SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

MARCH 15, 1977

The meeting was called to order at 8:00 a.m. Senator Close was in the Chair.

PRESENT: Senator Close
Senator Bryan
Senator Dodge
Senator Foote
Senator Sheerin
Senator Gojack
Senator Ashworth

ABSENT:

SB 116 Establishes the Department of Prisons.

Eugene A. Coughlin, Training Officer, Nevada State Prison appeared at the request of A. A. Campos, Chief Parole and Probation Officer, in support of this measure.

Following a brief discussion, Senator Gojack requested that Mr. Couglin furnish the Committee with a copy of the memorandum submitted to the Human Resources and Facilities Committee which outlines in detail exactly what this bill accomplishes.

Mr. Coughlin will return with that information at a later date. No action was taken at this time.

SB 162 Revises law on compensation for victims of crime.

Maynard R. Yasmer, Chief of Staff Services, Rehabilitation Division of Human Resources testified in support of this bill. He stated that the Nevada Rehabilitation Division provides services to disabled persons towards the achievement of vocational goals. Victims of crime are only eligible for rehabilitation services under federal regulations if vocational goal objectives are possible or practicable. Their concern was for persons who did not fall in this category such as the very young, who cannot wait until they are in high school and be picked up under another federal program; the elderly; and the housewife who wishes to continue as a housewife. He also expressed concern over the inequities in services granted to the offender vs. the victim. He cited the Governor's proposed budget which grants over $30 million to services for the offende and practically nothing to their victims, as an example.

SB 162 He further suggested that lines 5-7 on page 3 which ties the program to the definitions found in NRS 616 be deleted in that those definitions are fine for NIC but would limit the statute to people who are currently eligible for treatment under NIC rehabilitation and vocational rehabilitation.

Senator Gojack explained that they would not be eligible under NIC if it is the result of a commission of a crime. This was only used to define the kind of treatment and amount of disabili a person might suffer so that when the claim went before the Board of Examiners, they would have some sort of established criteria.
She further stated that they had looked at various other states to see what they had done in this area and that this particular bill was taken from the California model.

Mr. Yasmer commented that they would like to see some language included that would direct the Board of Examiners to refer disabled victims to the rehabilitation division at the time of thei consideration of application for awards and that an evaluation o rehabilitation and recommendations be made by the division to the Board for the Board's consideration in its actions.

No action was taken at this time.

SB 260 Limits tort liability of public officers and employees.

George Miller stated that he was in favor of the bill but that he was opposed to the concept of the Attorney General having the sole discretion to decide whether or not the employee was acting within the scope of his employment.

Michael Dyer and Pat Dolan, Deputy Attorneys General testified in support of this measure. They submitted for the Committee's review several proposed amendments. See attached Exhibit A.
The inclusion of the political subdivision in Section 1, subsection 2 is to clarify what is already being done at the presen time.
Their proposal would require that the employee that was served to notify his superior within 10 days, in writing, of the fact that he had been served. The agency or department head then has 15 days after receipt of the notification to make a certification to the Attorney General's office to the effect that the employee was serving within the scope of his employment. Upon notice of the certification, the Attorney General or the chief legal officer of the political subdivision would then have 10 days to determine if the defense of the action would create a conflict of interest between the state or political subdivision.
Mr. Dyer suggested that perhaps there should also be a determination as to whether or not there would be a conflict with the

SB 260 defense of another employee in that this has happened in a few instances. If there should be a conflict, subsection 4 of the bill, as presently drafted, would provide for the procedure to be followed.
Mr. Dyer stated that the main reason for the determination to be made initially is that in their proposed new Section 6, subsection 3 if an employee is found to have been acting within the scope of his employment and a judgment is rendered against him, the state will indemnify that employee. They have also limited the amount of any judgment rendered against an employee to $25,000, which is consistent with limitations on actions against the state.

Senator Dodge stated that he did not believe that that could be sustained in court. He had a question as to whether or not an employee can raise the governmental immunity shield as an individual.

Senator Bryan concurred with Senator Dodge and further stated that, by statute, the state had waived its sovereign immunity to the extent of $25,000 and although that has been subject to a number of judicial attacks, the court has limited those judgments to $25,000. He questioned whether or not they would be jeopardizing or weakening their argument if they tried to tack on a $25,000 limitation for an individual.

Mr. Dyer responded that there is a lot of case authority to that extent under the federal tort claims act. There is a good legal foundation that says that if the employee was performing an act that was a classical employee act that that was, in reality, the act of the state itself; the employee could be cloaked with some type of governmental immunity at that point.

