Ross moved for a Do Pass. Mrs. Wagner seconded the motion and the motion carried. (Mrs. Hayes was not present for this vote.)

AB 268: Deputy Attorney General, Shirley Smith and Mike Clasen of the Department of Human Resources addressed the committee regarding the letter which had been received by all the committee members and other Assembly members in reference to AB 268 stating that they did not believe that they were afforded a proper chance to express their views on this bill as they did not receive notice of hearings. Ms. Smith said that the reason the letter was written was so that the legal position and testimony of the Department of Mental Hygiene could be made a part of the record. Her letter and attachments are attached and marked Exhibit A.

She briefly went over the main points of her attached statement and there was considerable discussion between the committee and Ms. Smith concerning the points of conflict and the way this matter was handled by her office.

Mr. Ross brought out a point of order stating that this bill was no longer in this committee and he felt that the committee should go on to other matters which were on the agenda. Mr. Sena concurred on this. Mrs. Wagner pointed out that there was notice of all the hearings posted with enough prior notice that they should have been aware of the joint hearings and she felt that since there was a representative of the Attorney General's office present at those hearings, that perhaps there should have been a

better system, within the AG's office, for communicating what was going to affect their different departments.

In conclusion, Chairman Barengo stated that they must go on to other matters and that it would be best if those who had further comments on this bill would address those comments to the Senate Judiciary Committee where this bill is now being heard.

SB 75: Mr. Gwynn, Department of Motor Vehicles, was first to testify on this bill pointing out that he felt this bill had caused many, many more problems than had been anticipated. He stated that last session when this bill was introduced the bill should not have included automobiles in the property section. He said that the inclusion of vehicles in this bill had severly hindered the negotiability of the title to these vehicles and that the Senate Judiciary committee agrees with that opinion and the exclusion of the automobile in this bill. He also stated that his department should have caught this last session and perhaps the problem could have been eliminated at that time.

Chairman Barengo pointed out that they heard lengthy testimony on this very problem last session and they had specifically included the automobile under the property section.

Mr. Gwynn explained to the committee why he felt in the situation of divorce and separations why the negotiability factor is so important. And, he also pointed out why this bill, as is, is so available to use in fraudulent circumstances. Mr. Gwynn also stated that if the automobile was to be included as joint property without one spouse being able to sell the vehicle, then both the names should appear on the title to the vehicle so that it could not be sold without both signatures.

Discussion followed regarding the various situations and problems which might arise under both alternatives.

Senator Gary Sheerin and Sheriff Rasner both testified in support of what Mr. Gwynn had to say on this bill. They both reiterated the problems the change last session had brought about in practical use and how it hinders the negotiability of the title in public and private transactions.

Senator Close also testified on this bill stating that he felt the inclusion of automobiles in this bill was something that should not have been written into the original bill and they felt that they simply were not aware of the long reaching ramifications of inclusion when they passed the bill last session. He also pointed out the possibility for using this for defrauding banks, dealers and others who loan money for vehicles or those who buy and sell vehicles in general. He also again, pointed out the problem with negotiability of the title.

SB 79: Senator Sheerin testified on this bill stating that when a person who is imprisoned commits a crime this bill would provide

that that prisoner would have to spend time for that crime in the state prison, rather than the county jail, even if the crime was a misdemeanor offense. He stated that at the present time this bill only effects Carson City; however, when the new prison in opened near Las Vegas it will also effect Clark County jail.

He explained that the reason behind this bill is the financial impact that housing these prisoners, after release from the state prison, has on the county where the state prison is located. He said he felt it was unfair that that county would have to shoulder the entire financial responsibility for these people and this bill would return that responsibility to the state by making the inmates of the prison who commit these crimes spend that time in the state prison after serving the sentence they were originally in for. He commented that this was a departure from the traditional common law practice, but, he felt it was for good reason.

Senator Sheerin also pointed out that this same thing would apply for where the time would be spent if the prisoner committed the crime while escaped from prison.

Chairman Barengo commented that what this bill in effect does, is redefine where the time for these crimes will be served. Senator Sheerin stated that that was the case.

Sheriff Rasner stated that this bill does help to alleviate the problem that he is facing now of overcrowding in the county jail. And, he stated, they are at maximum capacity at this time and due to that fact, his department would like to see this bill passed.

Mr. Bud Campos, Parole and Probation was next to testify on several different bills.

SB 68: Mr. Campos stated that this bill provides for a preliminary inquiry process, following the arrest of an alleged probation violator, to determine if probable cause exists to return the individual to court for a violation hearing. He stated that the bill, on page 2, line 47, is more extensive, as far as due process is concerned, than the Supreme Court decision it is patterned after. He also stated that the only other difference between this bill and that decision is the slight modification in language, the balance of the bill is the same as the current law.

In answer to a question from Mrs. Wagner, Mr. Campos stated that an inquiry officer is simply a person who can hear the facts of the case who is not directly connected with the charges being brought forward. He also stated that, except in the rural areas, regular staff members can be utilized for this purpose.

