SENATE JUDICIARY COMMITTEE

MINUTES OF MEETING

MARCH 2, 1977

The Committee reassembled at 10:00 a.m. Senator Close stated they would take one bill at a time, paragraph by paragraph.

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

Senator Bryan stated the first thing was that the nurses and pharamicists wanted to be included in that definition.

Senator Dodge stated the easiest thing there would be to put licensed nurse wherever registered nurse appears.

Senator Close asked what adding them to this section does?

Senator Hilbrecht stated that this was something that was overlooked by the interim committee. He felt it would place an additional but not unreasonable burden on them. In the case of the pharmacists, it is already required by the state pharmacy board. In the case of registered nurses usually the nurses records consist of notes on a chart which is usually considered not to be her professional property anyway. The records are usually the property of an institution or physician by whom she is employed.

Senator Bryan stated that NRS 629 does not presently exist and yet this is an amendment to 629.

Andy Gross, Legislative Counsel Bureau stated that the chapter does exist there just isn't anything in it, therefore the correct amendatory language is to amend not to write it. This is just a bill drafters technique.

Senator Gojack felt the language should be licensed nurse as this would also include Registered Nurses who are doing private practice as their records, in those cases, would be their property.

Senator Hilbrect stated this is an atypical situation. If you had a special nurse for example in the home, she would then be the custodian of the records.

Andy Gross stated that they are all covered in 632, they have to be licensed.

Senator Close stated that whatever is done they will make sure that the bill drafter makes it clear in the language.

Senator Hilbrecht stated that while the benefits conveyed under 630, in certain particulars as screening panel, protection, etc., would not be afforded to the other

allied health fields. They would have the shield provided by this section and he felt that is a valid consideration.

Senator Close questioned if these nurses then have to keep these records for five years?

Senator Dodge stated that Mrs. Pope had said she had contacted her people and they wanted to be included, so they must know what the bill contains. She had the bills listed and they are professional enough, and follow these things particularly in this area, that they will be aware of what legislation is enacted.

Senator Bryan stated that on page two, line one we should have the authorization or designation to be required by statute to be in writing.

Senator Dodge stated that someone had made a comment that notice to the patient had not been provided for. He felt this brought up the question as to whether the record was in fact the patient's record and whether there was any violation of his rights of privacy by the exploration of the record.

Senator Sheerin stated that Isaeff came along with the proposed amendment indicating that if the Board of Examiners wants information, that notice be given to the patient and then the patient had 10 days to go to court to get it stoped. He felt if we stayed with this the burden should be the other way. He would want the state to go to court to show why they should get these records. He felt the Committee was getting a little off the track here, the whole thing to remember is the only person we are talking about is the complaining party. If we are talking about that then the bill should be amended to read that way. When the party makes a complaint about the doctor, it seems to me, he is waiving his right to the confidentiality of those records. Once he makes that complaint there is no question that the board should be able to get at his records.

Senator Hilbrecht stated the genisus of this bill was that it was a consumer protection measure originally advanced by the trial lawyers and by several people in their own behalf. They had paraded some rather bizarre circumstances where records had been withheld apparently unreasonably by a physician concerning treatment that they had had. In one case the testimony was actually that a doctor had refused to release a patients records to a second treating physician. These records were important to his followup treatment. In other cases it was where there was suspected neglignece. The doctor would not cooperate with the lawyer who might on investigation, decide, elect or recomment to prosecute an action against the doctor based on some material in those records. In that case the doctor was raising the patient/

attorney privelege in the statute, but the doctor's felt it was also theirs to raise. That is a seperate problem and in that case the written waiver, and everything that has been discussed so far is certainly applicable. He feels that when you have paid a practitioner to perform services and you later want to go to another doctor and that doctor says he can't help unless he knows what the regimine was under the previous physician. It seems reasonable he should have the right to get the records from one doctor over to another. Secondly, if a citizen feels that the doctor made a mistake, or he has been told by the second doctor that a mistake could have occured, they ought to be able to review their records and get them to their second doctor or their lawyer for that determination. They paid for those services and that is the only record they have really got of what was done. He feels that this bill, with the few amendments that have been suggested addresses that. The second problem is where an allegation has been filed by a person who finally got his records, or maybe hasn't gotten them yet, but feels he was a victim of some act of neglect. The medical authorities ask the AG to investigate, because they have determined it is not frivilous, the AG investigates, and all he really needs is a determination with respect to this specific case of alleged malpractice. There I don't believe that the person who initiated the allegation should reasonbly be able to say "wait a minute I have changed my mind now". At this stage we have the AG involved, we have invested time of the medical authorities, and then the doctor has gotten back together with this guy and in some way worked out their differences. It is kind of like taking a criminal prosecution and saying alright, all I have to do is go withdraw my complaint, and that prohibits the AG or DA from continuing the prosecution of the case. The committee felt very strongly that once you put the wheels in motion, you can't in the interest of the public, stop it. The third case is where Isaeff said in the case of repeated negligence, there might be the need to look at more peoples records who have never filed allegations, he feels that those should be privileged. No one has brought forward a justification where if they want to get at the doctor who treats me, they can examine my personal records with that doctor without my consent.