Senator Sheerin stated that if an employee is acting within the scope of his employment, he doesn't need any limitation because there is no liability. All he needs is for the state to defend him so that he doesn't have to come out-of-pocket for his defens

Mr. Dyer replied that the majority of actions they defend are instances where it is not entirely clear; that although the agency head may feel that the action was entirely properly made and that the person exercised due process and care, a jury may find otherwise. A jury is free to make that decision.
Another determination that must be made is that the employee was not only acting within the scope of his employment but also that he was acting in good faith.

The Committee requested Frank Daykin of the Legislative Council Bureau to address the issue of the validity of limiting the liability of an individual.
Mr. Daykin stated that he was not satisfied that the limitation

SB 260 would be invalid because this is an economic area; not something like free speech or the right to vote where the equal protection clause requires a compelling state interest. This is a question of economic benefit and there, the United States Supreme Court has said that the rational classification is enough. There is a rational basis between the position of a public officer acting within the scope of his employment and in good faith and an ordinary person going about his own concern. There is a public interest in limiting the liability in the former case simply in order to secure the unintimidated performance by the officer of his duty. Therefore, he felt that the courts might well sustain that classification.

In further discussion of the bill, Senator Close suggested that "public officer" be broadened to include a part or full-time board or commission or similar body of the state or political subdivision.

Senator Ashworth moved to amend and do pass and rerefer to this Committee.
Seconded by Senator Bryan.
Motion carried unanimously.

SB 262 Allows additional peremptory challenges in certain cases.

Senator William J. Raggio testified in support of this measure. He stated that on occasion there are multiple parties involved and this will give each side as many peremptory challenges as there are parties. At the present time, the parties have to join in a challenge unless the court otherwise directs. He further stated that this bill was at the request of Clark County District Judge J. Charles Thompson.

Senator Dodge moved a do pass.
Seconded by Senator Gojack.
Motion carried unanimously.

SB 263 Revises procedures relating to recovery of costs and attorney's fees in civil actions.

William Raymond, Deputy Attorney General, Department of Highways testified in opposition to this bill. He stated that the Highway Department is the biggest single purchaser of real estate in the state and as a general rule, they settle or negotiate for approximately 95% of the property they acquire for highways. The remaining 5% goes to court. Should there be an award of attorney's fees in eminent domain actions, this will be paid

SB 263 entirely out of state funds as the federal government will not participate in any award for attorney's fees. Therefore, the cost to the state would be astronomical and on that basis they oppose the bill.

Grant Bastian, State Highway Engineer, Highway Department concurred with Mr. Raymond's remarks and further stated that should attorney's fees be awarded, it would remove the incentive for individuals to settle out-of-court.

Al Osborn, attorney from Reno testified in support of this measure. He stated that the bill sets forth some things in the law that have not been before. It defines what an attorney's lien is and more accurately defines what allowable costs are in an action. In response to Mr. Raymond's concern about the cost to the state, he felt that if the state was being fair in its offer they could file an offer of judgment and no court costs or attorney's fees would be awarded. If the state isn't being fair and is out of line, the court will take that into considera tion. The present rule is that the courts do not have to award costs and fees. They can specify reasons wherein such costs are not appropriate.

Darryl Cappuro, Nevada Motor Transit Association stated that they were in opposition to this bill. He felt that this measure greatly expands the current fees provided in the law. Subsectio 2, line 6 would legitimatize what would amount to fishing expedi tions in that depositions would be paid for even if they were not used during the trial. He stated that this was quite a departure from the present practice where the cost of depositions obtained by the prevailing party and used by him at the trial could be recovered.
In regard to Section 4, he stated that Oregon had enacted a similar law and the number of cases that eventually went to cour increased considerably; there is no encouragement to settle out of court because you don't lose anything if you do.
He further commented that because of the situation involving the use of federal funds and the rules and regulations under which the highway department has to operate, their appraisals and offers with regard to right-of-way acquisitions have been pretty fair.

Jack McAuliffe, attorney from Reno stated that he felt this bill imposes responsibility where it should be; it is characterized in terms of leaving it to the discretion of the court. It has been his experience in the past that the court tends to impose fees insofar as how legitimate the action was when it was brought or how legitimate the defense was.
There were two aspects of the bill with which he did not agree:

SB 263 Section 11 which requires a foreign party to post a bond. As proposed, this makes it a party that resides out of state or is a foreign corporation. He felt that the present statute has been a workable solution to this problem. The other concern is the requirement that an attorney who has been discharged by his client must deliver his files upon demand. This is a particular problem in the area of personal injury cases where there is a contingency fee; there is not a fee until the conclusion of the litigation. It also does not provide any guidelines for the court in determining under what circumstances the attorney is required to deliver his files.