Chairman Barengo brought out the fact that there was a similar bill to this one last session which delt with parolees. Mr. Campos stated that that was correct and this was quite similar, only providing for probationers.

SB 76: Mr. Campos stated that there were two major areas in this bill. He stated that in this bill they are trying to eliminate from the law the provision which makes it appear that the Parole Board has jurisdiction over the inmates in the county jails. This change is made on page 1, line 2. He stated that the Parole Board hasn't had jurisdiction over these inmates since the change in the law which occurred in 1967, and this clarifies that so that the inmates in the county jail who apply for parole, under this law, will know that they are not covered by it.

He stated that the second point for change was on line 22 of section 3. This section relates to the loss of good time credits for escapees. But, since it is in the section relating to parole absconers, it does not relate to inmates who escape from prison. This part of the law is not being used at this time because of the problems it causes in application. He stated that the parole absconders provision is set out on line 17 thorugh line 19 and their department feels that that is sufficient.

SB 78: Mr. Campos stated that he did not feel that this bill had had any significant amendments in many years and he felt it was in need of some. He said that this is another law which is not being enforced and even though this bill presently allows that someone who has been discharged from probation may be arrested for up to one year after that time, they do not do that because he does not feel that is proper. He said this was the change on line 8 and continuing. He said that he felt that perhaps the law should be changed that if a person were a fugitive that his time credits would stop at the point he became a fugitive, so that his term would not expire at the normal expiration time.

SB 83: He stated that the law provides that the court can, as a condition of probation, require the probationer submit to drug testing if the offense was drug related. This bill would provide that this could be broadened to allow this testing as a condition of parole at the discretion of the court even if the person being put on probation was not convicted of one of the controlled substance provisions.

Chairman Barengo commented that he thought the courts were already doing this in some cases. Mr. Campos stated that they were and that he felt this particular bill could be thrown out and it wouldn't change anything because there are other portions of the law which allows the court to set any terms for probation that they see fit.

There was a brief discussion of this and the discretionary uses of it by the courts. Mr. Campos also told the committee that drug testing today is a very simple process compared to the way it was done a few years ago.

SB 77: Chairman Barengo asked Mr. Campos to comment on this bill. Mr. Campos stated that he really did not understand why NRS 176.375 through 176.405 is in the law. He stated he felt this way because it basically provides that the court may approve the staying of

an execution of sentence for a period of 20 days to allow counsel to appeal to the Board of Pardons for a modification of sentence or other action by the board. He stated that, due to the exclusion of certain crimes from that statute, a person may appeal to the board only on crimes that are already under the jurisdiction, totally, of the court. Therefore if the judge felt clemency was in order, he could exercise his perogative and grant it. He was therefore, in favor of SB 77.

SB 73: Gayle Smookler, Nevada Trial Lawyers Association, spoke in support of this bill. She stated that this bill was simply a codification of the law relating to the guest statutes which had been declared unconstitutional in Nevada and most other states.

Discussion followed on the guest statute and its past applications.

SB 70: Senator Close testified on this bill stating that the first portion of the bill dealt with notification regarding wills and estates of deceased persons. He stated that lines 9 through 12 provided that notification shall be given specifically to the executor, administrator or trustee, who is not a party to the filing. He said this had been changed becuase they felt that the notice provision, in the old law, were deficient and that the executor might not be notified and he should be present during any matter which might affect the estate or will.

He stated that the second section of this bill which is dealt with was a provision concerning cemeteries. This change would provide notice, by publication, if a piece of property which had been used as a cemetery were going to be used for a different purpose. He then related the comments of Frank Daykin regarding this matter from his minutes of the Senate Judiciary Committee meeting. He stated that the reason for this was that, until now, notice of this type had been required to be sent only to those who had specifically asked that they be notified and this would allow publication of this and therefore notify more people who might be interested in this fact.

SB 72: Senator Close stated that Cameron Batjer, Justice of the Supreme Court, had spoke to the Senate Judiciary Committee on this bill. He explained that the reason for the court not wanting to set the fees for attorneys was that, at a later time, that same court might be put in a position to rule on the competence of the attorney which they had set the fee for earlier and this was, possibly, a conflict of interest problem. Therefore, they suggested that all the attorneys be appointed by the lower courts so that they could use hindsight and utilize that in making their determination as to the capability of the attorney in representing the client in the court case.

Chairman Barengo pointed out that there was a case reference on this point which he had requested the Research Department to supply to the committee.

Committee Action:

SB 64: Chairman Barengo introduced a note from Jim Jones, Washoe County recorder, which is attached and marked Exhibit B, in support of this bill. Mrs. Hayes moved for a Do Pass. Mr. Polish seconded the motion and it carried unanimously. (Mr. Sena was absent during this vote.)

SB 73: Mrs. Hayes moved for a Do Pass. Mrs. Wagner seconded the motion and it carried unanimously. (Mr. Sena was absent during this vote.)