Senator Dodge stated what if we were to make the AG go in and get a subpeona from the court on those records. You do have situations where you are trying to establish a pattern of negligence practice, a patient who has been treated by a doctor and who hasn't had any adverse condition as a result, may be very reluctant to go ahead and say take a look. He may out of respect for his doctor particularly in a small community where doctors are scarce, not want to do that. However, with a subpeona of course he would feel or think he didn't have any alternative.

Senator Ashworth questioned could the AG go to court and

and subpeona my records and me never know about it?

Senator Hilbrecht thought they could now. He felt there has to be some privilege when it comes to complete strangers.

Senator Bryan stated he felt the Committee was pretty much in agreement as to the records being either the patient's or his designated representative. He thought in the case where a patient is filing a complaint, that the act of filing against the physician would constitute a waiver. He stated the only way he had any appetite in the third area was if a notice to the patient that his records were subject to inquiry were given. He would have the opportunity to be heard were given and the burden should be on the investigatory agency to demonstrate why those records are necessary.

Senator Hilbrecht stated their intent was to limit it to the first two cases, although there was some discussion in the necessity of the third area.

Senator Sheerin thought then there had to be a policy establish a policy in the third area. There had to be a subpeona with notice and the burden on the doctor or the AG.

After some additional discussion by the Committee Senator Close felt it was then the consensus of the Committee to go on the first two areas and Andy will work on that part and also to put the term "written authorization" in line 1.

Senator Bryan stated that we also have to make a determination on the cost of these copies.

After some discussion it was decided that they should go with 60¢ a copy for Xerox copies and the actual cost of photographic reproductions, in the case of X-rays.

Senator Dodge stated on line 7, rather than "a place convienent for physical inspection" it should be specified.

Senator Hilbrecht that when a physician is admitted into practice in a hospital or becomes a member of the staff, there are conditions expressed in his staff membership. One of those is access to records for purpose of review by tissue committees, specialty committees of the hospital, with respect to any activities or procedures that he conducts. The committee didn't go into that because there was no showing need to them that these weren't perfectly satisfactory.

Senator Close stated he would like to get the amendments drafted, then look at them again in this area before it was passed out of Committee.

After further discussion by the Committee Senator Bryan moved amend and do pass.

Seconded by Senator Ashworth
Motion carried unanimously.

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

Senator Hilbrecht stated this was a policy decision. On one side you have the trial lawyers, who suggested that the idea be abandoned althogether. On the other hand the physicians felt that structured settlements go far beyond those categories that they presented evidence to support. For example the future earnings. The evidence they presented as unfair windfalls resulting from the premature death or recovery of someone related to future medical payments. The committee didn't see any reason why the victim, should he recover, expect to receive money that was really earmarked by the jury for medical care. Also the family shouldn't expect money that was earmarked for a hospital bed and care, if that person should die. When you get into the earnings area, we weren't persuaded that there was a case made. We felt that if a fellow died, he surely couldn't earn, but his family is entitled under law to recover because of the wrong. The family should certainly be protected to those future earnings whether the fellow died or not. This was a controversial part of the committee's deliberation and it was only with a lot of compromise that there was a decision of unanimity on this bill and he would be reluctant to suggest it either be extended or eliminated altogether, as he felt it does serve a fair function in terms of equities.

Senator Dodge stated that there had been a substantial trend in addressing this malpractice thing toward structured settlements in other states. Would he say on the future earnings or replacement of income, that ought to be considered as a compensatory damage award aside from this.

Senator Hilbrecht stated what he was saying is it's an economic damage figure, but no evidence was presented to the committee that indicated that there was a good reason for changing the present tort system. The only evidence had to do with medical changes, the future earning compensation under this bill would remain in the original award and not structured.

Senator Close stated the reason he would be opposed, is the fellow who is say 25 years old, and has a family, his future earnings were say $250,000 and you go for so much per year during his lifetime. If he died the balance of the $250,000 would go back to the insurance company. It seems to me his death might be hastened because of the injury and if so, I would think his family should be entitled to have the benefit of what he would have earned in his life if it had continued according to his expectency.

Senator Ashworth stated his understanding was there had

been a lump sum settlement agreed upon, seperate from future earnings.

Senator Hilbrecht stated that they had elected to leave it as it now comes down. The award would include future earnings. You could have received a special verdict which would have specified how much was allocated for future medical care, for lost services, and how much for personal damages which would be personal pain, suffering, etc. The fact is now the judge would not have the right to do anything with that but simply identify on request of counsel how much is specified, the money would all be paid to the parents or guardians in a lump sum. What we did in this bill, was to say what portion has to do with future medical care. The court on a special verdict may break that out and then decide how to break it down into a series of payments and it will only be paid as long as it is necessary.

Mr. Rottman stated that if the Committee decided to go a step further, then we might have to clarify the survivor benefits, in order to get into a category of survivor benefits, in terms of future income. If you are going to to put him on a structured basis, for example he is at a prime age, the family shouldn't be penalized because of that shortened life.

After some discussion by the Committee it was agreed that perhaps they needed to clarify the language in the area of the lump sum award.

Senator Close stated at this time they would have to adjourn, but would pick this up tomorrow morning at 8:00 a.m.

Respectfully submitted,

Virginia C. Letts

Virginia C. Letts, Secretary

APPROVED:

MELVIN D. CLOSE, JR., CHAIRMAN