In response to a question from Senator Close as to what changes in the present law are being made, Mr. McAuliffe stated that Section 2, subsection 2 is a substantial change in that at the present time a reporter's fee for discovery is recoverable only if the original deposition is used at trial. He felt that this was an improvement because this is a real expenditure as far as parties to an action are concerned.
Subsection 3 would add the cost of the bailiff in charge of the jury rather than it being born by the county.
Subsection 4 is a change in that you will now be entitled to witness fees for pretrial hearings and deposing witnesses.
Subsection 7 is a change in that it will allow for recovery of fees paid to a licensed process server as well as to the sheriff
Section 3 is a new addition and a good one. More often than not the judge makes his own decision as to what the allowable fee should be in a case. This clarifies that procedure. The court in its discretion can establish that amount or it may require a presentation of evidence.

In answer to a question from Senator Gojack regarding the Highway Department's observation as to the cost of this bill to the state, Mr. McAuliffe stated that the Constitution requires that a property owner receive just compensation for his property If the Highway Department offers just compensation, they won't become involved in litigation. It has been his experience that there is generally a very broad spread between the staff appraisals of the Highway Department and what the property owner and independent fee appraiser think it is worth. His firm's standard fee is in the range of 1/3 of what they are able to get beyond the offer of the state and they have found this to be a profitable source of litigation. He felt that this suggests that judges and juries are not persuaded that the Highway Department is really offering just compensation. He further stated that it was his feeling that if a property owner is truly going to be compensated as he is required to be by the Constitution, then the Highway Department should be required to pay the cost of that litigation.

SB 263 In response to a question from Senator Dodge as to the expansion of recovery of attorney's fees and costs into other areas, Mr. McAuliffe stated that the courts presently feel that if there is a legitimate legal and factual dispute between the parties, they do not allow fees. But if the court feels that it is a case that either never should have been filed because there is no merit and there never was any merit or the defense that was interposed has no merit, then they will award fees.

Senator Bryan expressed concern that Section 4 would preclude the award of attorney's fees in justice court proceedings. Mr. McAuliffe replied that in district court if you have a recovery under $300 you don't get attorney's fees but that he did not think that pertained to justice court. He further stated that this was part of the Civil Practice Act and that it would be applicable in justice court.

Charles D. Glattly, attorney from Reno stated that he used this statute on a daily basis. He felt that the ability to impose attorney's fees was often times the only club he had to settle disputes out of court in that the imposition of fees makes the opposing attorney think twice.

George L. Ciapusci, Property Claim Superintendent, State Farm Insurance Co. testified against this measure. He stated that since the advent of no-fault insurance the percentage of liability law suits has doubled and with that, the costs related to the defense of lawsuits has increased by 328%. This bill has an add-on of fees and costs which will be awarded upon judgment and in his mind this does nothing to help the consumer; these costs will have to be passed back on to the policy-holder. He felt that the only beneficiary of this bill would be the Plaintiff's Bar.

Fred Patzke, Manager, Brown Brothers Adjusters concurred with Mr. Ciapusci's remarks.

Senator William J. Raggio informed the Committee that this bill had been requested by Clark County District Judge J. Charles Thompson because in sitting on the bench, he has had an opportunity to see the problems that come up in these types of situations.
In response to the Committee's question on the $300 figure in Section 4, Senator Raggio stated that this was to bring it in line with existing law that establishes costs recoverable where the recovery is $300 or over.

Virgil Anderson, AAA Insurance concurred with Mr. Ciapusci's remarks concerning the impact on the cost of insurance. He also expressed concern over Section 3 in that he felt it was completely open-ended with respect to attorney's fees.

SB 263 Richard R. Garrod, Special Representative, Farmer's Insurance Group responded to a question regarding witness fees granted in California. He stated that the only fees that are allowed by law are those reimbursements to a state or local agency where a police officer or some techinical person with a state, county or city agency is subpoenaed to appear before the court in an action.

Following a discussion by the Committee, Senator Ashworth moved to indefinitely postpone.
Seconded by Senator Sheerin.
Motion did not carry. The vote was as follows:

VOTING AYE:	Senator Dodge	VOTING NAY:	Senator Close
	Senator Sheerin		Senator Bryan
	Senator Ashworth		Senator Foote
			Senator Gojack

SB 264 Provides alternative method of selecting jurors in civil cases.

Al Osborn, attorney from Reno stated that this bill would implement the so-called "Arizona System" to make it mandatory in the district courts that peremptory challenges be amde outside the hearing of the jury. He stated that as a practical matter, this is being done already. It is a much quicker process.

Senator William J. Raggio testified in support of this measure and concurred with Mr. Osborn's remarks.

Following a brief discussion, Senator Gojack moved a do pass. The motion was seconded and carried unanimously.