SB 83: Mrs. Hayes moved for a Do Pass. Mr. Price seconded the motion and all voted yes except Mr. Banner who voted no. (Mr. Sena was absent during this vote.)

SB 75: Mrs. Wagner moved for a Do Pass. Chairman Barengo seconded the motion and it carried unanimously. (Mr. Sena, Mr. Ross and Mr. Coulter were not present.)

SB 70: Mrs. Wagner moved for a Do Pass. Mrs. Hayes seconded the motion and it carried unanimously. (The same members were absent.)

SB 72: Chairman Barengo introduced the case point he referred to prior at this time, which is attached and marked Exhibit C, and this bill will be taken up again at a later time.

SB 76: Mr. Polish moved for a Do Pass. Mr. Banner seconded the motion and all voted yes except Mrs. Hayes who voted no. (The same members were absent.)

SB 78: Mr. Polish moved for a Do Pass. Mrs. Hayes seconded the motion and all voted yes except Mr. Banner who voted no. (The same members were absent.)

Mr. Price then asked Chairman Barengo if he could give a report on the findings of the sub-committee on AB 247 and Chairman Barengo said this would be the next order of business.

AB 247: Mr. Price gave the committee a general overview of what happened at the March 31 meeting which was attended by representatives of both sides and may be referred to in the minutes of that meeting. He stated that as a result of the meeting they had come up with a plan which should be amended into the bill which would set out the steps of procedure. They are: 1. The person would file the charges which would be notarized and sworn to be truthful, 2. There would be a 180 day time period begin at that time (in agreement with the federal regulations). 3. A 60 day period starts also, which is for the hearings to be completed. 4. The employers will have an informal opportunity to make a settlement and understand the charges. This is called a predetermination settlement meeting and if no settlement can be reached, 5. The EEOC will continue to investigate the case, 6. The investigating officer will make his report to the director

and the director will decide, based upon that report, whether to move forward. If they do move forward, 7. The employer would be called in for a conciliatory hearing which will be confidential. The information in this hearing will not be allowed to be used in future court cases because this is an informal hearing which will hopefully end in settlement without cost to either side. After this procedure is followed there were two alternatives that the committee discussed as to what would happen at that point. They were: 1. There could be a full-blown administrative hearing and, if the employer lost, this could go to a trial by records or a new trial in court. 2. Give the commission the power to go into court on behalf of the complaining party and have the trial in court.

Mr. Price said that all sides agreed that the second method of going directly into court would be the best and least expensive and would meet with the federal requirements in this area.

He also stated that the Attorney General's Office and the Agency had stated that they did not want punitive damages included. Therefore, page 2 line 48 should be deleted. Mr. Price also pointed out that the federal people have a procedure for a re-employment waiver which they would like to include.

Mr. Price stated that he wanted to get Mike Dyer and the representative for the employers and get together with the bill drafter and go through this bill and make the amendments necessary. He asked the committee if this would be acceptable to them and they concurred.

Mr. Price, additionally, stated that due to the complexity of this issue the sub-committee suggested that there be an interim committee to study this and come up with an act which would break out the different sections, such as housing or employment discrimination, and bring all the equal rights laws into that act. He said he had asked Mike Dyer to draw up a resolution to cover this. This was thought to be a good idea by the committee.

Mrs. Wagner said that she wished to go on record as commending Mr. Price for his diligence in this and other areas that he had taken responsibility for and done such a good job in. Chairman Barengo concurred in this.

There being no further business, the meeting was adjourned at 10:05.

Respectfully submitted,

Linda Chandler

Linda Chandler, Secretary

EXHIBIT A
(WITH ATTACHMENTS)

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL
CAPITOL COMPLEX
SUPREME COURT BUILDING
CARSON CITY 89710

ROBERT LIST
ATTORNEY GENERAL

March 30, 1977

Robert R. Barengo, Chairman
Assembly Committee on Judiciary
Legislative Building
Carson City, Nevada 89701

Dear Assemblyman Barengo:

I have been asked by the Attorney General's Office and Charles R. Dickson, Ph.D., Administrator of the Division of Mental Hygiene and Mental Retardation to prepare testimony in regard to A.B. 268. I have done so in written form and request that ~~the enclosed~~ statement be made a part of the record.

The Attorney General's Office was unable to appear and testify personally on March 28 when the bill was voted out of Assembly Judiciary because it was not listed in the Daily History for that date. The Division of Mental Hygiene and Mental Retardation had asked the Secretary to the Judiciary Committee to be informed if further hearings were to be held, but unfortunately that was not done. Therefore, I would appreciate the opportunity to provide you with the information we had prepared for that purpose. I am enclosing, for your information, a copy of the fiscal note that was submitted by the Attorney General's Office on January 6, 1977.

If possible, I would like to have the opportunity to appear in person to present my statement orally and to answer questions. If I may be of assistance in regard to this bill, please feel free to call upon me.

Sincerely,

ROBERT LIST
ATTORNEY GENERAL

By: Shirley Smith
Shirley Smith
Deputy Attorney General

SS/jb
Encl.
cc: Members of the Assembly Committee
on Judiciary

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OFFICE OF THE ATTORNEY GENERAL
DIVISION OF MENTAL HYGIENE
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ATTORNEY GENERAL

SHIRLEY SMITH
DEPUTY ATTORNEY GENERAL

TESTIMONY IN OPPOSITION TO AB 268

The Attorney General's Office opposes AB 268 for several reasons. In order to present those reasons clearly, let me first indicate the present state of the law and then outline how the bill would change the law.

I. Existing Law

NRS 11.400 is a statute of limitations provision which prohibits medical malpractice actions against health care providers more than four years after the date of the injury or two years after discovery of the injury, whichever occurs first, or ten years in the case of brain damage or birth defect. The effect of this rule would be harsh if applied uniformly, therefore, certain exceptions are included. For example, where a health care provider conceals an act, error, or omission that would constitute medical malpractice, the running of the statute is tolled during the time of the concealment. Thus, a plaintiff who fails to discover his injury because it was concealed from him by the defendant is not barred from suing until four years after discovery of the injury.

Another exception favors prisoners and persons admitted to State mental health care facilities. The Warden of the Nevada State Prison and the Administrator of the Division of Mental Hygiene and Mental Retardation are held "responsible for exercising reasonable judgment in determining whether to initiate any cause of action" on behalf of persons "subject to their respective control who is under a legal disability".

Note that the existing language requires the Warden and the Administrator to initiate any cause of action. "Initiate" is broad enough to include a number of courses of action. For instance, if the Administator became aware that a health care provider may be guilty of malpractice against a client at the Institute, he could inform the client, the client's family or guardian, refer the case to legal aid, or in any other reasonable way see to it that action on the client's behalf is taken.

II. Proposed Changes

AB 268 substitutes "prosecute"for "initiate". The change would mean that the Administrator himself must prosecute the action on the client's behalf. He could not fulfill his duty by alerting the client or his family, but would have to personally bring the action. The bill does not provide for staffing for the Attorney General's Office or funds for private counsel.

The major change is at lines 22-33 wherein the Warden and Administrator are made personally liable to the legally disabled person or minor child for "damages sustained" because of failure to bring such action. Damages of course would include the amount of any judgment that could have been had against the health care provider, had the statute not run.

III. Attorney General's Conflict of Interest

The bill would put the Attorney General's Office and the Administrator in hopelessly conflictual positions. "Provider of health care" is defined to include physicians, dentists, nurses, physical therapists, psychologists, medical laboratory directors and technicians, as well as licensed hospitals. The Division of Mental Hygiene and Mental Retardation employs members of all those professions and operates two licensed hospitals. The Administrator then would be charged with the duty of filing suit against his own employees and his own facilities. Should he fail to do so he should be personally liable to the legally disabled person for damages sustained.

The Attorney General provides legal representation to the Division of Mental Hygiene and Mental Retardation, defending it against negligence suits and bringing contracts actions on its behalf. Under the provisions of NRS 41.0337, the Attorney General also represents State employees who are named as co-defendants with the State. Thus the Attorney General, as legal counsel to the Division and its staff, would be required to prosecute the medical malpractice action on behalf of the Administrator and to defend the State and it's employees in the same action. Not only does such an arrangement offend common sense, it violates Canon No. 5 of the lawyer's code of ethics which forbids representing clients whose interests conflict.

It could be argued, since the bill does not address the problem of conflict of interest, that the intent is for the Administrator and the Warden to prosecute those cases at their own expense and without representation by the Attorney General. If that is the result, then few people would take those jobs. Since the bill holds the Administrator personally liable then the $25,000 limitation contained in NRS 41.035 for actions against the State may not apply in such cases brought against the Administrator.

Alternatively, the State could hire private counsel to prosecute those actions, thereby avoiding the conflict of interest, but at some cost to the State.

IV. Administrator's Conflict of Interest

A similar conflict applies to the Administrator. He would be required to bring suit against his own staff people who come within the definition of provider of health care. As an employer, the Administrator may be amenable to suit under a theory of respondeat superior for the torts of his own employees. A lawyer bringing a tort action on behalf of an injured person would name not only the individual health care provider, but would name his supervisors as well. Thus you have the Administrator prosecuting a law suit on behalf of one of his clients and being named as a defendant therein. He would be both plaintiff and defendant in the same suit!

V. Respondeat Superior

The reasons for the doctrine of respondeat superior are grounded in social policy.

Courts reason that where one is injured through no fault of his own, then it is desirable that the loss occasioned by that injury be spread not only to the person directly responsible, but to those who stood to gain most by the conduct that caused the injury. Therefore, where a delivery driver for Ajax Dairy negligently injures a plaintiff in a crosswalk then not only is the driver held liable, but so is his employer, who stood to benfit the most from the driver's conduct within the scope of his employment, i.e., driving the truck.