SB 272 Restricts persons who may have access to another person's safe-deposit box and establishes procedure for removal of any content

Bill Isaeff, Deputy Attorney General testified in support of thi bill. He stated that this grew out of a lengthly investigation by the Churchill County Grand Jury into the handling of the estate of Virgil Coleman Cox who died in 1974. A part of the testimony received by the Grand Jury pointed out that after Mr. Cox died, the bank allowed entrance to his safe-deposit box by the county coroner who, in the opinion of the Grand Jury, had no legal right or proper responsibility for going into that safe-deposit box.
At the present time Nevada has no statutory provisions on this subject, primarily because we do not have the sort of death taxes that other states have which result in the immediate sealing of the box upon notification of death.

Senator Close expressed concern over several portions of the bill. He felt that the situation where a husband and wife

SB 272 have a box together, should one spouse pre-decease the other, the surviving spouse would be precluded from entering the box. He also felt that the term "his attorney" should be clarified in that often times an individual may have more than one attorney.

Senator Dodge agreed with Senator Close and further commented that if a person is a co-lessee he should be entitled to remove the contents of the box because that is an arrangement made by by the both of them by common consent. If that is not the situation, then he felt that the only thing that should be removed from a box would be matters that indicate the intent of the deceased as far as instructions on this estate.

Senator Ashworth stated that he felt that anyone, with the exception of a joint-tenant or co-lessee, should have a court order before entering another person's safe-deposit box.

Messrs. L. J. McGee, Pioneer Citizens Bank; Ted Nigrow, Security Bank; and John Cockle, Nevada National Bank testified on this measure. Mr. McGee stated that in conversations with trust people throughout the state, it was their concern that this bill should not upset the joint-tenancy arrangement because this is a contractual relationship with the right of survivorship. It was also their feeling that the persons who would be allowed access to the safe-deposit box was a bit broad.

Bob Bradford stated that he and his wife have a safe-deposit box in joint-tenancy and that their children are also named on it. He wanted to insure that should both he and his wife died, that their children would be able to open the box.

No action was taken at this time.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Cheri Kinsley

APPROVED: Cheri Kinsley, Secretary

SENATOR MELVIN D. CLOSE, JR., CHAIRMAN

PROPOSED AMENDMENTS, SB 260

SECTION 1.

2. [The state or appropriate political subdivision shall defend any such action on behalf of the officer, employee or legislator or former officer, employee or legislator unless such person refuses legal representation offered by the state or political subdivision. If such legal representation is refused by such person, the state or political subdivision shall defend on its own behalf.] *The attorney general or in the case of a political subdivision, the political subdivision, shall provide for the defense, including the defense of cross-claims and counterclaims of any officer or employee or former officer or employee of the state or political subdivision or against any state legislator or former state legislator in any civil action brought against such person in his official or individual capacity or both, if the person submits a written request for such defense within 10 days after a complaint has been filed against him to both the agency administrator and to the attorney general* OR THE SUBDIVISION'S CHIEF LEGAL OFFICER. *The agency administrator shall have 15 days after receipt of said written request to certify to the attorney general or in the case of an employee of a political subdivision, to the subdivision's chief legal officer that the act or omission of the person was in good faith and in the scope of his employment. Upon notice of the certification by the agency administrator, the attorney general or chief legal officer, shall have 10 days to determine if his defense of the action would create a conflict of interest between the state or the political subdivision and that person. The initial written request shall extend the time to answer, move or otherwise plead to the complaint to 45 days after the date of service.*

SECTION 2. NRS 41.035 is hereby amended to read as follows:

41.035 1. No award for damages in an action sounding in tort brought under NRS 41.031 *or 41.0337* may exceed the sum of $25,000,

exclusive of interest computed from the date of judgment, to or for the benefit of any claimant. No such award may include any amount as exemplary or punitive damages.

SECTION 6. NRS 41.0337 is hereby amended to read as follows:

41.0337 1. No tort action arising out of an act or omission within the scope of his public employment may be brought against any officer or employee, or former officer or employee, of the state or of any political subdivision or against any state legislator or former state legislator unless the state or appropriate political subdivision is named a party defendant under NRS 41.031.

2. The state or appropriate political subdivision shall defend any such action on behalf of the officer, employee or legislator or former officer, employee or legislator unless such person refuses legal representation offered by the state or political subdivision. If such legal representation is refused by such person, the state or political subdivision shall defend on its own behalf.

3. The state or appropriate political subdivision shall [have no right of contribution or indemnity against] *indemnify* the officer, employee or legislator or former officer, employee or legislator unless it establishes that he failed to cooperate in good faith in the defense of the action or that his conduct was wanton or malicious *in which event it shall have the right of contribution from said person.*

PDD:akb

3/15/77