By making the Administrator liable for conduct of which he has only constructive knowledge is in effect making him liable as if under respondeat superior without the concomitant policy reasons. The Administrator does not stand in an entrepreneurial relationship to his employee; he does not stand to earn a profit from that emplyee's work. The bill gratuitously shifts the liability from the proper person, the health care provider who has committed a tortious act, to one who is not at fault, the Administrator or the Warden.

Not only does the bill require the Administrator to bring suit when he has actual knowledge of an injury, but also when he has constructive notice. Under the doctrine of constructive knowledge one is held responsible for knowing that which he does not in fact know. A common application of the doctrine is in principal-agent or employer-employee relationships. In this situation, the Administrator would be held responsible for the knowledge of each of hundreds of Division employees who are directly involved in client care.

VI. Cost of Compliance

To protect himself fully from potential liability he would have to perform a thorough review of each case file for every Division client for the last ten years. (Ten years is the longest limitation period provided for in NRS 11.400.) That review would have to be conducted by health care professionals in order to evaluate the quality of care that was provided, e.g., by physicians to review other physicians' work. Dentist, nurses, etc., likewise. A review would also have to be made by a lawyer to determine whether there was an actionable cause. Witnesses would have to be interviewed to verify the accuracy of case files. Needless to say, Division of Mental Hygiene and Mental Retardation facilities have provided service for tens of thousands of persons over the last ten years.

In every case where there is found a colorable cause of action the Administrator would have to resolve any doubts for the benefit of the legally disabled person. To do otherwise would be to run the risk of himself later being sued by the injured party.

The bill is objectionable because it will expose the State's fiscal resources to another possible liability. NRS 41.0337 provides that no action can be brought against a State employee unless the State is also joined as a co-defendant. Subsection three provides that the State shall have no right of contribution against an employee found liable with the State as joint tortfeasors unless the State can prove that the employee acted wantonly, maliciously, or failed to cooperate in the defense. Therefore, by creating a new cause of action against the Administrator, this legislation also creates one against the State. The practical effect, where the State has no right of contribution against the Administrator, is that the State and it's taxpayers are left holding the bag.

VII. Who is Covered?

In regard to certain clients, those whose treatment involves symptoms relating to alcohol or drug abuse, the bill imposes a duty, the execution of which potentially could put the Administrator in violation of the federal confidentiality requirements of 42 Code of Federal Regulations section 2, and thereby endanger all federally funded programs operated by the Division. Those rules prohibit the use of any information which would reveal the identity of clients, by any persons other than the treatment team, without a written, specific waiver of confidentiality or a court order. If the written release or court order were unavailable, the Administrator would have to elect between failure to prosecute the malpractice action and the attendant penalties and violating his right to confidentiality and thereby subjecting himself to a possible fine of from $500.00 to $5,000.00 or losing federal funding.

VIII. Lack of Definitions

The bill fails to define "subject to their respective control". The Division offers services in a variety of settings and circumstances and it is not clear which, if any, of its clients are subject to the control of the Administrator. Some people may have only one contact, for a few minutes, voluntarily and as an outpatient. Others may return for an hour or two per week. Others are served as voluntary admissions in residential facilities, or are brought in by the police for emergency treatment or are court committed. Others are referred from the criminal justice system as incompetent to stand trial, not guilty by reason of insanity, or for mental illness occurring while imprisoned. Some of these people may be residents for years. While resident, some are afforded passes and convalescent leaves during which they can leave Division facilities: Even those people who are in Lake's Crossing Center, the security facility for the disordered offender, can be said to be under the control of the Administrator in only limited ways.

The lack of definition of "control" would require the Administrator to proceed conservatively and bring suit in a number of cases where such control is not very evident.

Similarly, legal disability is not defined. NRS 433A.460 provides a rebuttable presumption of legal capacity unless he has been specifically adjudicated incompetent. Does "legally disabled" mean the same thing as "adjudicated incompetent"? Should the Administrator bring a malpractice action on behalf of one who has not been adjudicated incompetent but who as a factual matter does not have the capacity to do so himself?

Similar problems arise in regard to minors, persons who have guardians of the person or the estate or both, or guardians ad litem. Those persons may be "legally disabled", but they may also have parents or guardians who have the duty to act on their behalf and in their own best interests. To that extent they are not legally disabled. Would the Administrator be obligated under this law to sue on their behalf? If so, that duty would overlap the duty of the parent and guardian.

IX. Constitutional Infirmities

The selection of the Administrator and the Warden appears to be arbitrary and not reasonably related to the problem the bill attempts to address. There are

a number of other facilities in the State which house people who may suffer from "legal disability". These include county jails, public and private children's homes, hospitals, the Elko boys' school, Caliente girls' school, Wittenberg Hall, Clark County Juvenile Court Services, County and State Welfare Departments and so on. Those programs are not included. If the intent is to preserve rights and remedies to people who may be under a disability, then the bill only addresses a small part of the problem.

If the intent is to protect those helpless people, then the choice of the Administrator as the responsible person is a poor one. He of all the staff of the Division of Mental Hygiene and Mental Retardation is least likely to have specific information on individual cases. He directs a statewide multi-million dollar program serving thousands of clients. For the benefit of those clients it would make more sense to place the responsibility with people who would have reason to know of acts of medical malpractice.

Mental health law and prisoners rights are very glamorous legal issues today, just as civil rights and poverty law were the glamour issues ten years ago. It may be that the selection of the Administrator and Warden instead of persons closer to those to be protected was inspired by the currency of those issues in the news.

To single out these two men and place on them an onerous responsibility and personal liability may constitute a violation of their rights to equal protection and substantive due process.

X. Other Remedies

If the intent is truly to provide a protection to prisoners and mental health clients, there are other means of doing so without cost to the State or to the two men singled out by AB 268. Some of the more obvious possibilities that could be used either singly or in combination would include:

(a) tolling the running of the statute of limitations for medical malpractice actions during any legal disability,
(b) authorizing other representatives, relatives and friends, who are close to the clients to initiate actions on their behalf, or
(c) put the time and money this bill will cost into a client-advocacy program.

XI. Conclusion

NRS 11.400 as it now stands, only requires the Administrator and the Warden to exercise "reasonable judgment", based on their own personal knowledge, for initiating action. That does not impose unreasonable burdens on the Administrator and Warden nor does it create conflict of interest problems for the Attorney General's Office, or result in the government in effect suing itself. Neither does it place a heavier burden on the State and its employees than it does upon parents, guardians, spouses, etc. whose inherent duty it is to assert the rights of their children and wards. Our specific objections are to the changes proposed at page two lines 3 and 13 where the word "prosecute" is inserted, lines 6 and 16 where "commence on" is inserted and all of the new language contained in lines 22 through 33.

In summary, on behalf of the Attorney General, the Administrator of the Division of Mental Hygiene and Mental Retardation, and the Warden of the prison, I respectfully submit that AB 268 be defeated.

Sincerely,

ROBERT LIST, ATTORNEY GENERAL

BY Shirley Smith
Shirley Smith
Deputy Attorney General

SS:jlb

Now AB268

January 6, 1977

MEMORANDUM

To: Ed Schorr, Deputy Fiscal Analyst 5690
Office of Fiscal Analysis
Legislative Counsel Bureau

FROM: James H. Thompson, Chief Deputy Attorney General

SUBJECT: Fiscal Note to Bill Request 2-20

We have attempted to forecast (without any reliable indicators) the financial impact of BDR 2-20. In all likelihood the Amendment would impact very little on the Prison Warden or the Welfare Administrator. However, there could be considerable litigation arising out of patients at the mental health hospitals in terms of added personal service of another full time deputy attorney general to be budgeted at $25,000 per annum.

DD262

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MEMORANDUM

TO: Attorney General Robert List B.D.R. 2-20

FROM: Ed Schorr, Deputy Fiscal Analyst Date: November 16, 1976
Office of Fiscal Analysis
Legislative Counsel Bureau
Telephone: 885-5640

SUBJECT: FISCAL NOTE

The attached bill has been prepared as a result of a study conducted by a subcommittee of the Legislative Commission on the Problems of Medical Malpractice Insurance.

In view of legislation enacted by the 1975 Legislature (NRS 41.0337), this bill appears to create a new obligation the Attorney General to defend state agency heads. Possibly it also creates new liability exposure for Nevada.

Will you please review the bill, estimate the financial impact of its enactment and prepare a fiscal note. A fiscal note form is attached for your convenience.

Ed Schorr

ES:fl
Attachment

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Office of the Attorney General

SUMMARY--Specifies conditions under which persons under disability may recover damages for parents' or guardians' failure to bring medical malpractice action. (BDR 2-20)
Fiscal Note: Local Government Impact: No.
State or Industrial Insurance Impact: Yes.

AN ACT relating to medical malpractice actions; specifying the conditions under which persons under legal disability may recover damages for failure of parents or certain guardians to bring such actions; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 11.400 is hereby amended to read as follows:

11.400 1. Except as provided in subsection 2, an action for injury or death against a [health care provider as defined in subsection 5] provider of health care shall not be commenced more than 4 years after the date of injury or 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs first, for:

(a) Injury to or wrongful death of a person, based upon [such health care provider's] alleged professional negligence [; or] of the provider of health care;

(b) Injury to or wrongful death of a person [for rendering] from professional services rendered without consent; or

(c) Injury to or wrongful death of a person [for] from error or omission in [such health care provider's] practice [.] by the provider of health care.

2. This time limitation is tolled for any period during which [such health care provider] the provider of health care has concealed any act, error or omission upon which such action is based and which is known or through the use of reasonable diligence should have been known to [such health care provider.] him.

3. For purposes of this section, the warden of the Nevada state prison and the administrator of the mental hygiene and mental retardation division of the department of human resources shall be deemed

the guardian of every person subject to their respective control who is under a legal disability and are responsible for exercising reasonable judgment in determining whether to [initiate] prosecute any cause of action [arising under this section which any such legally disabled person may have against any health care provider under] limited by subsection 1. If the warden or administrator fails to [take] commence an action on behalf of such legally disabled person within the prescribed period of limitation, the legally disabled person shall not be permitted to bring an action based on the same injury against any [health care] provider [under subsection 1] of health care upon the removal of his legal disability.

4. For purposes of this section, the parent, guardian or legal custodian of any minor child is responsible for exercising reasonable judgment in determining whether to [initiate] prosecute any cause of action [which such minor child may have against any health care provider under] limited by subsection 1. If the parent, guardian or custodian fails to [take any] commence an action on behalf of such child within the prescribed period of limitations, such child shall not be permitted to bring an action based on the same alleged injury against any [health care] provider [under subsection 1] of health care upon the removal of his disability, except that in the case of brain damage or birth defect the period of limitation is extended until the child attains 10 years of age.

5. If the warden or administrator with respect to a legally disabled person under his control, or a parent, guardian or legal custodian with respect to his minor child:

(a) Has actual or constructive knowledge that the legally disabled person or minor child may have a cause of action under this section against any provider of health care;

(b) Fails to exercise reasonable judgment in determining whether to prosecute the cause of action; and

(c) Fails to bring the action on behalf of the legally disabled person or minor child within the prescribed period of limitations, he is personally liable to the legally disabled person or minor child for damages sustained because of such failure.

6. As used in this section, ["health care provider"] "provider of health care" means a physician [or surgeon,] licensed under chapter 630 or 633 of NRS, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, [osteopath,] chiropractor, [clinical laboratory bioanalyst, clinical laboratory technologist, veterinarian] doctor of traditional Oriental medicine in any form, medical laboratory director or technician, or a licensed hospital as the employer of any such person.

EXHIBIT B.

SB 61

Jim Jones, Washoe County Recorder, called on behalf of himself & Joan Swift, Clark Co. Recorder, in support of this bill.

See Page 3.

EXHIBIT C

92 Nev., Advance Opinion 138

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH L. BRACKENBROUGH, APPELLANT, v.
THE STATE OF NEVADA, RESPONDENT.

No. 7862

August 6, 1976

Original post-judgment motion for attorney's fee.

Motion denied, without prejudice.

Halley & Halley, Reno, for Appellant.

Robert List, Attorney General, Carson City; *Larry R. Hicks*, District Attorney, Washoe County, for Respondent.

OPINION

Per Curiam:

Counsel who represented Keith L. Brackenbrough in this appeal, which was summarily resolved in July, 1975 (Brackenbrough v. State, 91 Nev. 487, 537 P.2d 1194 (1975)), has now filed an undocumented motion in this court requesting payment of attorney's fees.

The record in this case, was returned to the Second Judicial District Court, Washoe County, in August, 1975, after remittitur issued; therefore, we are unable to ascertain (1) whether appellant was, in fact, an indigent and counsel was duly appointed to prosecute this appeal; or, (2) on what charges appellant was before the court. See NRS 7.125(2). This, and other data, properly documented, is essential to the motion.

In 1875, our legislature first recognized an obligation to implement a means of compensating counsel appointed to represent indigents in criminal proceedings. See Stats. of Nev., 1875, ch. 86, p. 142. In the ensuing century the statute was amended on eight (8) separate occasions, several of which provided for an increase in the amount of compensation payable to appointed counsel. The most recent amendment, codified as NRS 7.115–NRS 7.165, places Nevada lawyers who are appointed to represent indigents in the state courts, on a par, "financially," with lawyers appointed—and paid—by the Federal Courts. The fiscal portions of the statute (Stats. of Nev. 1975, ch. 612, pp. 1153–56) were patterned, in part, on the Federal Criminal Justice Act (18 U.S.C. § 3006A), first

enacted in 1964 and amended by the Congress in 1970. See 91 Stat. 447 (1970).

In addition to increasing the hourly amount of compensation and designating maximum amounts recoverable, the new act also provides for the payment of a fee in excess of the statutory maximum where there are "unusual circumstances."[1] Other portions of the new statute attempt to place both an administrative and fact finding burden on the supreme court in so far as appointing counsel, processing and approving claims for fees, and evaluating the value of counsel's services on an appeal are concerned. For example, NRS 7.125(3)(b) purports to proscribe payment of a fee in excess of the statutory maximum in an appeal where there are "unusual circumstances" unless the excess amount is ". . . approved by a justice of the Nevada supreme court." See also, NRS 7.145(1) which provides: "Claims for compensation and expenses shall be made to: . . . (c) the supreme court on any appeal to that court."

Prior to May 20, 1975, the effective date of the new statute, a request for an attorney's fee by private counsel who had been appointed pursuant to NRS 171.188, was directed to the district court. That court considered and evaluated all the claims (whether they were for services in the trial court, or on an appeal) and, upon approval, issued counsel a certificate, pursuant to NRS 7.260 (see Stats. of Nev., 1973, ch. 102, p. 168), for presentment to the appropriate financial officer of the county for payment. Cf. Hancock v. State, 80 Nev. 581, 584, 397 P.2d 181, 182 (1964). Most other states have followed an analogous procedure. The United States Code provides that claims for compensation for similar services in the federal district and appellate courts ". . . shall be submitted to the district court which shall fix the compensation and reimbursement to be paid." 18 U.S.C. § 3006A(d)(4).

Historically, both retained and appointed counsel have been selected by a client or designated by the trial court prior to the time an appeal is taken. Determination of the amount of remuneration to be paid appointed counsel—for the trial and for the appeal—has almost uniformly been determined by the trial courts. See Edmonds v. State, 62 N.W. 199 (Neb. 1895), which held that the trial court must determine the amount of an attorney's fee for appointed counsel, for the trial—and for the appeal. See also, State v. Wentler, 45 N.W. 816 (Wis.

[1]See United States v. Thompson, 361 F.Supp. 879 (D.C. D.C. 1973) and People v. Wilson, 302 N.Y.S.2d 647 (Monroe County Ct. 1969), for comprehensive treatment and discussions of what factors are considered to constitute "unusual circumstances" which might warrant a fee in excess of the statutory maximum.

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1890); State v. Behrens, 79 N.W. 387 (Iowa 1899); and, De Long v. Board of Sup'rs, 69 N.W. 1115 (Mich. 1897). Cases from many other states, which are in accord, are collected in Annot., 18 ALR3d 1074 at 1082, et seq. Cf. Washoe Co. v. Humboldt Co., 14 Nev. 123 (1879); Op. Att'y Gen. No. 135 (Apr. 25, 1944).

The wisdom and economy of this procedure and custom is quite evident. Counsel who handled the trial—and is familiar with all aspects of the case—should, if feasible, also handle the appeal. Such counsel usually resides in—or near—the area where the trial took place. Their capacity and availability are usually better known to the trial judge than to members of the appellate bench. The rules of practice provide that questions relating to, and concerning, the content and preparation of the record and transcript are ordinarily presented to the trial court judge. Having presided over pretrial proceedings, over the trial, over post-trial motions, and over matters concerning preparation of the appellate record, the district court is therefore usually in a better position than this court to determine expeditiously how much new and effective effort has truly been devoted to preparation of appellate briefs.

Brown v. Board of County Comm'rs, 85 Nev. 149, 451 P.2d 708 (1969), recognized the inherent power of this court to set an attorney's fee; however, we deem it appropriate that normally such fees be first processed and resolved in district court, which is a fact finding tribunal, before we consider them. See the Const. of Nev., Art. VI § 4, which provides, in part, "The supreme court shall have appellate jurisdiction in all cases in equity; also in all cases at law . . ."

Thus, we deem the portions of Stats. of Nev., 1975, ch. 612, pp. 1153–56, which would compel this court, in the first instance, to appoint counsel for indigents on all appeals, approve payment of their fees and expenses, or determine the dollar value of services performed by such counsel, to be invalid attempts by the legislature to impose its will on this court.

Accordingly, we hold invalid the language in NRS 7.125(1) and NRS 7.165 which refers to the "supreme court or a justice thereof," insofar as it relates to the appointment and payment of counsel; and, that portion of NRS 7.125(3)(b), which purports to proscribe payment of a fee in excess of the statutory maximum, unless such excess fee is ". . . approved by a justice of the Nevada supreme court." Equally impermissible and, therefore, void is that portion of NRS 7.145(1) which provides that "Claims for compensation and expenses shall be made to: . . . (c) the supreme court on any appeal to that

court." This court will, of course, continue to appoint counsel and fix fees whenever such orders appear necessary to the proper exercise of our proper appellate function.

The instant motion is denied, without prejudice to the right to reurge same in the district court, in accordance with this opinion.

GUNDERSON, C. J.
BATJER, J.
ZENOFF, J.
MOWBRAY, J.
THOMPSON, J.

NOTE—These printed advance opinions are mailed out immediately as a service to members of the bench and bar. They are subject to modification or withdrawal possibly resulting from petitions for rehearing. Any such action taken by the court will be noted on subsequent advance sheets.

This opinion is subject to formal revision before publication in the preliminary print of the Pacific Reports. Readers are requested to notify the Clerk, Supreme Court of Nevada, Carson City, Nevada 89710, of any typographical or other formal errors in order that corrections may be made before the preliminary print goes to press.

C. R. DAVENPORT, *Clerk.*

SPO, CARSON CITY, NEVADA, 1976